

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges	vi
District Court Judges	ix
Attorney General	xiii
District Attorneys	xiv
Public Defenders	xv
Table of Cases Reported	xvi
Cases Reported Without Published Opinion	xx
General Statutes Cited and Construed	xxiii
Rules of Evidence Cited and Construed	xxvi
Rules of Civil Procedure Cited and Construed	xxvi
U. S. Constitution Cited and Construed	xxvii
N. C. Constitution Cited and Construed	xxvii
Rules of Appellate Procedure Cited and Construed	xxvii
Opinions of the Court of Appeals	1-783
Rules for Court-Ordered Arbitration in North Carolina	787
Analytical Index	805
Word and Phrase Index	841

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CASES REPORTED

PAGE	PAGE		
Action Moving & Storage, Tate v.	541	City of Concord, City of Kannapolis v.	591
Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.	178	City of Kannapolis v. City of Concord	591
Allen v. Weyerhaeuser, Inc.	205	City of Raleigh, Raleigh Place Assoc. v.	217
Allgood Construction Co., Hailey v.	630	Clark, In re Adoption of	1
American Multimedia, Inc. v. Freedom Distributing, Inc.	750	Cochran v. Wallace	167
Amick v. Town of Stallings	64	Concerned Citizens v. Holden Beach Enterprises	38
Animal Protection Society v. State of North Carolina	258	Concrete Supply Co. v. Ramseur Baptist Church	658
Annadale, S. v.	734	Cumberland Associates v. Scotto's Pizza of N.C.	753
Annie Penn Memorial Hospital, Osborne v.	96	Daily v. Mann Media, Inc.	746
Apple, NCNB v.	606	DeHaven v. Hoskins	397
Ashburn v. Wicker	162	Dockery, Windley v.	771
Avery, S. v.	572	Dorosko, Blackwell v.	637
Baity, Russell v.	422	Doub, Douglas v.	505
Barber v. Woodmen Of The World Life Ins. Society	340	Douglas v. Doub	505
Barclays American Corp., McLaughlin v.	301	Drewyore, S. v.	283
Barnes v. Ford Motor Co.	367	Duke Power Co., N.C. Electric Membership Corp. v.	123
Barrow, Vernon v.	642	Duke University v. St. Paul Mercury Ins. Co.	663
Barrow v. Murphrey	738	English, S. v.	611
Benfield, S. v.	451	Epps, S. v.	173
Blackwell v. Dorosko	637	Eways v. Governor's Island	201
Blanchfield v. Soden	191	Fennell, S. v.	140
Bohlen, Smith v.	347	Fisher v. Melton	729
Bolton Corp. v. State of North Carolina	596	Ford Motor Co., Barnes v.	367
Boos, In re Appeal of	386	Forsythe v. Inco	742
Brooks v. Stroh Brewery Co.	226	Fournier v. Haywood County Hospital	652
Bullock, S. v.	524	Foxx, Snead v.	723
Burkhalter, CFA Medical, Inc. v.	391	Freedom Distributing, Inc., American Multimedia, Inc. v.	750
Butt v. Goforth Properties, Inc.	615	George W. Kane, Inc. v. Golin Creek West Assoc.	135
Caudle, Quate v.	80	Givens, S. v.	72
CFA Medical, Inc. v. Burkhalter	391	Godwin, S. v.	565
Charlotte Truck Driver Training School v. N.C. DMV	209	Goforth Properties, Inc., Butt v.	615
City Finance Co. v. Massey Motor Co.	623	Golden Palace, Inc., MER Properties-Salisbury v.	402
City of Asheville, Thrash v.	457		

CASES REPORTED

PAGE		PAGE
Golin Creek West Assoc.,	Johnson, S. v.	757
George W. Kane, Inc. v.	Jorgensen v. Seeman	767
Governor's Island, Eways v.	Keith, Love v.	549
Green, S. v.	Knox, S. v.	699
Groce, Lamb v.	Lamb v. Groce	220
Guess, In re	Langston, Napowsa v.	14
Guilford Mills, Inc. v. Powers ..	Lincoln Battleground Assoc.,	
	Thompson-Arthur Paving Co. v.	270
Hailey v. Allgood	Lormic Development Corp. v.	
Construction Co.	North American Roofing Co. .	705
Hair v. Hales	Love v. Keith	549
Hales, Hair v.	McLaughlin v. Barclays	
Hargett v. Reed	American Corp.	301
Harrington, S. v.	McLeod Oil Co., Wilson v.	479
Harris, S. v.	McMahan v. Stogner	764
Haywood v. Haywood	Manley, S. v.	213
Haywood County Hospital,	Mann Media, Inc., Daily v.	746
Fournier v.	Massey Motor Co., City	
Henson v. Henson	Finance Co. v.	623
Hiatt, Richardson v.	Meadlock, S. v.	146
Hiatt, Richardson v.	Melton, Fisher v.	729
Hiatt, Tolbert v.	MER Properties-Salisbury	
Hinton, S. v.	v. Golden Palace, Inc.	402
Hoffman, S. v.	Moore, S. v.	718
Holden Beach Enterprises,	Moore, Williams v.	601
Concerned Citizens v.	Moravian Home, Inc.,	
Hoskins, DeHaven v.	In re Appeal of	324
Howard v. Parker	Morgan, S. v.	639
Hunt v. Scotsman	Moul, S. v.	644
Convenience Store	Mullican, S. v.	27
	Murphrey, Barrow v.	738
In re Adoption of Clark	N.C. Bd. of Dental Examiners,	
In re Appeal of Boos	In re Cameron v.	332
In re Appeal of Moravian	N.C. Dept. of Human	
Home, Inc.	Resources, Payne v.	309
In re Appeal of Senseney	N.C. Dept. of Revenue,	
In re Application for Variance ..	Walls & Marshall Fuel Co. v.	151
In re Cameron v. N.C.	N.C. Dept. of Transportation,	
Bd. of Dental Examiners	Talbot v.	446
In re Guess	N.C. DMV, Charlotte Truck	
In re Scott	Driver Training School v.	209
In re Will of Penley	N.C. Electric Membership	
Inco, Forsythe v.	Corp. v. Duke Power Co.	123
	N.C. Federal Sav. and	
J. P. Stevens Co., Peace v.	Loan Assn. v. Ray	317
J. W. Campbell Electrical		
Corp., Yates v.		
Jaguar Cars Inc.,		
Star Auto Co. v.		

CASES REPORTED

	PAGE		PAGE
N.C. Rate Bureau, State ex rel. Comr. of Ins. v.	157	Sanders, S. v.	56
Napowsa v. Langston	14	Sanders, S. v.	494
Nationwide Mut. Ins. Co., Aetna Casualty & Surety Co. v.	178	Scotsman Convenience Store, Hunt v.	620
Nationwide Mutual Ins. Co. v. Winslow	413	Scott, In re	760
NCNB v. Apple	606	Scotto's Pizza of N.C., Cumberland Associates v.	753
North American Roofing Co., Lormic Development Corp. v.	705	Seeman, Jorgensen v.	767
Osborne v. Annie Penn Memorial Hospital	96	Senseney, In re Appeal of	407
Owens v. Pepsi Cola Bottling Co.	47	Shook v. Shook	578
P.A.W. v. Town of Boone Bd. of Adjustment	110	Smith v. Bohlen	347
Pakulski, S. v.	517	Smith v. Pass	243
Parker, Howard v.	361	Snead v. Foxx	723
Pass, Smith v.	243	Soden, Blanchfield v.	191
Payne v. N.C. Dept. of Human Resources	309	St. Paul Mercury Ins. Co., Duke University v.	663
Peace v. J. P. Stevens Co.	129	Star Auto Co. v. Jaguar Cars Inc.	103
Penley, In re Will of	655	S. v. Annadale	734
Pepsi Cola Bottling Co., Owens v.	47	S. v. Avery	572
Poore v. Swan Quarter Farms	449	S. v. Benfield	451
Powers, Guilford Mills, Inc. v.	417	S. v. Bullock	524
Price v. Walker	712	S. v. Drewyore	283
Pulley v. Rex Hospital	89	S. v. English	611
Quate v. Caudle	80	S. v. Epps	173
Queen City Sprinkler Corp., River Hills Country Club v.	442	S. v. Fennell	140
Raleigh Place Assoc. v. City of Raleigh	217	S. v. Givens	72
Ramseur Baptist Church, Concrete Supply Co. v.	658	S. v. Godwin	565
Ray, N.C. Federal Sav. and Loan Assn. v.	317	S. v. Green	558
Reed, Hargett v.	292	S. v. Harrington	187
Rex Hospital, Pulley v.	89	S. v. Harris	691
Richardson v. Hiatt	196	S. v. Hinton	683
Richardson v. Hiatt	780	S. v. Hoffman	647
Riegg, Thornhill v.	532	S. v. Johnson	757
River Hills Country Club v. Queen City Sprinkler Corp.	442	S. v. Knox	699
Russell v. Baity	422	S. v. Manley	213
		S. v. Meadlock	146
		S. v. Moore	718
		S. v. Morgan	639
		S. v. Moul	644
		S. v. Mullican	27
		S. v. Pakulski	517
		S. v. Sanders	56
		S. v. Sanders	494
		S. v. Tew	634
		S. v. Williams	627
		State ex rel. Comr. of Ins. v. N.C. Rate Bureau	157
		State of North Carolina, Animal Protection Society v.	258

CASES REPORTED

PAGE		PAGE	
State of North Carolina, Bolton Corp. v.	596	Waite, Wallace Computer Services v.	439
Stogner, McMahan v.	764	Walker, Price v.	712
Stroh Brewery Co., Brooks v.	226	Wallace, Cochran v.	167
Swan Quarter Farms, Poore v.	449	Wallace Computer Services v. Waite	439
Talbot v. N.C. Dept. of Transportation	446	Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue	151
Tate v. Action Moving & Storage	541	Warren, Young v.	585
Tate v. Tate	774	Westminster Co. v. Union Mutual Stock Life Ins. Co.	117
Tew, S. v.	634	Weyerhaeuser, Inc., Allen v.	205
Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.	270	Wicker, Ashburn v.	162
Thornhill v. Riegg	532	Williams v. Moore	601
Thrash v. City of Asheville	457	Williams, S. v.	627
Tindall v. Willis	374	Willis, Tindall v.	374
Tolbert v. Hiatt	380	Wilson v. McLeod Oil Co.	479
Town of Boone Bd. of Adjustment, P.A.W. v.	110	Windley v. Dockery	771
Town of Knightdale v. Vaughn	649	Winslow, Nationwide Mutual Ins. Co. v.	413
Town of Stallings, Amick v.	64	Woodmen Of The World Life Ins. Society, Barber v.	340
Union Mutual Stock Life Ins. Co., Westminster Co. v.	117	Yates v. J. W. Campbell Electrical Corp.	354
Variance, In re Application for	182	Young v. Warren	585
Vaughn, Town of Knightdale v.	649		
Vernon v. Barrow	642		

CASES REPORTED WITHOUT PUBLISHED OPINION

PAGE		PAGE	
Adams v. Town of Andrews	782	ESC, Faison v.	782
Agee, Barker v.	661	Faison v. ESC	782
Alston, S. v.	224	Fisher v. Homecraft Corp.	223
Alston, S. v.	454	Forbis, S. v.	454
American Communication Terminals, Industrial Technical Service v.	224	Freund, S. v.	661
Armfield, S. v.	454	G.E.M., Honeycutt v.	454
Barker v. Agee	661	Garcia, S. v.	454
Benbow v. Benbow	782	Gary, S. v.	224
Besaw v. Sharp	223	Gates, S. v.	224
Bovender v. Equitable Life Assurance Society	223	Gensinger v. Weston	223
Bowes, S. v.	454	Gibson, S. v.	455
Britt Jacks & Assoc. v. Weatherford	223	Godwin Associates v. McGee	223
Brown, S. v.	454	Guinn, S. v.	455
Brown v. Smith Transmissions	223	Gunn v. Gunn	454
Bryant, In re Estate of	782	Gwyn, Parks Chevrolet v.	454
Bryant v. Bryant	223	Hawke Newspaper v. Seahawke Newspaper	223
Bullard, S. v.	224	Hickman, S. v.	224
Bullock, In re	223	Hill, Cruse v.	223
Byndum, In re	661	Hitchcock v. Cullerton	223
Carroll v. Eddins	782	Holland v. NCNB	223
Cherry, S. v.	661	Homecraft Corp., Fisher v.	223
Chunn, Edwards v.	782	Honeycutt v. G.E.M.	454
City of Kings Mountain, Jenkins v.	661	Hughes, In re	224
Clark, S. v.	782	In re Bullock	223
Cook, S. v.	661	In re Byndum	661
County Dept. of Soc. Services, Ward v.	456	In re Estate of Bryant	782
Crawley, S. v.	224	In re Estate of Sharkey	661
Credle, S. v.	661	In re Harris v. Electricities	223
Cruse v. Hill	223	In re Hughes	224
Cullerton, Hitchcock v.	223	Industrial Technical Service v. American Communication Terminals	224
Davenport, S. v.	224	Ithaca Industries, Webber v.	783
Diggs, S. v.	661	Jackson, S. v.	455
Downing, S. v.	224	Jackson, S. v.	661
Duckett, S. v.	782	Jeffers, S. v.	662
Dunlap, S. v.	224	Jefferson, Williams v.	225
Eddins, Carroll v.	782	Jenkins v. City of Kings Mountain	661
Edwards v. Chunn	782	Johnson, S. v.	662
Electricities, In re Harris v.	223	Johnston, Weiss v.	225
Equitable Life Assurance Society, Bovender v.	223	Leinhardt v. Neuse Shores	224
		Leonard, S. v.	662

CASES REPORTED WITHOUT PUBLISHED OPINION

PAGE		PAGE	
Lupoli, Roach v.	224	Roberson v. Roberson	454
McAllister, S. v.	455	Robinson Real Estate v. May ..	661
McCauley, S. v.	455	Roposh, Woolard v.	456
McCrimmon, S. v.	662	Russell v. Price	782
McFadyen v. Olive	661	Schuitmaker, S. v.	225
McGee, Godwin Associates v. ..	223	Seahawke Newspaper,	
McIlwaine, Parks Chevrolet v. ..	661	Hawke Newspaper v.	223
McLaughlin v. Martin	782	Sharkey, In re Estate of	661
McLaughlin, S. v.	662	Sharp, Besaw v.	223
Martin, McLaughlin v.	782	Sink v. Sink	454
Mason, S. v.	782	Smith, Stephens v.	455
Mathis v. T. & S. Hardwoods ..	224	Smith Transmissions, Brown v. ..	223
May, Robinson Real Estate v.	661	S. v. Alston	224
Melton v. Texfi Industries	782	S. v. Alston	454
Miller, S. v.	455	S. v. Armfield	454
Morgan, S. v.	782	S. v. Bowes	454
Morris v. Pine Acres Lodge	454	S. v. Brown	454
Morris v. Terminix Co.	454	S. v. Bullard	224
Mosely, S. v.	783	S. v. Cherry	661
N.C. Human Relations		S. v. Clark	782
Council v. Sutton	454	S. v. Cook	661
NCNB, Holland v.	223	S. v. Crawley	224
Neuse Shores, Leinhardt v.	224	S. v. Credle	661
Olive, McFadyen v.	661	S. v. Davenport	224
Parks Chevrolet v. Gwyn	454	S. v. Diggs	661
Parks Chevrolet v. McIlwaine ..	661	S. v. Downing	224
Peoples v. Piedmont Federal		S. v. Duckett	782
Savings & Loan Assn.	224	S. v. Dunlap	224
Peterson, S. v.	224	S. v. Forbis	454
Phifer, S. v.	455	S. v. Freund	661
Phoenix Group, Piercy v.	782	S. v. Garcia	454
Piedmont Federal Savings		S. v. Gary	224
& Loan Assn., Peoples v.	224	S. v. Gates	224
Piercy v. Phoenix Group	782	S. v. Gibson	455
Pine Acres Lodge, Morris v.	454	S. v. Guinn	455
Pleasant v. Pleasant	782	S. v. Hickman	224
Polk, S. v.	455	S. v. Jackson	455
Price, Russell v.	782	S. v. Jackson	661
Quick, S. v.	225	S. v. Jeffers	662
Ray, S. v.	783	S. v. Johnson	662
Reid, S. v.	225	S. v. Leonard	662
Reid, S. v.	455	S. v. Mason	782
Rich v. Wright	661	S. v. McAllister	455
Roach v. Lupoli	224	S. v. McCauley	455
		S. v. McCrimmon	662
		S. v. McLaughlin	662
		S. v. Miller	455
		S. v. Morgan	782
		S. v. Mosely	783

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
S. v. Peterson	224	Terminix Co., Morris v.	454
S. v. Phifer	455	Texfi Industries, Melton v.	782
S. v. Polk	455	Thompkins, S. v.	225
S. v. Quick	225	Town of Andrews, Adams v.	782
S. v. Ray	783	Tucker, S. v.	783
S. v. Reid	225		
S. v. Reid	455	Waddell, S. v.	225
S. v. Schuitmaker	225	Ward v. County Dept. of	
S. v. Stephens	225	Soc. Services	456
S. v. Stephens	455	Watson v. Watson	456
S. v. Thompkins	225	Weatherford, Britt	
S. v. Tucker	783	Jacks & Assoc. v.	223
S. v. Waddell	225	Webber v. Ithaca Industries ...	783
S. v. White	225	Weiss v. Johnston	225
S. v. Wigfall	455	Weston, Gensinger v.	223
S. v. Williams	225	White, S. v.	225
S. v. Young	783	Whittington, Steve	
Stephens v. Smith	455	Dickson Builders v.	783
Stephens, S. v.	225	Wigfall, S. v.	455
Stephens, S. v.	455	Williams v. Jefferson	225
Steve Dickson Builders v.		Williams, S. v.	225
Whittington	783	Woolard v. Roposh	456
Sutton, N.C. Human		Wright, Rich v.	661
Relations Council v.	454		
T. & S. Hardwoods, Mathis v. .	224	Young, S. v.	783
Taylor v. Taylor	225		

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15(c)	Nationwide Mutual Ins. Co. v. Winslow, 413 Osborne v. Annie Penn Memorial Hospital, 96
1-52	Wilson v. McLeod Oil Co., 479
1-52(1)	Duke University v. St. Paul Mercury Ins. Co., 663
1-52(2)	Napowsa v. Langston, 14 Wilson v. McLeod Oil Co., 479
1-52(3)	Wilson v. McLeod Oil Co., 479
1-52(5)	Wilson v. McLeod Oil Co., 479
1-52(16)	Wilson v. McLeod Oil Co., 479
1-54(3)	Vernon v. Barrow, 642
1-75.4(5)a	CFA Medical, Inc. v. Burkhalter, 391
1A-1	See Rules of Civil Procedure, <i>infra</i>
6-21.5	Barnes v. Ford Motor Co., 367
Ch. 7A	In re Adoption of Clark, 1
7A-289.32(3a)	In re Scott, 760
8C-1	See Rules of Evidence, <i>infra</i>
14-27.4(a)(1)	State v. Manley, 213
Ch. 14, Art. 37, Part 2	Animal Protection Society v. State of North Carolina, 258
14-202.1(a)(2)	State v. Manley, 213
14-288.8	State v. Fennell, 140
14-288.8(c)(4)	State v. Fennell, 140
14-292	Animal Protection Society v. State of North Carolina, 258
14-309.6	Animal Protection Society v. State of North Carolina, 258
15A-701	State v. Avery, 572
15A-903(d)	State v. Drewyore, 283
15A-910(3)	State v. Drewyore, 283
20-16.2(c)	Tolbert v. Hiatt, 380
20-37.7(g)	Talbot v. N.C. Dept. of Transportation, 446
20-139.1(b3)	State v. Tew, 634 Tolbert v. Hiatt, 380
20-146	Smith v. Pass, 243
20-161(a)	Smith v. Pass, 243

GENERAL STATUTES CITED AND CONSTRUED—Continued

G.S.

20-161(b)	Smith v. Pass, 243
20-305(6)c2	Star Auto Co. v. Jaguar Cars Inc., 103
24-5(b)	Love v. Keith, 549
25-2-314	Lormic Development Corp. v. North American Roofing Co., 705
25-7-201	Tate v. Action Moving & Storage, 541
25-7-210(3)	Tate v. Action Moving & Storage, 541
25-9-504	City Finance Co. v. Massey Motor Co., 623
31-3.4	In re Will of Penley, 655
31-18.2	In re Will of Penley, 655
31-42(c)	NCNB v. Apple, 606
38-3	Tindall v. Willis, 374
48-5(c)	In re Adoption of Clark, 1
48-6(a)(3)	In re Adoption of Clark, 1
48-13	In re Adoption of Clark, 1
49-15	Napowsa v. Langston, 14
49-17	Cochran v. Wallace, 167
50-13.4(c)	Napowsa v. Langston, 14
50-13.6	Napowsa v. Langston, 14
50-13.10	Tate v. Tate, 774
50-16.3	Haywood v. Haywood, 426
50A-13	Henson v. Henson, 777
55-55(a)	Ashburn v. Wicker, 162
75-1.1	Barber v. Woodmen of the World Life Ins. Society, 340
	Owens v. Pepsi Cola Bottling Co., 47
	Quate v. Caudle, 80
75-5(b)(3)	Owens v. Pepsi Cola Bottling Co., 47
75-16	Quate v. Caudle, 80
75-16.1	Love v. Keith, 549
90-14(a)(6)	In re Guess, 435
90-41	In re Cameron v. N.C. Bd. of Dental Examiners, 332
90-95(a)(1)	State v. Moore, 718
95-36.8	Brooks v. Stroh Brewery Co., 226

GENERAL STATUTES CITED AND CONSTRUED—Continued

G.S.

95-130(8)	Brooks v. Stroh Brewery Co., 226
105-201	Guilford Mills, Inc. v. Powers, 417
105-202	Guilford Mills, Inc. v. Powers, 417
105-164.3(6)	Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue, 151
105-275(32)	In re Appeal of Moravian Home, Inc., 324
105-275(32)(vi)	In re Appeal of Moravian Home, Inc., 324
105-324(b)	In re Appeal of Moravian Home, Inc., 324
105-345(b)	In re Appeal of Moravian Home, Inc., 324
110-36(b1)	Tate v. Tate, 774
110-137	Tate v. Tate, 774
Ch. 131C	Animal Protection Society v. State of North Carolina, 258
143-3	Bolton Corp. v. State of North Carolina, 596
143-135.3	Bolton Corp. v. State of North Carolina, 596
143-215.93	Wilson v. McLeod Oil Co., 479
143-291	Talbot v. N.C. Dept. of Transportation, 446
146-79	Concerned Citizens v. Holden Beach Enterprises, 38
150B-43	Charlotte Truck Driver Training School v. N.C. DMV, 209
150B-51	In re Cameron v. N.C. Bd. of Dental Examiners, 332
Ch. 160A	Thrash v. City of Asheville, 457
160A-31(g)	City of Kannapolis v. City of Concord, 591
160A-36(b)(1)	Amick v. Town of Stallings, 64
160A-42(2)	Thrash v. City of Asheville, 457
160A-47	Thrash v. City of Asheville, 457
160A-49	City of Kannapolis v. City of Concord, 591
160A-49(j)	City of Kannapolis v. City of Concord, 591
160A-54(3)	Thrash v. City of Asheville, 457
160A-175(e)	Town of Knightdale v. Vaughn, 649

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
401	Smith v. Pass, 243 State v. Givens, 72
404(b)	State v. Bullock, 524 State v. English, 611
601(a)	State v. Green, 558
601(b)	State v. Green, 558
609(b)	State v. Moul, 644
701	State v. Drewyore, 283 State v. Givens, 72
702	Smith v. Pass, 243
804(b)(5)	State v. Bullock, 524

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(j1)	Snead v. Foxx, 723
6(e)	Williams v. Moore, 601
11(a)	Shook v. Shook, 578
12	Williams v. Moore, 601
12(b)(6)	City Finance Co. v. Massey Motor Co., 623
12(f)	Daily v. Mann Media, Inc., 746
15	In re Adoption of Clark, 1
50(b)	Russell v. Baity, 422
51(b)	Smith v. Bohlen, 347
53(g)(2)	Quate v. Caudle, 80
55(b)(1)	Williams v. Moore, 601
56(c)	Brooks v. Stroh Brewery Co., 226
59	Concrete Supply Co. v. Ramseur Baptist Church, 658 Douglas v. Doub, 505
60	Jorgensen v. Seeman, 767
60(b)	Windley v. Dockery, 771
60(b)(6)	Concrete Supply Co. v. Ramseur Baptist Church, 658
65	Town of Knightdale v. Vaughn, 649

CONSTITUTION OF UNITED STATES
CITED AND CONSTRUED

Amendment II State v. Fennell, 140

CONSTITUTION OF NORTH CAROLINA
CITED AND CONSTRUED

Article I, § 30 State v. Fennell, 140

RULES OF APPELLATE PROCEDURE
CITED AND CONSTRUED

Rule No.

9 Napowsa v. Langston, 14

11 Napowsa v. Langston, 14

28(b)(5) Tindall v. Willis, 374

CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS

OF
NORTH CAROLINA
AT
RALEIGH

IN RE THE ADOPTION OF DANIEL JAMES CLARK

No. 8821SC916

(Filed 15 August 1989)

1. Adoption § 2; Rules of Civil Procedure § 19— failure to join putative father—no opportunity given to join putative father—dismissal of adoption proceeding improper

Even if former N.C.G.S. § 48-5(c) provided no basis for petitioners' failure to name the putative father as a party of record in an adoption proceeding, and even if the putative father's consent to the adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join the putative father within a reasonable time.

2. Adoption § 2— no determination of putative father's rights—determination not required—putative father's consent not required

The trial court in an adoption proceeding erred in concluding that there must be a valid determination of the parental rights of the putative father prior to the filing of the adoption petition, that the Court of Appeals' earlier opinion which set aside the Termination Order rendered "the very basis of the adoption proceeding . . . void," and that the

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

putative father's consent was necessary before the adoption of the child could continue, since prior termination of the putative father's rights under N.C.G.S. Chapter 7A was not necessary if, under the applicable provisions of N.C.G.S. Chapter 48, his consent to the adoption was not necessary; the earlier decision of the Court of Appeals did not "void" the basis of the adoption proceeding on the earlier termination proceeding, but simply held that the Termination Order must be set aside since the *service* on the putative father was void; and, pursuant to N.C.G.S. § 48-6(a)(3), the putative father's consent was unnecessary because he failed to take any steps before the filing of the adoption petition to legitimate his child, the putative father's knowledge of the existence of his illegitimate child being irrelevant to a proper analysis of the necessity of his consent.

3. Adoption § 2; Rules of Civil Procedure § 15— putative father's failure to legitimate child—amendment of adoption petition proper

Because Rule 15 of the N.C. Rules of Civil Procedure applies to adoption proceedings, petitioners could properly amend or supplement their petition for adoption with an affidavit concerning the putative father's failure to legitimate his child, as required by N.C.G.S. § 48-13, and respondent was not prejudiced by the amendment where he did not see the adoption petition until it had been supplemented with the necessary affidavit.

Judge COZORT dissenting.

APPEAL by petitioners, Adoptive Parents and Family Services, Inc. from *Seay (Thomas W.)*, Judge. Order entered 16 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 March 1989.

Roy G. Hall, Jr., for petitioner-appellants, Adoptive Parents and Family Services, Inc.

Wilson, DeGraw & Johnson, by Daniel S. Johnson, for respondent-appellee.

GREENE, Judge.

This appeal by petitioners Family Services, Inc. and the adoptive parents arises from the superior court's order dismissing an

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

adoption proceeding related to the adoption of Daniel James Clark. The undisputed facts are that Stephanie Ann Clark and Christian Paul Lampe dated each other from October 1982 through April 1983. During that time they had sexual relations without the use of any contraceptives. Ms. Clark terminated the relationship with Mr. Lampe in April 1983 but did not tell Mr. Lampe she was pregnant. On 25 August 1983, Ms. Clark gave birth to the child, Daniel. On 31 August 1983, Ms. Clark released all of her rights in the child to Family Services and consented to the child's adoption. Ms. Clark never informed Mr. Lampe that she had given birth to the child nor that she had consented to the child's adoption; however, before she released her rights in the child to Family Services in August 1983, Ms. Clark told a Family Services employee the name of the child's father was Christian Paul Lampe whom she believed lived in Winston-Salem, North Carolina.

Family Services petitioned to terminate Mr. Lampe's parental rights based on Mr. Lampe's failure to take steps to legitimate the child under Section 7A-289.32(6). *Cf.* N.C.G.S. Sec. 7A-289.32(6) (1984) (may terminate putative father's rights if fails to legitimate or support child before termination petition filed). Family Services purportedly attempted to serve Mr. Lampe by publication under Rule 4. On 18 January 1984, the trial court entered an order terminating Mr. Lampe's rights under Section 7A-289.32(6) based on his failure to take steps to legitimate the child before the filing of the termination petition. On 16 February 1984, the adoptive parents filed a petition to adopt the child accompanied by a copy of the order terminating Mr. Lampe's parental rights (the "Termination Order"). The clerk entered his interlocutory adoption decree on 17 April 1984.

In March 1984, Family Services wrote Mr. Lampe requesting information about his background in order to assist the minor child. Upon receipt of that letter, Mr. Lampe immediately contacted Family Services and learned for the first time that Ms. Clark had given birth to their child and that she had released her parental rights. On 2 May 1984, Mr. Lampe moved to set aside the Termination Order on the ground that his service by publication was invalid because Family Services failed to exercise due diligence in attempting to locate him. On 4 May 1984, Mr. Lampe filed a special proceeding in superior court to legitimate his child. In June 1984, the district court set aside the termination order. On 16 July 1985, this court rendered its decision affirming the order of the district

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

court vacating the Termination Order based on Family Services's failure to exercise due diligence in attempting to serve Mr. Lampe with the petition. *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, *disc. rev. denied*, 314 N.C. 665, 335 S.E.2d 322 (1985). Family Services voluntarily dismissed its petition to terminate Mr. Lampe's parental rights under Chapter 7A and petitioners instead pursued the adoption proceedings commenced under Chapter 48.

On 4 February 1986, the Clerk of Superior Court served Mr. Lampe with notice of a hearing (the "Consent Hearing") to determine whether or not his consent was necessary to the proposed adoption of Daniel James Clark. After hearing evidence, the Clerk concluded that Mr. Lampe's consent was not necessary since he had failed to take any steps to legitimate or support the child before petitioners filed the adoption petition on 16 February 1984. Mr. Lampe appealed to the superior court which reversed the clerk, made various new findings, and concluded Mr. Lampe's consent was necessary before the adoption could continue. The superior court therefore dismissed the adoption petition without prejudice to its refileing. Petitioners appealed.

The issues presented for review are: I) Whether the trial court erroneously dismissed the adoption proceeding based on petitioners' failure to join the putative father at the time the original adoption petition was filed; II) whether the putative father's consent to adoption was necessary under Section 48-6(a)(3); and III) whether the trial court erroneously dismissed the proceedings based on petitioners' initial failure to file an affidavit under Section 48-13 that the putative father's consent was not necessary under Section 48-6(a)(3).

I

[1] One basis for the trial court's dismissal was its finding that Mr. Lampe was not named as a party in the adoption petition filed 18 February 1984. Mr. Lampe was apparently not served in the adoption proceeding until he received notice of the Consent Hearing in February 1986. Section 48-7(a) states that, "except as provided in G.S. 48-5, 48-6 or Article 24B of Chapter 7A, and if they are living and have not released all rights to the child and consented generally to adoption as provided in G.S. 48-9, the parents or surviving parent or guardian of the person of the child must be a party or parties of record to the proceeding and must give

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

written consent to adoption . . ." N.C.G.S. Sec. 48-7(a) (1984). Section 48-5(a) states that, "The court shall be authorized to determine whether the parent or parents of a child shall be necessary parties to any proceeding under this Chapter, and whether the consent of such parent or parents shall be required in accordance with G.S. 48-6 and 48-7." N.C.G.S. Sec. 48-5(a) (1984).

Since they filed the Termination Order with the original adoption petition, petitioners apparently believed Mr. Lampe was not a necessary party nor was his consent needed based on former Section 48-5(c), which stated in part, "In all cases where a district court has entered an order pursuant to . . . Article 24B of Chapter 7A terminating the parental rights *with respect to a child adjudicated to be neglected or dependent*, the parent whose parental rights with respect to such child may have been terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required." N.C.G.S. Sec. 48-5(c) (1984) (emphasis added). Section 48-5(c) was amended in 1985 to provide that a parent whose parental rights were terminated for *any* reason under Article 24B of Chapter 7A is not a necessary party nor shall his or her consent be necessary to an adoption proceeding. N.C.G.S. Sec. 48-5(c) (1988 Cum. Supp.). However, the child in this case was never adjudicated neglected or dependent as required under the version of Section 48-5(c) effective at the time the original adoption petition was filed. Therefore, former Section 48-5(c) provided no basis for petitioners' failure to name Mr. Lampe as a party of record under Section 48-7(a).

However, even assuming Mr. Lampe's consent to this adoption was necessary, petitioners' failure to join Mr. Lampe at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join Mr. Lampe within a reasonable time:

Where . . . a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court . . . *Absence of necessary parties does not merit a non-suit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead.*

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

Booker v. Everhart, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) (emphasis added) (citations omitted). Although *Booker* did not involve an adoption proceeding, the *Booker* Court's holding concerning the procedure for dismissing an action for failure to join a necessary party applies to adoption proceedings since the Rules of Civil Procedure and the provisions of Section 1-393 *et seq.* apply to adoption proceedings. *In re Searle*, 74 N.C. App. 61, 64, 327 S.E.2d 315, 317 (1985) (Rules of Civil Procedure and Section 1-393 *et seq.* apply to adoptions as special proceedings); *see also Virginia Electric and Power Co. v. Tillet*, 316 N.C. 73, 340 S.E.2d 62 (1986).

Therefore, even if Mr. Lampe's consent was necessary to this adoption, we conclude under *Booker* that the trial court could not dismiss the adoption proceedings based on petitioners' failure to name Mr. Lampe as a party without first giving petitioners the opportunity to join Mr. Lampe within a reasonable time.

II

[2] The trial court concluded that there must be a valid determination of the parental rights of Mr. Lampe prior to the filing of the adoption petition. The trial court found that this court's earlier opinion which set aside the Termination Order rendered "the very basis of the adoption proceeding . . . void" The court therefore concluded that Mr. Lampe's consent was necessary before the adoption of the child could continue. All three conclusions are erroneous.

First, the earlier decision of this court setting aside the Termination Order did not "void" the basis of this adoption proceeding or the earlier termination proceeding, but simply held that the Termination Order must be set aside since the *service* on Mr. Lampe was void. *Clark*, 76 N.C. App. at 87, 332 S.E.2d at 199-200. Family Services was not necessarily required to dismiss the termination proceeding after our earlier decision in *Clark*, but could have instead sought to join Mr. Lampe in the termination proceeding as permitted under *Booker*. In our earlier decision, we expressed no opinion on the substantive merits of the Termination Order insofar as it terminated Mr. Lampe's parental rights for failure to legitimate or support his child before the termination petition was filed.

Second, the trial court believed Mr. Lampe's parental rights actually had to be terminated before the petition for adoption could

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

be filed. While termination of a putative father's rights *may* precede an adoption petition, prior termination of his rights under Chapter 7A is not necessary if, under the applicable provisions of Chapter 48, his consent to the adoption is not necessary. His parental rights are then terminated by the final order of adoption under Section 48-23, which states, "The biological parents of the person adopted, if living, shall, from and after the entry of the final order of adoption . . . be divested of all rights with respect to such person." N.C.G.S. Sec. 48-23(2) (1984) (does not apply if putative father has adopted his own child); see *Rhodes v. Henderson*, 14 N.C. App. 404, 407, 188 S.E. 2d 565, 567 (1972) (final adoption decree terminates parental rights of natural parents); cf. N.C.G.S. Sec. 48-5(d) (1988 Cum. Supp.) (if parental rights have not previously been terminated under Article 24B of Chapter 7A, petitioner "may" file petition to terminate parental rights; adoption proceeding shall continue until final disposition of termination petition).

Finally, Section 48-6 sets forth various conditions under which a putative father's consent to the adoption is not required. The provisions pertinent to this case provide that:

In the case of a child born out of wedlock the consent of the putative father shall not be required *unless prior to the filing of the adoption petition*:

- a. Paternity has been judicially established or acknowledged by affidavit which has been filed in a central registry maintained by the Department of Human Resources . . . b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or c. The putative father has provided substantial financial support or consistent care with respect to the child and mother.

Determination under G.S. 48-6(a)(3) that the adoption may proceed without the putative father's consent shall be made only after notice to him pursuant to G.S. 1A, Rule 4. This notice shall be titled in the biological name of the child.

N.C.G.S. Sec. 48-6(a)(3) (1984) (emphasis added). Aside from the requirement that a "termination" petition rather than an "adoption" petition be filed, we note the grounds which render a putative father's consent unnecessary under Section 48-6(a)(3) are identical to the grounds for terminating his parental rights under Section 7A-289.32(6).

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

Mr. Lampe received notice of the Consent Hearing, filed various motions to dismiss the adoption proceeding, and argued strenuously that his consent to the adoption was necessary despite the language of Section 48-6(a)(3). Based on Mr. Lampe's argument that he took steps to legitimate this child as soon as he knew of its existence, the trial court rejected petitioners' argument that Mr. Lampe's consent to the adoption was rendered unnecessary by his failure to take the necessary steps to legitimate the child "prior to the filing of the adoption petition" under Section 48-6(a)(3). We reject the trial court's construction of Section 48-6(a)(3). Irrespective of when it was served, the adoption petition was "filed" on 16 February 1984. The first action taken by Mr. Lampe to legitimate his child under Section 48-6(a)(3) occurred on 4 May 1984 when he filed the special proceeding in superior court to legitimate the child. Thus, Mr. Lampe clearly did not take the necessary steps before the "filing of the adoption petition."

Mr. Lampe asserts he had no knowledge of the child's birth until he was notified of the Consent Hearing on 16 February 1984; he further contends, and the trial court found, that petitioners had sufficient information prior to the filing of the adoption proceeding to locate and serve Mr. Lampe with notice of the proceedings. However, a putative father's knowledge of the existence of his illegitimate child is not relevant to a proper analysis of the necessity of a putative father's consent under Section 48-6(a)(3). That statute does not provide that the putative father must take steps to legitimate the child within a certain time period after he has received notice of the proceedings under Rule 4; nor does the statute provide that the putative father has the right to veto the adoption if he takes steps to legitimate the child after he becomes aware of its existence. Section 48-6(a)(3) does not require that the putative father "willfully" fail to legitimate the child before the filing of the petition: it simply provides that the putative father's consent is unnecessary unless he takes certain steps to legitimate or support his illegitimate child before the adoption petition is filed. In so providing, Section 48-6(a)(3) reflects the same legislative choices evident in the termination of a putative father's rights under Section 7A-289.32(6): under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed.

The Legislature was clearly aware of the admittedly difficult policy considerations underlying the issue of a putative father's

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

right to veto the adoption of his illegitimate child. The Legislature stated these concerns in Section 48-1:

The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—(1) the primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, *and to protect them from interference, long after they have become properly adjusted in their adoptive homes by biological parents who may have some legal claim because of a defect in the adoption procedure. . . . The secondary purpose of this Chapter is . . . to prevent later disturbance of [the adoptive parent's] relationship to the child by biological parents whose legal rights have not been fully protected.*

N.C.G.S. Sec. 48-1(1), (2) (1984) (emphasis added). In Section 48-6(a)(3), the Legislature weighed the putative father's rights against the child's need for a stable adoptive home by choosing the date the adoption petition is filed as the date before which the putative father must take some step to legitimate or support his child. Although the putative father is certainly entitled to notice under Section 48-6(a)(3) of any hearing held to determine the necessity of his consent, the statutes do not provide for any notice to the putative father of a petitioner's *intent* to file a petition to adopt his illegitimate child or otherwise terminate his parental rights.

While the Legislature could have reasonably set the bar date at another point in time, it is certainly not unreasonable to charge putative fathers with the responsibility to discover the birth of their illegitimate children. *Cf. Lehr v. Robertson*, 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985 (1983) (unmarried father lacking custodial, personal, or financial relationship with child is not entitled to notice of child's adoption proceeding under due process and equal protection clauses). Since the record clearly shows Mr. Lampe failed to take any steps before the filing of the adoption petition to legitimate this child, we hold Mr. Lampe's consent to this adoption is unnecessary pursuant to Section 48-6(a)(3).

III

[3] The trial court also dismissed the petition based on petitioners' alleged failure to comply with the statutory requirements of Section

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

48-13 and Section 48-15. Section 48-15 merely summarizes the necessary contents of the adoption petition and states that, "The petition may be prepared on a standard form to be supplied by the Department of Human Resources, or may be typewritten, giving all the information required" N.C.G.S. Sec. 48-15(b) (1984). We have reviewed the copy of the petition in the record and find that at the time it was filed and at the time it was dismissed it complied in all respects with Section 48-15.

However, Section 48-13 provides that, "in the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G.S. 48-6 is necessary shall be filed with a petition for adoption." N.C.G.S. Sec. 48-13 (1984). As noted above, petitioners believed Mr. Lampe's consent was not necessary under their mistaken interpretation of the version of Section 48-5(c) in effect at the time the adoption petition was filed; therefore, they did not at that time file the supporting affidavit required under Section 48-13. Petitioners did not file the affidavit required under Section 48-13 until the Termination Order was set aside by this court in 1986.

The trial court apparently believed petitioners could not amend or supplement their petition by filing the necessary affidavit as they did in 1986. This is incorrect. As with all the adoption statutes, the construction of Section 48-13 "should not be narrow or technical nor compliance therewith examined with a judicial microscope in order that every slight defect may be magnified—rather, the construction ought to be fair and reasonable, so as not to defeat the act or the beneficial results where all material provisions of the statute have been complied with." *Locke v. Merrick*, 223 N.C. 799, 803, 28 S.E.2d 523, 527 (1944). As noted above, the Rules of Civil Procedure and statutes governing special proceedings govern this question since the adoption statutes do not address amended or supplemental petitions. Section 1-399 states that, "the trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property." Our Supreme Court has held Rule 15 applies to condemnation proceedings. *Virginia Electric and Power Co.*, 316 N.C. at 77-78, 340 S.E.2d at 65.

We likewise conclude Rule 15 of our Rules of Civil Procedure applies to adoption proceedings. Rule 15(a) provides that leave to

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

amend shall be freely given when justice so requires. N.C.G.S. Sec. 1A-1, Rule 15(a) (1983). Supplemental pleadings must also be allowed unless the allowance would impose a substantial injustice upon the opposing party. *Foy v. Foy*, 57 N.C. App. 128, 290 S.E.2d 748 (1982). Reasons justifying denial of an amendment include undue delay, bad faith, undue prejudice, futility of amendment, and repeated failure to cure defects by previous amendments. *Martin v. Hare*, 78 N.C. App. 358, 337 S.E.2d 632 (1985). The first notice Mr. Lampe received concerning the adoption proceedings was the notice of the Consent Hearing with the affidavit attached setting forth the grounds why his consent was not necessary under Section 48-6(a)(3). Since Mr. Lampe did not see the adoption petition until it had been supplemented with the necessary affidavit, we fail to see how Mr. Lampe was materially prejudiced by allowing the affidavit to be filed after its necessity became apparent when this court set aside the Termination Order. Furthermore, the Termination Order filed with the original petition stated Mr. Lampe's parental rights had been terminated because he had failed to take the steps necessary to legitimate his child before the termination petition was filed. Since the petition therefore gave sufficient notice of the legitimacy issue, petitioners' affidavit—which merely reiterated Mr. Lampe's failure to legitimate his child—relates back to the date the original petition was filed. See *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986); see also *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982) (supplemental pleadings are liberally allowed and will relate back to date of original filing). Under these circumstances, we conclude the trial court erroneously dismissed the adoption petition for failure to comply with Section 48-13 at the time of the original filing in 1984.

Accordingly, we reverse the trial court's judgment dismissing the adoption proceeding and hold the adoption proceeding shall proceed without the consent of Mr. Lampe.

Reversed and remanded.

Judge EAGLES concurs.

Judge COZORT dissents.

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

Judge COZORT dissenting.

I do not agree with the majority's conclusion that the trial court erred in dismissing the adoption petition, and I must dissent, even though further appeals and legal proceedings will make even more difficult the already formidable task of deciding what is best for this child who is now six years old and apparently knows nothing of his purported father or that man's efforts to legitimate him and win his custody.

The majority opinion makes virtually no reference to the trial court's findings and conclusions dealing with petitioners' making no attempt to contact Mr. Lampe until after the petition for adoption had been filed, a failing the trial court characterized as willful and negligent. Likewise, the majority appears to have been unaffected by this Court's opinion of 1985 upholding the setting aside of the 1984 Order terminating Mr. Lampe's parental rights. In that case, this Court stated:

Although the record reveals that Clark was evasive concerning Lampe's whereabouts, it is equally clear that she told everyone involved that the father's name was Christian Paul Lampe. We are not persuaded that the two possible spellings of his last name (*Lamp* or *Lampe*) given by Clark created any genuine doubt about the name or identity of the respondent.

* * * *

As we noted earlier, the trial court concluded as a matter of law that "petitioner did not exercise a diligent effort at the time of the preliminary hearing" in locating Lampe. . . .

In this case, petitioner knew respondent's name and the county in which he resided. The court found as a fact that the Forsyth County telephone directory contained only two listings under the name of "Lampe" during the time of the petition. Petitioner called only one of these numbers and found it to be disconnected. The other listing had belonged to respondent's father since August 1978. The court also found that the petitioner issued a subpoena to Appalachian State University for records relating to Lampe, but that no further check was made in regard to these records until after the termination order was signed.

We find the following findings of fact most persuasive:

IN RE ADOPTION OF CLARK

[95 N.C. App. 1 (1989)]

12. That since 1982, Christian Paul Lampe has had a North Carolina driver's license with the address of 101 Waddington Road, Clemmons, North Carolina; further that Christian Paul Lampe pays personal property taxes in Forsyth County with his address listed as 101 Waddington Road, Clemmons, North Carolina; further, that he is registered to vote in Forsyth County with his address for his draft recorded as 101 Waddington Road, Clemmons, North Carolina; further, at the time of the birth of the child, the movant had enrolled at Elon College and his parents lived at 101 Waddington Road and continue to reside there at this time.

13. That the petitioner in this matter checked no public records to determine the location and identity of the father of the minor child but instead relied solely on the information supplied by Stephanie Ann Clark.

. . . We . . . conclude that under the facts of this particular case, petitioner failed to act with due diligence in attempting to determine respondent's whereabouts.

In re Clark, 76 N.C. App. 83, 85-87, 332 S.E.2d 196, 198-200, *disc. rev. denied and appeal dismissed*, 314 N.C. 665, 335 S.E.2d 322 (1985).

The majority's opinion has the effect of overturning this Court's 1985 decision. The majority holds that the putative father's consent is not required because the adoption petition was filed before the putative father initiated proceedings to legitimate the child. This holding ignores the fact that the father could not have attempted to legitimate the child because he had no knowledge of the child; and he had no knowledge due to the petitioners' lack of diligence, as this Court has previously affirmed, which lack the trial court characterized as willful and negligent. To allow the petitioners to go forward with the adoption, without the father's consent, makes meaningless our opinion overturning the termination order. In effect, we would allow the petitioners to terminate the father's rights through the adoption process. I do not believe we should be a party to such flaunting of the father's rights and the rules of law.

I agree with the trial court's decision that, on the facts of this case, petitioners cannot proceed with adoption without the father's consent. I vote to affirm.

IN THE COURT OF APPEALS

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

PATRICIA NAPOWSA v. WILLIAM DWIGHT LANGSTON

No. 8810DC1007

(Filed 15 August 1989)

1. Appeal and Error § 38— record on appeal—two conflicting narratives of evidence—dismissal of appeal unnecessary

Where the record on appeal contained two conflicting narratives of the evidence, it was not necessary to dismiss the appeal for failure to bring forward a “settled” record as required under Appellate Rules 98 and 11, since defendant did not assert that the trial court’s findings were not supported by sufficient evidence at a custody hearing, but instead asserted that the trial court’s conclusions were erroneous or were not supported by the findings actually made, and under these circumstances a narrative of evidence or a verbatim transcript was not necessary to understand defendant’s assignments of error.

2. Parent and Child § 7— responsibility for child support—date paternity established immaterial—responsibility for expenditures for three years prior to filing of action

There was no merit to defendant’s contention that he could not be liable for any child support expenses incurred by the mother before the date his paternity was established, since the establishment of the father’s paternity is only a “procedural prerequisite” to his liability for child support; therefore, assuming adequate proof of the expenditures under N.C.G.S. § 50-13.4(c), plaintiff mother could recover reimbursement for her past support expenditures to the extent she paid the father’s share of such expenditures and to the extent the expenditures occurred three years or less before the date she filed her claim for child support.

3. Parent and Child § 7; Equity § 2— action for retroactive child support—doctrine of laches inapplicable

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in N.C.G.S. § 1-52(2).

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

4. Parent and Child § 7— failure to make appropriate findings— award of retroactive child support vacated

The trial court's award of retroactive child support must be vacated since the court made no findings whatsoever with respect to the parties' estates, earnings, conditions, and accustomed standard of living for one of the years for which plaintiff sought child support.

5. Attorneys at Law § 7; Parent and Child § 7— retroactive child support—award of attorney's fees proper

N.C.G.S. § 50-13.6 permits the trial court the discretion to award attorney's fees for retroactive child support just as the trial court has the discretion to award attorney's fees for future support actions, and dicta to the contrary in *Tidwell v. Booker*, 290 N.C. 98, is no longer applicable, since it was based in part on the mother's "secondary" liability for child support. N.C.G.S. § 49-15.

6. Attorneys at Law § 7— award of attorney's fees — insufficient findings—award improper

The trial court erred in awarding plaintiff attorney's fees in her action for retroactive child support where the court made no findings on all the factors required under N.C.G.S. § 50-13.6, and plaintiff's expense affidavits included some legal expenses attributable to the conduct of her paternity claim rather than her child support claim.

APPEAL by defendant from *Creech (William A.)*, Judge. Judgment entered 21 March 1988 in District Court, WAKE County. Heard in the Court of Appeals 13 April 1989.

Womble, Carlyle, Sandridge & Rice, by *Carole Gailor, Susan D. Crooks and Laura V. Leak*, for plaintiff-appellee.

Edmundson & Burnette, by *J. Thomas Burnette*, for defendant-appellant.

GREENE, Judge.

Defendant appeals from an order entered 21 March 1988 which, *inter alia*, ordered him to pay retroactive and future child support for his illegitimate child and attorney's fees to the plaintiff mother. As discussed below, the court stenographer apparently lost the transcripts of the custody hearing and the trial court settled the

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

record on appeal by including two conflicting narrative summaries prepared by plaintiff and defendant. However, the facts of the case are revealed by the trial court's following findings to which neither party has objected:

. . . .

4. On September 6, 1969 the Plaintiff gave birth to Timothy Allen Newsome. In Defendant's Answer he denied paternity of the child.

5. Pursuant to an Order of this Court requiring the Defendant to submit to bloodgrouping tests to establish his paternity of the minor child of the Plaintiff, the Defendant's bloodgrouping test performed by Duke Medical Center showed that the Defendant was the father of the minor child by a probability of 99.04%. This Court finds that as a result of the bloodgrouping test the Defendant stipulated that he was the father of the minor child Timothy Allen Newsome.

6. Subsequent to the birth of the minor child the Plaintiff informed the Defendant that he was the father of the child.

7. Subsequent to the birth of the minor child that Defendant refused to acknowledge paternity of the minor child and saw the child only intermittently until the child was 16 years old. During this period of time, the Defendant paid no child support and contributed infrequently to the child's support by the purchase of gifts and clothes.

8. The Plaintiff has introduced expense affidavits for each month beginning in January of 1984 through March of 1987, which affidavits were prepared by the Plaintiff by examination of cancelled checks, bank statements and receipts showing her actual past expenditures for herself and the minor child. The Court finds that the expenses of the minor child Timothy Allen Newsome as reflected on these affidavits and in the Plaintiff's testimony are in fact the actual past expenditures of the minor child. The Court further finds that these expenditures on behalf of the minor child were reasonable and necessary for the support of the minor child.

9. Since January 1, 1984, the Plaintiff spent \$32,536.74 for the support and maintenance of the minor child.

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

10. In 1986 the minor child was hospitalized at Charter North Ridge Hospital. The Defendant was informed of this hospitalization, but has failed and refused to contribute to the unreimbursed medical expense which totals \$6,164.00.

11. The Plaintiff is employed and earned \$13,872.00 in 1985, \$15,204.00 in 1986, and in 1987, earned \$1,371.00 gross income per month.

12. The Defendant is employed by the North Carolina Department of Transportation, and in 1985 earned \$29,335.94; in 1986 the Defendant earned \$31,573.15. In 1987 the Defendant was earning the sum of \$2,340.00 per month gross income.

13. The Defendant has a vested pension with his employer in the total amount of approximately \$36,000.00. The Defendant also has an IRA to which he makes a \$2,000 annual contribution. In addition, the Defendant has sole title to real estate and improvements located at 2812 Oak Ridge Court, Raleigh, North Carolina. In addition, the Defendant's tax returns reflect that he receives over \$2,000.00 in interest income which reflects accumulated savings of over \$22,000.00 as of December 29, 1986.

14. As of the date of the filing of this action the Defendant has not paid Plaintiff child support for a period exceeding the three years of which retroactive child support is sought by the Plaintiff.

15. Pursuant to an agreement reached by counsel for the Plaintiff and the Defendant in March, 1987 when this matter came before the Court and was continued due to the Court's schedule, the Defendant has paid the Plaintiff the sum of \$400.00 per month for the support and maintenance of the minor child. By stipulation of the parties, the Defendant will continue to pay the sum of \$400.00 per month as and for support of the minor child. By stipulation of the parties, the Defendant will continue to pay the sum of \$400.00 per month as and for the support of the minor child until the child becomes eighteen (18) years of age on September 5, 1987. Thereafter all support and maintenance for the minor child will cease.

16. The Defendant has stated his concern and love for the minor child, and his desire that he pursue a relationship with his son. The Defendant is a fit and proper person to have joint custody of the minor child.

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

17. The Plaintiff has insufficient funds to defray the expenses of the action.

Based on these findings, the trial court awarded plaintiff and defendant joint legal custody of the child and ordered defendant to pay plaintiff \$400.00 per month for the future support and maintenance of the minor child until he reached the age of eighteen. The trial court also ordered defendant to pay plaintiff \$17,200 as retroactive child support for the period 1 January 1984 through 30 March 1987. Finding that defendant had failed to pay adequate child support to plaintiff at the time her suit was instituted, the trial court also awarded plaintiff \$3,000 in attorney's fees. Although the record contains plaintiff's affidavit concerning attorney's fees, the trial court's order contains no findings concerning that affidavit. Defendant appeals.

These facts present the following issues: I) where the record on an appeal contains two conflicting narratives of the evidence, whether the appeal should be dismissed for failure to bring forward a "settled" record as required under Appellate Rules 9 and 11; II) whether the trial court was precluded as a matter of law from awarding retroactive child support under Section 49-15; III) whether the trial court erroneously denied defendant's motion to dismiss plaintiff's claim for retroactive child support based on the contention the claim was barred by laches; IV) whether the trial court erroneously failed to make findings of fact necessary to support its child support award; and V) whether (A) attorney's fees for retroactive child support are permitted by Section 50-13.6, and (B) the trial court's award of attorney's fees was supported by adequate findings of fact.

I

[1] As noted earlier, both parties submitted proposed narratives of the evidence presented at the custody hearing since the electronically recorded verbatim transcript of the hearing was accidentally erased or lost. Although the trial court purportedly "settled" the record on appeal, it did so by forwarding *both* proposed narratives of the evidence presented at the hearing. This does not constitute a proper settlement of the appellate record under Appellate Rule 11(c) which states:

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

other appellee . . . may in writing request the judge . . . to settle the record on appeal. . . . The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge.

N.C.R. App. P. 11(c) (effective for judgments entered prior to 1 July 1989). Appellate Rule 9(c)(1) also states that, "When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal."

The trial court apparently did not attempt to reconcile the competing narratives into a single settled record on appeal without a verbatim transcript of the proceedings. This is not a correct interpretation of the court's duties under Appellate Rule 11:

[T]he stenographer's notes are not the compelling and supreme authority as to what transpired during the trial . . . [I]n settling the cases on appeal the first authority is that of counsel themselves in agreeing to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred. . . . The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions We must repeat again that stenographers are a helpful aid, but are not indispensable.

State v. Allen, 4 N.C. App. 612, 615-16, 167 S.E.2d 505, 507-08 (1969) (approving settled record on appeal although trial court did not have stenographic transcript of trial) (quoting *Cressler v. City of Asheville*, 138 N.C. 482, 485-86, 51 S.E. 53, 54 (1905)). We do not believe that this is a case "of such length or complexity that an adequate record on appeal cannot be prepared without a stenographic transcript." *Id.*

However, it is not necessary to dismiss this appeal in light of the other documents in the record and defendant's assignments of error. Appellate Rule 9(a)(1)(v) states that the record shall 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" Defendant does not assert the trial court's findings quoted earlier were not supported by sufficient evidence at the custody hearing, but instead asserts the trial court's conclusions were er-

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

roneous or were not supported by the findings actually made. Under these limited circumstances, a narrative of evidence or a verbatim transcript is not necessary to understand defendant's assignments of error. Accordingly, we will not dismiss defendant's appeal and will address the merits of his assignments of error.

II

[2] Although the pertinent file stamp is somewhat indistinct, it appears plaintiff filed her complaint for custody and child support on 8 August 1986. She introduced affidavits of expenses she incurred in caring for her child during the period January 1984 through March 1987. Based upon these affidavits, the trial court awarded plaintiff child support for the period 1 January 1984 through 30 March 1987. Defendant's paternity was not judicially established until the judgment appealed from was entered 21 March 1988. Since the minor child was illegitimate, defendant contends he could not be liable for any child support expenses incurred by the mother before the date his paternity was established.

We disagree. Section 49-15 states:

Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child.

N.C.G.S. Sec. 49-15 (1984). Our Supreme Court construed Section 49-15 in *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976). Although the *Tidwell* decision was rendered before both parents were statutorily deemed primarily liable for child support, its analysis is otherwise pertinent:

The duty of the father of an illegitimate child to support such child is not created by the judicial determination of paternity. *That determination is merely a procedural prerequisite to the enforcement of the duty by legal action.* The father's duty to support his child arises when the child is born. . . . The liability of the father to reimburse the mother of an illegitimate child for expenditures reasonably incurred in the sup-

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

port of such child is a liability created by statute. G.S. 49-15. It is not a penalty or a forfeiture. Consequently, an action to enforce such liability is barred after three years. G.S. 1-51(2). *Each such expenditure by the mother creates in her a new right to reimbursement. The present action was instituted by the mother on October 9, 1974. Consequently, her right herein to judgment requiring reimbursement by the defendant, assuming his paternity is established, is limited to reimbursement for expenditures incurred by her on and after October 9, 1971. Upon a proper determination by the district court that the defendant is the father . . . , the district court may enter an order requiring the defendant to reimburse the plaintiff for reasonably necessary expenditures by her for the support of the child on and after October 9, 1971.*

Id. at 116, 225 S.E.2d at 827 (emphasis added); compare N.C.G.S. Sec. 50-13.4(b) (1976) (father primarily, and mother secondarily, liable for child support) with N.C.G.S. Sec. 50-13.4(b) (1987) (both parents primarily liable for child support). The father's paternity in *Tidwell* clearly had not been established at the time of the mother's appeal to the Supreme Court; however, the Supreme Court stated that, if the father's paternity was *subsequently* established, then he was required to reimburse the mother for each reasonable expenditure on the child incurred by her on and after 1 October 1971, i.e., the limitations period beginning three years before the date the mother instituted the action.

Thus, under *Tidwell* the establishment of the father's paternity is only a "procedural prerequisite" to his liability for child support. Furthermore, the three-year statute of limitations under Section 1-52(2) bars the recovery of child support expenditures incurred more than three years before the date the action for child support is filed. However, since the father's obligation to support his illegitimate children is a continuing obligation, "[e]ach . . . expenditure by the mother creates in her a new right to reimbursement." *Tidwell*, 290 N.C. at 116, 225 S.E.2d at 827. Therefore, assuming adequate proof of the expenditures under Section 50-13.4(c), the plaintiff-mother can recover reimbursement for her past support expenditures: (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before 8 August 1986, the date she filed her claim for child support.

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

Defendant argues *Tidwell* is distinguishable since at the time of the decision the mother was "secondarily" liable for child support, while the father was "primarily liable." *Cf. id.* at 115, 225 S.E.2d at 826. However, actions for retroactive child support have clearly survived the subsequent amendments to Section 50-13.4(b). *E.g., Warner v. Latimer*, 68 N.C. App. 170, 314 S.E.2d 789 (1984); *Buff v. Carter*, 76 N.C. App. 145, 331 S.E.2d 705 (1985). We note the trial court did not order plaintiff reimbursed for the total amounts expended by her to support the child, but instead reimbursed her only for her expenditures which represented defendant's share of the child's support under Section 50-13.4(c).

We therefore reject defendant's argument that plaintiff was not entitled as a matter of law to retroactive child support under Section 49-15 for expenditures incurred before defendant's paternity was established. Thus, the trial court was not precluded as a matter of law from ordering defendant to reimburse plaintiff for past expenditures incurred from January 1984 through the date the support claim was filed on 8 August 1986. (We note the parties stipulated that defendant had paid, and would continue to pay, his share of expenses for child support incurred *after* the complaint for child support was filed.)

III

[3] Defendant also asserts the trial court erroneously denied his motion to dismiss on the ground that laches barred plaintiff from recovering past child support since the action was not filed until the child was seventeen years of age. The doctrine of laches was created to discourage stale claims. *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981), *disc. rev. denied*, 304 N.C. 728, 288 S.E.2d 381 (1982). We believe the doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in Section 1-52(2). N.C.G.S. Sec. 1-52(2) (1983). "Since the obligation . . . to furnish support to . . . minor children is a continuing one, it would seem that a mere lapse of time alone should not be a bar to the commencement of the action [for child support]." *Streeter v. Streeter*, 33 N.C. App. 679, 682, 236 S.E.2d 185, 187 (1977) (quoting 2 R. Lee, *North Carolina Family Law* Sec. 164 at 269 (4th ed. 1980)). We are aware of no decision of this State which has accepted laches as a defense to the enforcement of a court order for child support. *See Sedberry*, 54 N.C. App. at 168-69, 282 S.E.2d at 552-53 (collect-

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

ing illustrative cases). Plaintiff only sought and only recovered reimbursement for expenditures incurred within three years prior to the filing of the complaint. The expenditures on which plaintiff based her claim for reimbursement were no more than three years old and therefore do not create a "stale" claim under these circumstances in any event. Accordingly, we hold the trial court properly refused to dismiss plaintiff's action based on the defense of laches.

IV

[4] Defendant also asserts the trial court's findings are insufficient under Section 50-13.4(c) to support an award of child support. Section 50-13.4(c) states in pertinent part:

Payments ordered for the support of a minor child shall be in such amount as 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.G.S. Sec. 50-13.4(c) (1987). In *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980), our Supreme Court stated:

Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents It is not enough that there be evidence in the record sufficient to support findings which *could have been made*.

(Emphasis in original.) This court furthermore stated in *Newman v. Newman*, 64 N.C. App. 125, 128, 306 S.E.2d 540, 541, *disc. rev. denied*, 309 N.C. 822, 310 S.E.2d 351 (1983):

Not only must the trial court hear evidence on each of the factors listed above, but the trial court must also substantiate its conclusions of law by making findings of specific facts on each of the listed factors. . . . The trial court must hear evidence and make findings of specific fact on the child's actual

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

past expenditures and present reasonable expenses to determine 'the reasonable needs of the child.' . . . Further, the trial court must hear evidence and make findings of fact on the parents' income, estates . . . and present reasonable expenses to determine the parties' relative ability to pay.

(Citations omitted.)

In the instant case, the trial court's award of retroactive child support for the period commencing January 1984 must be based on findings adequate to show that plaintiff paid defendant's share of child support as determined under Section 50-13.4(c). While the trial court's findings were otherwise adequate on this issue, the trial court made no findings whatsoever with respect to the parties' "estates, earnings, conditions, [and] accustomed standard of living" for the year 1984. Accordingly, the trial court's award of retroactive child support must be vacated since it is not based on sufficient findings pertaining to the year 1984.

V

A

[5] Section 50-13.6 states:

In an action or proceeding for the custody of support, or both, of a minor child . . . 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 of the party ordered to furnish support has refused to provide support which is adequate under those circumstances existing at the time of the institution of the action or proceeding

N.C.G.S. Sec. 50-13.6 (1987). Citing *Tidwell*, defendant asserts the trial court erred as a matter of law in awarding attorney's fees in an action for retroactive child support of an illegitimate child. In *Tidwell*, this court had held the putative father was estopped to deny his paternity and affirmed the trial court's award of retroactive and future child support and attorney's fees. The Supreme Court held the father was not estopped and that no child support or attorney's fees could be ordered until the determination of paternity on remand. *Tidwell*, 290 N.C. at 114, 225 S.E.2d at 826. However, believing that the issue would arise again on remand, the *Tidwell*

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

Court proceeded to construe the trial court's authority to order attorney's fees under Section 50-13.6. Although noting the trial court had not ordered that defendant to pay attorney's fees in connection with retroactive child support, the *Tidwell* Court nevertheless stated in dicta and without explanation, "We think the proper construction of [Section 50-13.6] is that it applies to a proceeding to compel the future support of the child, not to a proceeding to compel reimbursement for past payments made by a person secondarily liable for such child's support." *Id.* at 117, 225 S.E.2d at 827; cf. B. Massey, 10 Campbell L. Rev. 111, 138, *Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina* (1987) (characterizing statement in *Tidwell* as dicta).

We believe the dicta concerning attorney's fees in *Tidwell* is no longer applicable since it was based in part on the mother's "secondary" liability for child support. As Section 50-13.4(b) was amended in 1981 to charge each parent with primary liability for support unless circumstances warrant otherwise, the rationale underlying the *Tidwell* dicta has been superseded by amendments to the statute it was construing. Furthermore, although the dicta of our Supreme Court are entitled to due consideration, such dicta are not binding on this court. As our Supreme Court stated in *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985), "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." See also *State of North Carolina ex rel. Util. Comm'n v. Central Tel. Co.*, 60 N.C. App. 393, 395, 299 S.E.2d 264, 266 (1983) (Court of Appeals not bound by *obiter dictum* of Supreme Court) (cited favorably by Supreme Court in *Trustees of Rowan Technical College*).

The purpose of Section 49-15 is to require parents to uphold their rights, duties, and obligations to their illegitimate as well as legitimate children. To deny the award of attorney's fees as a matter of law in an action for retroactive child support creates a distinction between the obligation to support legitimate and illegitimate children which is contrary to the express intent of Section 49-15 and is not required by the language of Section 50-13.6. Accordingly, we hold Section 50-13.6 permits the trial court the discretion to award attorney's fees for retroactive child support just as the trial court has the discretion to award attorney's fees for future support actions. The trial court in this case was there-

NAPOWSA v. LANGSTON

[95 N.C. App. 14 (1989)]

fore not precluded as a matter of law from awarding attorney's fees in a proceeding for retroactive child support. *Cf. Warner v. Latimer*, 68 N.C. App. 170, 314 S.E. 2d 789 (1984) (affirming award of attorney's fees in action for future and back child support).

B

[6] The trial court found plaintiff had insufficient funds to defray the expenses of the action, concluded defendant had failed to pay adequate child support at the time the action was filed, and ordered defendant to pay \$3,000 as attorney's fees. However, defendant asserts these findings and conclusions were insufficient to support the trial court's award of attorney's fees. We agree. As we stated in *In re Scarce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 412, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 590 (1986):

Before awarding attorney's fees, the trial court must make specific findings of fact concerning: (1) the ability of the [party] to defray the cost of the suit, i.e. that the [plaintiff is] unable to employ adequate counsel in order to proceed as the litigant . . . ; (2) the good faith of the [party] . . . ; (3) the lawyer's skill; (4) the lawyer's hourly rates; (5) the nature and scope of the legal services rendered The lawyer's skill, hourly rate, and the nature and scope of the legal services rendered all relate to a conclusion of the reasonableness of the attorney's fees.

Although plaintiff introduced affidavits of her legal expenses, the trial court made no findings on all the factors required under Section 50-13.6. Furthermore, we note plaintiff's expense affidavits include some legal expenses attributable to the conduct of her paternity claim: attorney's fees incurred in prosecuting paternity actions may not be awarded under Section 50-13.6, but may only be assessed as costs under Section 6-21(10). *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986). Accordingly, we must also vacate the trial court's award of attorney's fees and remand for further proceedings consistent with this opinion.

Affirmed in part, vacated in part and remanded.

Judges ARNOLD and LEWIS concur.

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

STATE OF NORTH CAROLINA v. THOMAS NOLEN MULLICAN

No. 8818SC884

(Filed 15 August 1989)

Criminal Law § 138.15 — guilty plea — aggravating factors — position of trust — guilt of greater crime — prosecutor's statement of evidence

The prosecutor's summary of the State's evidence upon defendant's guilty plea to attempted first degree sexual offense was sufficient to support the trial court's findings as factors in aggravation that defendant took advantage of a position of trust and that defendant was in fact guilty of the greater crime of first degree sexual offense where defense counsel's admission of the correctness of that summary in his own statement to the court constituted an admission by defendant that he had placed his penis in the mouth of the five-year-old niece whom he bathed, fed and took care of and with whom he lived. Moreover, because he failed to object to the district attorney's summary of the evidence offered upon his guilty plea, defendant waived his right to appeal any possible error regarding the evidence.

Judge GREENE dissenting.

APPEAL by defendant from *Morgan (Melzer A.)*, Judge. Judgment entered 21 March 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 March 1989.

Defendant was indicted for a first degree sexual offense with a child under the age of thirteen. In exchange for his guilty plea to attempted first degree sexual offense the State agreed to reduce the charge and dropped an indecent liberties charge.

After a thorough and complete discussion of the plea negotiation with defendant and the defendant's plea of guilty, the trial judge asked for evidence from the State. The prosecuting attorney began by stating, "With the permission of the Court and the Defense, I will summarize what the State's evidence will show." She then summarized that defendant stuck his penis in the mouth of his five-year-old niece who lived in his home and whom defendant took care of by bathing her, washing her hair, and feeding her. In a statement to Officer Long, defendant admitted all of this.

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

Defendant remained silent, made no objection or motion throughout this statement of the State's evidence.

The court then asked, "Evidence for the defendant?" Counsel for defendant began by saying, "If it please the Court, I too would [not] like to delay our being heard and would present our evidence to the Court with the permission of the State." Counsel then summarized defendant's evidence in part as follows:

. . . And evidently he lived there with his mother and sister would leave her child there and his mother would be there and his sister would go off and be gone for long periods of time, and sometimes she would not come home after work. And his mother might go and see some neighbors and come back later and sometimes later and later, and it was pretty much evident that he was stuck with care of the child. Of course that is not any excuse for his doing this. He told the Officer he was sorry, sorry for committing the offense. . . .

Following arguments by counsel the trial court found three mitigating factors and the following aggravating factors:

(14) The defendant took advantage of a position of trust or confidence to commit the offense and, (16) The element of the greater offense of first degree sexual offense to which attempted first degree sexual offense is a lesser included offense was present here, to wit: there was actual penetration of the oral cavity of the five year old victim by the penis (sic) of the defendant.

The trial court concluded that the aggravating factors outweighed the mitigating factors and committed defendant for a period of 8 years greater than the presumptive term.

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

Assistant Public Defender Frederick G. Lind for defendant appellant.

ARNOLD, Judge.

Counsel for defendant who was also counsel at trial enigmatically now argues on appeal that since there was no formal stipulation at the sentence hearing "the prosecutor's mere assertion of the

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

evidence in a statement to the court is totally insufficient to support the findings in aggravation."

Defendant, citing cases such as *State v. Powell*, 254 N.C. 231, 118 S.E.2d 617 (1961), points out that while there is no particular form to be followed for a stipulation, the terms, nevertheless, must be definite and certain, and must be assented to by the parties.

A good case could be made on this record that there are no terms or issues which are not definite and certain. And, unlike *Powell*, there are no issues present here which are controverted by a not guilty plea. Furthermore, the *Powell* decision says silence is not an assent "unless the solicitor specifies that assent has been given." (Emphasis added.) *Powell* at 235, 118 S.E.2d at 620. However, it is unnecessary to discuss formal stipulations in this appeal.

Rather than characterize the prosecuting attorney's summary of the evidence as a "mere assertion" it is more appropriate to focus on the fact that defense counsel admitted the correctness of that summary in his own statement to the court. See *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The message communicated to the trial court by defendant, through counsel, was very clear by conduct, syntax and vocabulary, and if not a stipulation, it was certainly an admission that defendant in fact stuck his penis in the mouth of the five-year-old niece whom he bathed, fed and took care of, and with whom he lived.

Therefore, there was sufficient evidence to support the findings in aggravation. See *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), and *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Moreover, because he failed to object to the district attorney's summary of the evidence offered upon his guilty plea, defendant has waived his right now to appeal any possible error regarding this evidence. *State v. Bradley*, 91 N.C. App. 559, 373 S.E.2d 130 (1988), *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989).

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissents.

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

Judge GREENE dissenting.

I dissent on two grounds. First, I believe defendant has properly preserved his assignment of error that the prosecutor's remarks were insufficient to prove the aggravating sentencing factors found by the trial court. *See generally* N.C.R. App. P. 10 (governing exceptions and assignments of error) (affecting judgments entered prior to 1 July 1989). With certain stated exceptions, Appellate Rule 10(a) limits the scope of appellate review to those exceptions which are set out in the record and asserted as a basis of an assignment of error. However, only those exceptions which have been properly "preserved" below may be set forth and asserted in this manner. The general rule states that "any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal *by objection noted or which by rule or law was deemed preserved or taken without any such action*, may be set out in the record on appeal . . . and made the basis of an assignment of error." Appellate Rule 10(b)(1) (emphasis added) (labelled as the "general" rule). Since the transcript shows defendant did not preserve his exception by "objection noted," the question remains whether the exception was "by rule or law . . . deemed preserved or taken without any such action . . ." as allowed by Appellate Rule 10(b)(1). This court has reached different results over whether Section 15A-1446(d)(5) permits, absent an objection, a defendant to appeal the insufficiency of a prosecutor's remarks to prove an aggravating factor. *Cf.* N.C.G.S. Sec. 15A-1446(d)(5) (1988) (even though no objection, defendant may appeal issue whether "evidence was insufficient as a matter of law"); *compare State v. Williams*, 92 N.C. App. 752, 376 S.E.2d 21, *disc. rev. denied*, 324 N.C. 251, 377 S.E.2d 762 (1989) (permitting appeal under Section 15A-1446(d)(5) and *State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E.2d 663 (1988) (permitting appeal under Section 15A-1446(d)(5) with *State v. Bradley*, 91 N.C. App. 559, 373 S.E.2d 130, *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989) (appeal without objection under Section 15A-1446(d)(5) unconstitutionally violates implicit requirements of Appellate Rule 10(b)(2)).

The *Bradley* court held Section 15A-1446(d)(5) violates the rule "implicit" in Appellate Rule 10(b)(2) that a party must object to erroneous findings made by the trial court: "[A]ppellate Rule 10(b)(2) also explicitly requires a party to object to the failure of the court to make necessary findings and conclusions in order to advance

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

these issues on appeal Implicit in this rule is also an obligation on a party to object to erroneous findings by the trial court.” *Bradley*, 91 N.C. App. at 564, 373 S.E.2d at 133. The premise of the *Bradley* analysis is mistaken. The only *objection* required under Appellate Rule 10(b)(2) is an objection to jury instructions. The remainder of Appellate Rule 10(b)(2) simply requires that *exceptions* to the failure to make findings or conclusions must set out the omitted findings or conclusions. Appellate Rule 10(b)(2) does not otherwise require any objections to preserve an exception to the trial court’s failure to make a finding or conclusion: that issue is determined by the general rule stated in Appellate Rule 10(b)(1) that all exceptions must be preserved by objection noted or as deemed preserved by rule or law without objection.

Therefore, I believe defendant’s exception was preserved without objection under Section 15A-1446(d)(5). However, I also believe defendant’s exception is in any event deemed preserved without objection under Section 15A-1446(d)(18) which permits an appeal without an objection when “the sentence imposed was unauthorized at the time imposed, exceeded a maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” To the extent Section 15A-1446(d)(18) is not inconsistent with any other appellate rule, Section 15A-1446(d)(18) may be utilized to preserve an error under the general rule stated in Appellate Rule 10(b)(1). *Cf. State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (Section 15A-1446(d)(5) inapplicable “to the extent” inconsistent with Appellate Rule 10(b)(3)); *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986) (holding defendant failed to preserve exception by not complying with Section 15A-1446(d)(9)). Given the minimal guarantee of reliable information at a sentencing hearing required under *Swimm* and the cases discussed below, I would in any event consider defendant’s assignment under our “plain error” review or as arguably raising a “manifest injustice” justifying the invocation of Appellate Rule 2 to suspend the formal requirements of Appellate Rule 10. *See State v. Albert*, 312 N.C. 567, 580, 324 S.E.2d 233, 241 (1985) (invoking Rule 2 where defendant failed to argue in brief that trial judge failed to find mitigating factor to which prosecutor stipulated).

Since the prosecutor only presented a proposed summary of evidence to the trial court without defendant’s express stipulation to its correctness, defendant contends there was no evidence presented at the sentencing hearing to support the prosecutor’s

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

assertions that defendant performed fellatio on the victim while the victim was under the defendant's care. I agree. Although the determination of guilt at trial is accomplished with an "accusatorial" model which relies upon "spirited, adversary presentation of evidence to a detached, reactive fact finder," sentencing hearings are primarily "inquisitorial" proceedings which are "less formalistic and advance an investigatory, proactive focus." J. Weissman, *Sentencing Due Process: Evolving Constitutional Principles*, 18 Wake Forest L. Rev. 523, 533-34 (1982). The sentencing judge is permitted to consider factors and information which might ordinarily be excluded during trial since the broad purpose of the sentencing hearing is to determine which criminal sanction will best serve the sentencing purposes stated in Section 15A-1340.3. See *State v. Smith*, 300 N.C. 71, 81-82, 265 S.E.2d 164, 171 (1980); cf. N.C.G.S. Sec. 15A-1340.3 (1988) (enumerating sentencing purposes). Section 15A-1334(b) sets forth certain procedural guidelines during sentencing but disclaims the application of the formal rules of evidence. N.C.G.S. Sec. 15A-1334(b) (1988).

However, our courts have recognized that the goal of achieving a complete picture of the circumstances surrounding the defendant's crime is nevertheless not served by the reception of information which is inherently unreliable. See *United States v. Tucker*, 404 U.S. 443, 447-48, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); see also 18 Wake L. Rev. at 534-35 (analyzing need for "complete" versus "reliable" information). Thus, it was held before the enactment of the Fair Sentencing Act that the trial court could not base its sentence on "unsolicited whispered representations and rank hearsay." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). More specifically, although the prosecutor and defense counsel are permitted under Section 15A-1334(b) to make "arguments on facts relevant to the sentencing decision," our Supreme Court and this court have often held that such arguments by the prosecutor or defense counsel are themselves insufficient as a matter of law to prove the existence of a sentencing factor:

Under the Fair Sentencing Act, a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists . . . Likewise, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence in support of statutory mitigating factors . . . Such statements may, of course, constitute adequate evidence of the existence

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

of aggravating or mitigating factors *if the opposing party so stipulates . . . [A]bsent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of non-statutory mitigating factors.* Here, there was no stipulation by the prosecutor as to the correctness of defense counsel's statement concerning the defendant's good behavior while incarcerated. Furthermore, there is no evidence in the record or transcript which would support a finding of this non-statutory factor. In short, there was simply *no* evidence upon which the trial court could base a finding of this mitigating circumstance. . . .

State v. Swimm, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986) (emphasis added); accord *State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1986) (prosecutor's unsworn statements based on "memory" and "indication on folder" deemed insufficient to prove prior convictions); *State v. Albert*, 312 N.C. 567, 579, 324 S.E.2d 233, 240-41 (1985) (counsel's assertion that defendant had "no record at all in her lifetime" failed to show absence of criminal record as mitigating factor); *State v. Williams*, 92 N.C. App. 752, 376 S.E.2d 21, *disc. rev. denied*, 324 N.C. 251, 377 S.E.2d 762 (1989); *State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E.2d 663 (1988); see also *State v. Powell*, 254 N.C. 231, 235, 118 S.E.2d 617, 619 (1961) (unilateral statement by the solicitor may not be considered as evidence). Based on this ample precedent, it is clear the respective summaries of proposed evidence by the prosecutor and defense counsel in this case were *both* insufficient to show any sentencing factors *unless* the opposing party stipulated or admitted the correctness of the summaries as required under *Swimm*.

Thus, the dispositive issue is whether defense counsel's own statements or silence constituted a stipulation to the correctness of the summary of proposed evidence recited by the prosecutor. The majority contends the quoted remarks by defense counsel that defendant told the arresting officer that he was "sorry for committing the offense" constituted an unequivocal admission of the truth of the prosecutor's assertion that defendant committed fellatio on the victim while the victim was under his care. While defense counsel's remarks arguably state facts showing that defendant committed an offense while caring for the victim, there is not one reference in counsel's remarks to the oral penetration which the

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

prosecutor asserted. Therefore, there was no evidence presented of the aggravating factor that "the element of the greater offense of first-degree sexual offense was present here, to wit: there was actual penetration of the oral cavity of the five-year-old victim by the penus [sic] of the defendant." "A stipulation is a judicial admission It has been the policy of this Court . . . to restrict their effect to the extent manifested by the parties in their agreement 'Stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished'" *Rickert v. Rickert*, 282 N.C. 373, 379-80, 193 S.E.2d 79, 83 (1972) (citations omitted).

In its statement of facts, the majority states defendant admitted committing fellatio on the victim "[i]n a statement to Officer Long" Officer Long did not testify nor was his alleged statement introduced at the sentencing hearing nor included in the record on appeal; therefore, the only evidence of fellatio at the sentencing hearing was the prosecutor's assertion that defendant told Officer Long he had committed fellatio on the victim. Under *Swimm*, this is no evidence at all. See *Williams*, 92 N.C. App. at 753, 376 S.E.2d at 22 (where prosecutor did not offer records in evidence or seek stipulation to their contents, court rejected assertion that prosecutor read directly from records). While it is true the defense counsel stated defendant was "sorry" he committed the "offense," the transcript of plea in the record shows the "offense" defendant admitted by his guilty plea was *attempted* first-degree sexual offense in which oral penetration is not an element. Defense counsel never made any other reference to the prosecutor's specific assertions that defendant performed fellatio on the victim. "While a stipulation need not follow any particular form, its terms must be *definite and certain* in order to afford a basis for judicial decision, and it is essential that they be asserted to by the parties or those representing them." *State v. Toomer*, 311 N.C. 183, 189, 316 S.E.2d 66, 70 (1984) (emphasis added) (quoting *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961)). "An unilateral statement by the solicitor may not be considered as evidence. Silence will not be construed as assent thereto *unless the solicitor specifies that assent has been given*. The court inadvertently [falls] into error by not insisting upon a full, complete,

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

definite and solemn admission and stipulation." *Powell*, 254 N.C. at 235, 118 S.E.2d at 620 (emphasis added).

As the Court clearly stated in *Powell*, the defendant's silence cannot be construed as an admission of the prosecutor's remarks unless the prosecutor actually specifies that the defendant has so stipulated. *Id.* As in *Powell* and *Toomer*, the prosecutor here did not assert that defendant actually stipulated to the correctness of his remarks. Given the ambiguous reference by defense counsel to defendant's feeling sorry about the "offense," counsel's words certainly did not make "definite and certain" the terms of any stipulation that defendant committed fellatio on the victim. Thus, the trial judge erroneously considered the prosecutor's arguments as evidence without "insisting upon a full, complete, definite and solemn admission and stipulation" by defendant that the remarks were correct. *Powell*, 254 N.C. at 235, 118 S.E.2d at 620.

The facts of *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985) illustrate the distinction between a mere assertion that a fact exists and a stipulation the fact exists. In *Albert*, the defendant's attorney asserted the defendant had "no record at all in her life time" and had "never been in court before" except as a juror. Based on these assertions, the *Albert* Court stated that the defendant had "failed to carry her burden on this factor." However, the record also disclosed the prosecutor subsequently admitted the correctness of the defense counsel's assertions:

[T]he record discloses that the trial court inquired of the prosecutor, 'Mr. Solicitor do any of [the three defendants] have a prior criminal record?' The prosecutor answered 'Only Mr. Dearen . . . ' Inasmuch as the State appears to have stipulated that neither the defendant Mills nor the defendant Albert had a criminal record, we hold that the trial court erred in failing to find this fact in mitigation.

312 N.C. at 579-80, 324 S.E.2d at 241. In *Albert*, the prosecutor's specific response to a direct inquiry by the trial court that only one of the defendants had a criminal record constituted a clear admission that the other two defendants had no criminal record. In *State v. Brewer*, 89 N.C. App. 431, 366 S.E.2d 580, cert. denied, 322 N.C. 482, 370 S.E.2d 229 (1988), the prosecutor stated that defendant had an eleven-year-old conviction and a fourteen-year-old conviction. Where the defense counsel responded by emphasizing that defendant's record "indicates no convictions for almost ten

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

years" (emphasis added), this court cited *Albert* and held the assertion by counsel that defendant had no convictions for at least ten years was "tantamount" to an admission that defendant did have the eleven- and fourteen-year-old convictions asserted by the prosecutor. 89 N.C. App. at 436, 366 S.E.2d at 583. Although Brewer clearly extends the scope of *Albert*, the instant case is distinguishable even from *Brewer* since defense counsel in this case never referred to any specific remark by the prosecutor such that there was even a negative implication that he conceded the correctness of the prosecutor's specific assertions.

The State also notes that the prosecutor commenced her summary of proposed evidence by stating, "With the permission of the Court and the Defense, I will summarize what the State's evidence *will* show." (T. 10) (emphasis added). Even assuming no stipulation was entered, the State contends the defendant "waived" his "right" to any stipulation when defendant's counsel began his own remarks with the statement, "If it please the Court, I too would [not] like to delay our being heard and would present our evidence to the Court with the permission of the State." (T. 12.) Contrary to the State's assertion, the requirement of a stipulation is not a technical remnant of the formal rules of evidence. The State has the burden of producing evidence of aggravating factors to rebut the presumption that the presumptive sentence mandated by the Legislature best serves the purposes of sentencing set forth in Section 15A-1340.3. See *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). Absent the defendant's stipulation to their correctness, the prosecutor's unsworn assertions are under *Swimm* and the cases cited earlier *no* evidence of the existence of any aggravating factors. The defense counsel's announcement that he too was going to summarize proposed evidence was, absent the State's stipulation to its correctness, as insufficient to prove any mitigating factors as the prosecutor's unsworn assertions were to prove any aggravating factors. Irrespective of how insufficient defendant's evidence was to discharge his own burden to show mitigating factors, the defense counsel's silence or remarks did not show defendant's intent to discharge the State from *its* burden to show by a preponderance of the evidence that aggravating factors existed. Thus, this case is distinguishable from cases where the defendant's silence waives certain defenses or objections which he has the burden to bring forward. Cf. *State v. Thompson*, 309 N.C. 421, 427, 307 S.E.2d 156, 159 (1986) (*after* State adequately proves prior convictions,

STATE v. MULLICAN

[95 N.C. App. 27 (1989)]

defendant has burden at hearing to challenge validity of conviction based on indigency and lack of counsel).

Accordingly, I would reject the State's contention that the defendant's own presentation of insufficient evidence somehow waived the statutory requirement that the State prove its own case by a preponderance of evidence. In a criminal case, the defendant is entitled to remain silent and make the State prove its case: the State here in effect contends defendant's silence is a stipulation to the correctness of the assertions by the prosecutor. I would reject this contention just as our Supreme Court explicitly rejected it in *Powell* and *Toomer*. I also note that there is no mention in the published reports of *Swimm* and the cases noted earlier of any objection during the sentencing hearing by those defendants. Pursuant to its active inquisitorial function during sentencing, the trial court has the duty to examine all the evidence presented to determine if it would support any of the statutory sentencing factors, even absent a request by counsel. See *State v. Cameron*, 314 N.C. 516, 520, 335 S.E.2d 9, 11 (1985). Unlike the trial court in *Albert*, the trial court here did not inquire as to the correctness of the assertions being made by the prosecutor and defense counsel. The lack of any stipulation that defendant committed fellatio on the victim resulted in defendant's sentence being improperly enhanced based on assertions by the prosecutor that are not evidence under the case law of this state. Since the remarks by both the prosecutor and defense counsel were not evidence under *Swimm*, I would vacate and remand to the trial court for resentencing in accord with *Swimm* and the cases cited earlier.

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

CONCERNED CITIZENS OF BRUNSWICK COUNTY TAXPAYERS ASSOCIATION, RAYMOND COPE AND ROYAL WILLIAMS AND STATE OF NORTH CAROLINA, *EX REL.* S. THOMAS RHODES, SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, PLAINTIFF INTERVENOR v. HOLDEN BEACH ENTERPRISES, INC.

No. 8813SC1075

(Filed 15 August 1989)

1. Easements § 6.1— road to beach— no prescriptive easement— use of road interrupted by defendant— use not confined to definite and specific line

In an action to determine whether the public's previous continuous and uninterrupted use of a pathway through defendant's property established a prescriptive easement in its favor, the evidence was conflicting but was sufficient to support the trial court's conclusions that (1) defendant had interrupted the public's use since 1963 by placing a log, cable, gates and a guardhouse across the road so that public use of the pathway was not continuous and uninterrupted for a twenty-year period and (2) the public's use of defendant's property was not confined to a definite and specific line of travel for twenty years where defendant's witnesses testified that there was no single path through defendant's property.

2. Easements § 6.1— action to establish existence of easement— no presumption that easement was in State

There was no merit to plaintiff's argument that this was an action to establish title to an easement in favor of the public and therefore, pursuant to N.C.G.S. § 146-79, title to the easement was presumed to be in the State, since N.C.G.S. § 146-79 applies in those cases where title to the land is in dispute, not where the State has conceded defendant owns the land but is attempting, as here, to establish the existence of an easement over the land.

3. Dedication §§ 1.2, 3— road across private property to beach— no express acceptance of a dedication

The trial court properly concluded that there was no express acceptance of a dedication of a road across private property at Holden Beach and that the public's continued use of the road as well as the providing of police and fire protection, water service, and garbage service by the Town of Holden

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

Beach were insufficient actions to constitute an implied acceptance of defendant's offer to dedicate, since merely providing municipal services to homeowners in a subdivision within a municipality does not constitute an implied acceptance by the municipality of dedication of a road when the homeowners have paid for those services by the payment of their ad valorem taxes.

4. State § 2— access to public beach—“public trust doctrine” inapplicable

The public trust doctrine will not be extended to secure public access to a public beach across the land of a private property owner without compensation.

APPEAL by plaintiffs and intervenor-plaintiff from *Briggs, Judge*. Judgment entered 12 November 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 17 May 1989.

Plaintiffs Concerned Citizens of Brunswick County Taxpayers Association (Association), an unincorporated association, Raymond Cope (Cope), and Royal Williams (Williams) brought this declaratory judgment action against defendant Holden Beach Enterprises, Inc. requesting that the trial court declare that a road through defendant's property on Holden Beach is a public right-of-way.

Holden Beach is one of North Carolina's barrier islands located in Brunswick County. The length of the island runs along an east-west axis. Holden Beach is bordered by the Atlantic Ocean to the south and the Intracoastal Waterway to the north. To the west of the island is Shallotte Inlet and to the island's east is Lockwood's Folly Inlet.

Ocean View Boulevard is a state-maintained highway which runs the length of Holden Beach and, generally, parallels the Atlantic Ocean. On the western end of the island the road ends at a guardhouse built and manned by defendant. The guardhouse marks the entrance to defendant's property, a residential subdivision known as Holden Beach West. Beyond the guardhouse a road known as Ocean View Boulevard West extends further west into the subdivision about seven-tenths of a mile ending about 1,700 to 1,800 feet east of Shallotte Inlet. It is undisputed that defendant built and paved Ocean View Boulevard West without the aid of State funds.

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

Plaintiffs' complaint alleged that the Town of Holden Beach had either expressly or impliedly accepted an offer of dedication of Ocean View Boulevard West by defendant. The complaint also alleged that prior to the paving of Ocean View Boulevard West the public's previous continuous and uninterrupted use of a pathway through defendant's property established a prescriptive easement in its favor over what is now Ocean View Boulevard West.

On 10 April 1987 pursuant to the Coastal and Estuarine Water Beach Access Program, G.S. 113A-134.1, *et seq.*, the North Carolina Department of Natural Resources and Community Development (NRCD) moved to intervene as a matter of right as a party plaintiff. Intervenor-plaintiff's complaint recited that the NRCD was vested with the power and responsibility to administer and manage the right of public access to the beaches, including any right of access which this declaratory judgment action might establish. NRCD requested to appear on behalf of all North Carolina citizens. The intervenor-plaintiff's complaint then incorporated by reference the allegations of plaintiffs' complaint without alleging any additional claims against defendant. On 30 April 1987 the trial court granted NRCD's motion to intervene.

The trial court heard the case without a jury and concluded that the public had not acquired a prescriptive easement over defendant's property and there had not been a dedication of Ocean View Boulevard West for public use. From the trial court's order plaintiffs and intervenor-plaintiff appeal.

Attorney General Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Maxwell, Freeman & Beason, by James B. Maxwell, for plaintiff-appellants.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, Barbara J. Sullivan, and Reid G. Hinson, for defendant-appellee.

EAGLES, Judge.

The issues here all relate to whether the public may have access through defendant's property to the beach at Shallotte Inlet. Specifically, appellants assign as error the trial court's denial of a prescriptive easement for public access through Holden Beach

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

West and the trial court's failure to find that there has been a dedication of Ocean View Boulevard West. We affirm.

Initially we note that when the trial court is the fact-finder its findings of fact are conclusive on appeal if supported by any competent evidence even though there is evidence which might support a contrary finding. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Our standard of review in a declaratory judgment action is whether the record supports the trial court's findings and whether the findings support the trial court's conclusions. *Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473, *disc. rev. denied*, 303 N.C. 315, 281 S.E.2d 652 (1981).

In *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985), our Supreme Court restated the elements necessary to establish a prescriptive easement:

1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.
2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.
3. The use must be adverse, hostile, or under a claim of right. . . .
4. The use must be open and notorious. . . .
5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . .
6. There must be substantial identity of the easement claimed. . . .

Id. at 49-50, 326 S.E.2d at 610-611.

Plaintiffs and intervenor-plaintiff presented evidence which tended to show the following: Loie Priddy, a land surveyor with the North Carolina Geodetic Survey, testified as an expert witness in coastal surveying and interpretation of aerial photography. Using aerial photographs and maps of the Shallotte Inlet and Holden Beach areas which spanned from 1962 until 1972 Priddy testified that there were several definite trails through defendant's property. He described the trails as "several pedestrian appearing trails going to the beach and one vehicular trail." On each of the photo-

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

graphs he testified that the vehicular trail began at the end of a paved road, Ocean View Boulevard, and that the trail continued west about 3,200 feet to a large sandy overwash area. In this overwash area Priddy could not detect any trails but was able to point to a number of trails emerging from the west edge of the overwash towards the beach. The overwash area he explained was a low spot which resulted from Hurricane Hazel in 1954. Additionally, because the overwash was a low spot in the terrain it was subject to continued flooding which would obliterate any trails through that area.

Harrell Paden, a long-time Brunswick County resident, testified that from about 1930 until the 1950s he and his family had been going to the Shallotte Inlet area of Holden Beach on a seasonal basis to fish. He stated that the owner of the property, Peter Robinson, allowed people to use the property. He further testified that he used the pathway described by Priddy to get to the beach. Paden claimed that the pathway he used was in the same general location as the present Ocean View Boulevard West. He also testified that the present road is straighter than the pathway and located a little further away from the beach. Until about 1972 Paden's trips to the beach were unimpeded. However, in 1972 the owners of the property put a log across the road at approximately the same spot where the guardhouse is now located. Paden stated that a short time later the log disappeared and he continued using the road to get to the beach. Two or three years later a farm gate was put up to block the road.

Kermit Coble, a former member of the Holden Beach Town Council, next testified that he first came to Holden Beach in 1954. He frequently visited the Shallotte Inlet using the pathway which continued west after the paved road stopped. Coble testified that Ocean View Boulevard West was within 100 feet of the pathway he had used to get to Shallotte Inlet. He further testified that until a log was placed across the pathway he had never been prevented from using it to get to Shallotte Inlet. Coble stated that the log was placed across the trail during the 1960s. After a short time a cable replaced the log and a little later a gate was placed. While the gate was kept locked, he could get the key from a realtor and use the pathway for access to the beach.

Plaintiff Raymond Cope, a member of the Association, testified that he and his family had been camping on the west end of Holden

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

Beach since 1973 or 1974. He would drive to the beach by driving west onto a path at the end of Ocean View Boulevard to the beach. Cope said that at least once or twice a month during the summer he would bring his family to this beach. He also testified that there is not much difference in location between the present road and the path he used to drive to Shallotte Inlet.

Defendant's evidence tended to show the following. James D. Griffin, Jr., an employee of defendant and former employee of defendant's predecessor, Holden Beach Realty Corporation (Corporation), testified that on 8 August 1985 defendant purchased the property now known as Holden Beach West from Corporation. He further testified that Corporation acquired the property in 1961 or 1962 from the Robinson heirs and other parties. At the time the Corporation purchased the property, there were no houses or roads on the land. In fact, the State road ended over a half mile from the eastern edge of the Corporation property. Griffin claimed there were trails all over the property. Griffin stated that the paths were not of a permanent nature and that a severe storm would obliterate the trails at low points.

In the 1960s the Corporation placed "no trespassing" signs throughout the property. At some time in the late 1960s Griffin placed a telephone pole across the pathway where he estimated the defendant's property line was. Occasionally the pole would be moved and Griffin would put it back. A year or so later Griffin cut the telephone pole in half and used each half to secure a cable to block the path. The cable stayed up for a year or two. While the cable caused some people to turn around, others would drive around it and continue along the path. In the middle 1970s the Corporation placed gates across the path which were kept locked. Finally, in 1985 defendant placed a guardhouse at the entrance to the subdivision.

Griffin further stated that in 1977 and 1978 the Corporation built a marl road through the property generally parallel to the ocean. No county equipment or funds were used to build the road. Griffin testified that he had been a member of the Holden Beach Town Council for ten or twelve years. He said that he knew of no town money having been spent on constructing Ocean View Boulevard West within the subdivision. Furthermore, there were no city lighting facilities within Holden Beach West. The Holden Beach police did not enforce traffic regulations within the subdivision.

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

Elwood Newman, a resident of Holden Beach for 18 years, testified there had been no single pathway to Shallotte Inlet through defendant's property. He further testified that starting in 1970 he was a member of the Holden Beach beach patrol. His duties included keeping vehicles off the beach. On the occasions that he saw people in the area now known as Holden Beach West, he asked those people to leave. The owners of the property asked the beach patrol to watch their property. Finally, he testified that the property on the western end of the island was considered private property. Several other witnesses as well testified that they always felt that defendant's property was private property.

[1] After finding facts the trial court concluded that defendant had interrupted the public's use since 1963 so that public use of the pathway was not continuous and uninterrupted for a twenty year period. The trial court further concluded that the public's use of defendant's property was not "confined to a definite and specific line of travel for twenty years."

On the issue of whether there existed through defendant's property a single line of travel whose use was continuous and uninterrupted, the evidence is conflicting. Plaintiffs' witnesses claim that they had used the same pathway to drive to Shallotte Inlet for years. Defendant's witnesses stated that there was no single path through the western end of Holden Beach. Additionally, defendant's evidence demonstrated that since the 1960s they have attempted to restrict people from traveling through and on their property. Elwood Newman testified that he had been asked by defendant's predecessor to request that people found on the property be asked to leave. The evidence here permits but does not compel the findings of fact and conclusions of law drawn by the trial court. We hold that there is competent evidence to support the trial court's findings and that the findings of fact support the conclusions of law. Accordingly, we overrule this assignment of error.

[2] Plaintiffs further argue that this is an action to establish title to an easement in favor of the public and, therefore, pursuant to G.S. 146-79, title to the easement is presumed to be in the State. We disagree. G.S. 146-79 applies in those cases where title to the land is in dispute; not where the State has conceded defendant owns the land, but is attempting to establish the existence of an easement over the land. See *State v. Taylor*, 63 N.C. App.

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

364, 304 S.E.2d 767 (1983), *disc. rev. denied and appeal dismissed*, 310 N.C. 311, 312 S.E.2d 655 (1984).

[3] Plaintiffs next assign as error the trial court's denial of their claims that defendant had dedicated Ocean View Boulevard West for public use. Our Supreme Court in *Owens v. Elliot*, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962), stated that the dedication of a street for the general public's use is a revocable offer "and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way [the public] has consented to assume them." Furthermore, the recording of a plat denoting the lots and streets, nothing else appearing, impliedly offers to dedicate the streets for public use. *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E.2d 898 (1956). However,

a dedication is never complete until acceptance. This acceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but, under certain circumstances, by user as of right on the part of the public, or other facts, but unless and until acceptance has been in some way established, it should be properly termed an offer to dedicate on the part of the owner.

Id. at 368, 90 S.E.2d at 901.

The evidence is undisputed that the Town of Holden Beach took no action expressly accepting any offer of dedication made by defendant through the recording of a plat of the Holden Beach West subdivision. Accordingly, we affirm the trial court's conclusion that there was no express acceptance of a dedication of Ocean View Boulevard West.

Plaintiffs argue that the public's continued use of Ocean View Boulevard West as well as the providing of police and fire protection, water service, and garbage service by the Town of Holden Beach are actions sufficient to constitute an implied acceptance of defendant's offer to dedicate. We disagree.

The trial court here explicitly found that no public funds or equipment were used to construct or maintain Ocean View Boulevard West. In addition, the Town of Holden Beach has never authorized or enforced any traffic regulations on Ocean View Boulevard West. Finally, the trial court found that homeowners within the subdivi-

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

[95 N.C. App. 38 (1989)]

sion are residents of the Town of Holden Beach and are taxed at the same rate as other residents of the town.

Mr. Griffin's testimony alone supports each of these findings. We hold that merely providing municipal services to homeowners in a subdivision within a municipality does not constitute an implied acceptance by the municipality of dedication of a road when the homeowners have paid for those services by the payment of their *ad valorem* taxes. See *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958). Plaintiffs here have failed to sustain their burden of showing that public authorities have assumed control of Ocean View Boulevard West for a period of twenty years. *Owens* at 317, 128 S.E.2d at 586. Accordingly, we affirm the trial court's conclusion that there was no implied acceptance of defendant's offer to dedicate the road.

[4] Finally, we note that in its joint brief plaintiffs and plaintiff-intervenor rely heavily on the "public trust doctrine." They argue that holding our State's beaches in trust for the use and enjoyment of all our citizens would be meaningless without securing public access to the beaches. However, plaintiffs cite no North Carolina case where the public trust doctrine is used to acquire additional rights for the public generally at the expense of private property owners. We are not persuaded that we should extend the public trust doctrine to deprive individual property owners of some portion of their property rights without compensation. See *Matthews v. Bay Head Improvement Assoc.*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821, 83 L.Ed.2d 39, 105 S.Ct. 93 (1984). Rather, we believe that the doctrine should be used to shield those properties in the public trust from unlawful use. *E.g.*, *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988).

Affirmed.

Judges PARKER and ORR concur.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

MICHAEL OWENS, D/B/A OWENS EXPRESS v. PEPSI COLA BOTTLING COMPANY OF HICKORY, N. C., INC.

No. 8825SC590

(Filed 15 August 1989)

1. Unfair Competition § 1— Soft Drink Interbrand Competition Act—inapplicability to plaintiff's claims

The Soft Drink Interbrand Competition Act was inapplicable to plaintiff's action where plaintiff did not assert a challenge to defendant's right to enter into licensing agreements which restricted licensees' commercial activity to a specific area, but its complaint instead raised allegations concerning tortious contractual interference, fraud, price fixing and unfair trade practices arising out of factual allegations which did not pertain to the matters covered by the Act.

2. Contracts § 33— tortious interference with contracts—sale of Pepsi products—failure to allege contracts with customers

Plaintiff could not maintain a claim of tortious interference with his contracts for the sale of Pepsi products where plaintiff's forecast of evidence showed that defendant knew of plaintiff's arrangements with his customers and defendant allegedly interfered with those arrangements thereby injuring plaintiff, but there was no showing of a contract with these customers such that plaintiff would have had any contractual rights against the customers.

3. Fraud § 12— distribution of Pepsi products—representations made by supplier—no showing of fraud

The trial court did not err in dismissing plaintiff's fraudulent misrepresentations claim where plaintiff alleged that he was told by defendant supplier's representatives that he would be held to a 100 case shipment inventory, and he was "led to believe" and was "under the impression" that the same limitation was being imposed throughout defendant's territory, but plaintiff's forecast of evidence failed to show that he was specifically told that similar limits were being imposed throughout the territory or that he was fraudulently led to believe that to be the case.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

4. Unfair Competition § 1— sale of Pepsi products—price fixing alleged—existence of question of fact

Plaintiff's evidence sufficiently established a genuine question of fact regarding his allegations of price fixing in violation of N.C.G.S. § 75-5(b)(3) where plaintiff's evidence tended to show that defendant undertook to injure plaintiff's business by imposing stringent restrictions on plaintiff's Pepsi inventory and by limiting the types of customers with whom plaintiff could do business; defendant threatened to discontinue completely plaintiff's supply if he disobeyed its directive; defendant made threats to some of plaintiff's customers and forbade them to buy Pepsi products from plaintiff; and defendant demanded that plaintiff raise the price of its drinks. There was no merit to defendant's claim that even if it had made demands that plaintiff raise the price of its drinks, this had no effect on plaintiff's business because plaintiff refused to comply.

5. Unfair Competition § 1— sale of Pepsi products to distributor—unfair and deceptive trade practices alleged—question of fact raised

Evidence was sufficient to raise a question of fact as to whether defendant's conduct was violative of N.C.G.S. § 75-1.1 where defendant was alleged to have attempted to control plaintiff's productivity by limiting his inventory and his customers; defendant made demands on plaintiff to raise his prices; and defendant sought to control who plaintiff's customers were.

APPEAL by plaintiff from *Lamm (Charles C., Jr.)*, Judge. Judgment entered 25 February 1988 in Superior Court, CALDWELL County. Heard in the Court of Appeals 12 December 1988.

Tuggle Duggins Meschan & Elrod, P.A., by *Joseph F. McNulty, Jr. and William R. Sage*, for plaintiff-appellant.

Petree Stockton & Robinson, by *George L. Little, Jr. and J. David Mayberry*, for defendant-appellee.

ORR, Judge.

Plaintiff is the owner of Owens Express, a convenience-type store which is located in Granite Falls, North Carolina. Among

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

other things, plaintiff sells Pepsi-Cola (Pepsi) brand soft drinks which he purchases from Pepsi-Cola Bottling Company of Hickory, North Carolina (Hickory Pepsi), the defendant. Hickory Pepsi is the exclusive bottler, distributor and seller of Pepsi products in several northwestern North Carolina counties including plaintiff's county.

Plaintiff's complaint alleges that in April of 1986 he was induced and did purchase large quantities of Pepsi products at reduced prices from defendant through one of defendant's promotional campaigns. Plaintiff stored those products in his store and later in three of his warehouses. In addition to selling these products to customers who visited Owens Express, plaintiff sold Pepsi products, at lower prices than defendant, to several industrial and institutional customers in the Granite Falls area.

On 2 April 1987, defendant's representative visited plaintiff's store and allegedly "demanded" that plaintiff increase his retail price on his Pepsi products, and that he limit the number of cases which he sold to his customers. Plaintiff's complaint further alleges that he was ordered to discontinue his practice of selling Pepsi products to industrial and institutional customers.

After learning that a new promotional campaign was underway and that no one had asked him to participate, plaintiff had his lawyer contact defendant and defendant then agreed to sell plaintiff Pepsi products under certain limited conditions. Plaintiff was instructed to limit his sales to 10 cases of canned drinks per customer; plaintiff was told to stop selling the products to schools and factories; he was permitted to store the products in his store only; and he was limited to a 200 case per week delivery of two-liter Pepsis for his store. At that time, plaintiff told defendant that the new limit did not adequately meet his retail needs.

Plaintiff was informed by letter dated 17 July 1987 that defendant was concerned about the quality of the Pepsi products which plaintiff was accused of "stockpil[ing]" in his warehouses. Plaintiff was told that if he did not discontinue this practice he would receive no further shipments from defendant.

Thereafter, on 10 August 1987, plaintiff filed this action alleging the facts set forth above and alleging four causes of action: (1) unfair and unlawful trade practices, (2) fraudulent misrepresentations, (3) tortious interference with contracts, and (4) price fixing.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

The material portions of defendant's answer admitted that it only offered plaintiff the 1987 promotional after being contacted by plaintiff's attorney because plaintiff had previously stated that he would not comply with the "terms of defendant's program." Defendant also admitted that it had tried to curtail plaintiff's alleged "wholesaling" activities. Defendant further admitted limiting plaintiff's deliveries in order to guard against transshipping (the purchase of Pepsi products in one territory for resale in another). Defendant denied the allegations relating to price fixing and interfering with the contracts of plaintiff. Finally, defendant's answer moved to dismiss plaintiff's second cause of action and claimed that its actions were lawful under the North Carolina and United States Constitutions.

On 22 February 1988, the trial court heard arguments regarding defendant's summary judgment motion. The court filed its order granting the motion as to each cause of action on 25 February 1988. At that time, the court also filed its order denying plaintiff's motion requesting the production of additional documents and his request for sanctions. From these orders, plaintiff appeals.

I.

[1] The first issue which we shall address is whether the Soft Drink Interbrand Competition Act, 15 U.S.C.A. sections 3501-3503 (1982), governs plaintiff's claims which were brought under North Carolina General Statute Chapter 75 (which prohibits unfair and deceptive trade practices).

Plaintiff alleges that defendant engaged in unfair and unlawful trade practices, that it fraudulently misrepresented that it was limiting the supplies of all of its retail accounts, that defendant tortiously interfered with plaintiff's contracts, and that defendant attempted to fix prices at an artificially high level by demanding that plaintiff raise its prices beyond those of its own. Plaintiff claims that these activities violate Chapter 75.

Defendant contends that its conduct is lawful as determined by the Soft Drink Interbrand Competition Act (the Act), 15 U.S.C.A. sections 3501-3503, which preempts state law in the area of contracts which restrain competition within the soft drink industry. Defendant further argues that its conduct does not violate North Carolina General Statute Chapter 75.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

According to Congress, the Soft Drink Act was passed in order to clarify the confusion regarding the application of antitrust laws to territorial restrictions which were contained in many soft drink manufacturing, distribution and sales licenses. 1980 U.S. Code Cong. Admin. News p. 2373. Additionally, the Act was intended to "halt trends that might otherwise lead to the demise of small bottling firms and the disappearance of the refillable bottle." *Id.* at 2374. Section 3501 states that:

Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture[,] . . . distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area. . . .

According to *O'Neill v. Coca-Cola Co.*, 669 F.Supp. 217 (N.D. Ill. 1987), "the purpose of Section 3501 is to exempt from the antitrust laws agreements which essentially forbid transshipping [as previously defined] of soft drink products by resellers." *Id.* at 225. Consequently, this Act would clearly apply to any claims where a plaintiff asserts a challenge against a licensor's territorial restrictions on its licensee. Likewise, it would be applicable to claims challenging a licensor's authority to limit a licensee's sale of soft drink products for ultimate resale within geographic areas.

However, in cases such as the one at bar, where the plaintiff is *not* asserting a challenge to defendant's right to enter into licensing agreements which restrict licensees' commercial activity to a specific area, the Act is inapplicable. Plaintiff's complaint raises allegations concerning tortious contractual interference, fraud, price fixing and unfair and unlawful trade practices arising out of factual allegations that do not pertain to the matters covered by the Act. Therefore, since this Act does not apply, there is no preemption, express or otherwise, of North Carolina authority to apply its laws to the case *sub judice*.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

II.

We next turn to the issue of whether the court erred in granting summary judgment in favor of defendant. G.S. 1A-1, Rule 56(c) states that:

[t]he judgment sought shall be rendered forthwith 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.

The procedure involved in this motion is designed to give a forecast of the proof which the parties intend to offer on behalf of their claims and defenses in order to determine whether a jury trial is necessary. This is done by considering evidence beyond the mere pleadings when determining whether a genuine issue of material fact actually exists. See *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972). "In a summary judgment motion, all facts must be viewed in the light most favorable to the non-moving party." *L. C. Williams Oil Co., Inc. v. Exxon Corp.*, 625 F.Supp. 477, 480 (M.D.N.C. 1985).

A.

[2] Turning first to plaintiff's claim of tortious interference with his contracts, the fourth cause of action in his complaint, our courts will recognize such causes of action when the following elements are shown: (1) the existence of a valid contract between plaintiff and a third party, conferring upon plaintiff a contractual right against that third party, (2) knowledge of that contract by defendant, (3) intentional inducement by defendant for the third party not to perform the contract with plaintiff, (4) done without justification, and (5) causing damages to plaintiff. *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954).

Plaintiff's evidentiary forecast as to this issue includes an affidavit by Brent Helton, a principal at a local school to which plaintiff sold canned Pepsi products over the past several years. Helton stated that he had previously purchased more than 100 cases of Pepsi products from plaintiff until plaintiff's supplies were depleted and until he was contacted by an agent of defendant's. This agent told Helton that he could no longer buy Pepsi products from plaintiff. He was told that he must instead buy them from defendant at the "truck price," which was higher than plaintiff's

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

prices. Plaintiff's deposition testimony stated that on "[n]umerous occasions" one customer in particular had "begged" him for Pepsi products. Plaintiff further testified that he was unable to completely meet the needs of his customers; consequently, his business suffered. Notably absent from plaintiff's forecast are statements alleging the existence of contracts with any of the persons with whom plaintiff did business.

While it is true that defendant knew of plaintiff's arrangements with his customers and defendant allegedly interfered with those arrangements thereby injuring plaintiff, there was no contract with these customers such that plaintiff would have had any contractual rights against the customers. In the absence of any showing of a valid contract with his customers, plaintiff cannot maintain an action on this ground. Accordingly, we affirm the trial court's judgment on this issue.

B.

[3] We turn to plaintiff's claim that the trial court erred in dismissing plaintiff's fraudulent misrepresentations claim which is the third cause of action in his complaint. The essential elements of actionable fraud are: "(1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Shreve v. Combs*, 54 N.C. App. 18, 21, 282 S.E.2d 568, 571 (1981). Furthermore, the material misrepresentation must be definite and specific, and it must be of a past or existing fact. *Rosenthal v. Perkins*, 42 N.C. App. 449, 451, 257 S.E.2d 63, 65 (1979).

In the case *sub judice*, plaintiff alleged that he was told by defendant's representatives that he would be held to a 100 case shipment inventory. He stated further that he was "led to believe" and that he was "under the impression" that the same limitation was being imposed throughout defendant's territory. When asked whether any of defendant's agents ever specifically assured him that defendant's other customers were being handled similarly, plaintiff's response was "I don't think he ever assured me that it was." Deposition testimony from plaintiff's father was ambiguous on the question of whether defendant ever stated that a similar limit was being imposed on its other customers.

On the basis of the above facts, plaintiff's evidence was not sufficient to withstand a summary judgment motion. While plaintiff alleged that he was falsely told that all of defendant's customers were being treated similarly, his evidentiary forecast does not support such an allegation. There was no evidence in the record which indicated that plaintiff was specifically told that similar limits were being imposed throughout the territory or that he was fraudulently led to believe that to be the case. Accordingly, the trial court's grant of summary judgment on this claim is affirmed.

C.

[4] We shall next address the issue of whether the lower court erred in granting defendant's summary judgment motion to plaintiff's price fixing claim, the second cause of action in his complaint. G.S. 75-5(b)(3) provides:

(b) In addition to other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

Plaintiff's evidentiary forecast for this issue contains deposition testimony from plaintiff that he was told to raise his prices on two-liter Pepsis. Also, plaintiff's evidence contains an affidavit of Michael Hawks, a former employee of defendant's. His affidavit stated that on 25 November 1985, he was told by one of defendant's sales managers to visit Owens Express store and to tell its owner, Michael Owens, to "raise his retail price on Pepsi-Cola in two-liter bottles." Hawks stated that Owens Express was selling two-liter Pepsi products at \$.79 and that other stores had been complaining about the low price at which plaintiff's store was selling its two-liter Pepsis. Hawks further stated that he and another of defendant's employees went to plaintiff's store and told plaintiff and his father that Owens Express would have to raise its retail prices. Mr. Hawks stated that he was instructed to delete from his weekly activity report any mention of this particular visit to Owens Express.

OWENS v. PEPSI COLA BOTTLING CO.

[95 N.C. App. 47 (1989)]

Defendant claims that even if it had made demands that plaintiff raise the price of its drinks, this had no effect on plaintiff's business because plaintiff refused to comply. Additionally, defendant claims that it was justified in intervening in the sales transaction between plaintiff and other retailers.

Despite defendant's claims, G.S. 75-5(b)(3) makes it unlawful for an entity to undertake to destroy or injure another's business for the purpose of *attempting* to fix prices. (Emphasis added.) The evidence for purpose of a summary judgment motion adequately demonstrates that defendant undertook to injure plaintiff's business by imposing stringent restrictions on plaintiff's Pepsi inventory, and by limiting the types of customers with whom plaintiff could do business. Defendant threatened to completely discontinue plaintiff's supply if he disobeyed its directive. Likewise, defendant made threats to some of plaintiff's customers and forbade them to buy Pepsi products from plaintiff. We hold that plaintiff's evidence, taken in the light most favorable to him, does sufficiently establish a genuine question of fact regarding his allegations of price fixing in violation of G.S. 75-5(b)(3). See *Baynard v. Service Distributing Co.*, 78 N.C. App. 796, 797, 338 S.E.2d 622, 623 (1986). Moreover, that defendant's purpose was not achieved is inconsequential because the statute punishes undertakings which *attempt* to fix prices.

D.

[5] Finally, we turn to the question of whether the trial court erred in dismissing plaintiff's first cause of action which alleges unfair and deceptive trade practices. "A precise definition of unfair or deceptive acts is not possible, but whether a particular act is unfair or deceptive depends on the facts surrounding the transaction and the impact on the market place." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

In the case before us, defendant is alleged to have attempted to control plaintiff's productivity by limiting his inventory and his customers. Defendant made demands on plaintiff to raise his prices. It sought to control who plaintiff's customers were. This conduct is sufficient to raise a question of fact as to defendant's conduct. Consequently, we find that the trial court erred in granting summary judgment on this claim. Furthermore, "any act which is a violation of [sec.] 75-5(b)(3) would also be considered to be a violation of [sec.] 75-1.1, since [sec.] 75-5(b)(3) simply sets out specific conduct

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

which is considered to be illegal and an unfair competitive act." *American Rockwool, Inc. v. Owens-Corning Fiberglas*, 640 F.Supp. 1411, 1435 (E.D.N.C. 1986). Therefore, since we concluded that plaintiff's price fixing allegations raise a question of fact, we find that such allegation, if proven, would constitute an unfair and deceptive trade practice as would the allegations pertaining to the defendant's effort to restrict plaintiff's business.

Based upon the foregoing, we remand to the trial court plaintiff's price fixing and unfair and deceptive trade practices claim. We affirm the court's entry of summary judgment in plaintiff's tortious interference with contracts and fraud claims.

Reversed and remanded in part, affirmed in part.

Judge ARNOLD concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. T. J. SANDERS

No. 8822SC1170

(Filed 15 August 1989)

1. Criminal Law § 7— entrapment—denial of essential element dealing with intent—right to assert defense

Although in general North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged, a defendant who denies an essential element which deals with intent but who admits committing the acts underlying the offense with which he is charged may employ an entrapment defense.

2. Criminal Law § 7— sale of cocaine charged—defendant's belief that powder was baking soda—defense of entrapment available to defendant

Defendant could properly raise the defense of entrapment since a defendant must have knowledge that the substance in question is a controlled substance in order to be convicted of

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

possession with intent to sell or deliver a controlled substance, maintaining a dwelling house to keep or sell a controlled substance, or sale of a controlled substance; defendant in this case testified that he thought the substance he sold to an undercover agent was baking soda; he thus denied the essential element of knowledge that the substance he was selling was cocaine; and the denial of an essential element dealing with intent does not prevent a defendant from raising the defense of entrapment.

3. Criminal Law § 163— failure to instruct on entrapment—no plain error

Though the trial court erred in failing to include an entrapment instruction with its instructions to the jury for six of the charges for which defendant was tried, this failure to instruct did not entitle defendant to a new trial because it did not constitute plain error in that it probably had no impact on defendant's conviction.

APPEAL by defendant from *DeRamus, J. D., Jr., Judge*. Judgment entered 28 July 1988 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 11 May 1989.

Defendant appeals his convictions of trafficking in cocaine, conspiracy to traffic in cocaine, two counts of possession with intent to sell or deliver cocaine, two counts of maintaining a dwelling house to keep or sell a controlled substance, and two counts of selling cocaine. Defendant received concurrent sentences of fifteen years and two \$50,000 fines for the trafficking in cocaine and conspiracy to traffic in cocaine convictions; concurrent ten year sentences for each of the selling of cocaine and possession with intent to sell or deliver cocaine convictions, to be served at the expiration of the two fifteen year sentences; and concurrent five year sentences for the convictions of maintaining a dwelling house to keep or sell a controlled substance, to be served at the expiration of all other sentences.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

Michael D. Lea for defendant-appellant.

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

JOHNSON, Judge.

The State presented evidence at trial which tended to show the following: On 27 October 1987, undercover SBI agent Walter House went to an apartment located at 321 Tremont Street in Thomasville, North Carolina. Agent House was accompanied by a confidential police informant who had identified himself to Agent House as Clad McNair. After Agent House and McNair entered the apartment, McNair introduced Agent House to defendant. Agent House negotiated with defendant to purchase one-eighth of an ounce of cocaine. Agent House then purchased from defendant one-eighth of an ounce of white powder, which was later found to be cocaine, for \$300. On 28 October 1987 Agent House, again accompanied by McNair, returned to the apartment on Tremont Street and purchased for \$850 one-half of an ounce of a white powder which was also later found to be cocaine.

On 2 November 1987 Agent House parked his car in front of the apartment on Tremont Street. Defendant walked up to Agent House's car and asked Agent House if he wanted to buy cocaine. Agent House told defendant that he wanted to buy one and one-half or two ounces of cocaine. Defendant said that he needed to use a telephone to check with his source, and since defendant indicated that there was no telephone in his apartment he got into Agent House's car so Agent House could drive him to a pay phone. Agent House drove defendant and McNair to the parking lot of a restaurant, and defendant left the car and walked across the street to use a pay phone in a convenience store. Defendant returned to Agent House's car approximately 15 minutes later and told Agent House that one and one-half ounces of cocaine would be delivered to the convenience store parking lot in approximately 10 minutes. Defendant and Agent House then agreed upon a price of \$2,500 for the cocaine. Agent House parked his car in a car wash stall located in the convenience store parking lot, and a white car driven by a woman arrived in an adjacent stall approximately eight minutes later. Defendant and McNair left Agent House's car, and the driver of the white car then walked up to Agent House's car and got into the passenger side of the car. Agent House then purchased from the driver of the white car one and one-half ounces of a white powder which was later proved to be cocaine for \$2,500. Defendant and McNair were not in sight of Agent House's car when this sale took place. Defendant and the driver of the white car were seated in the white car when Agent House drove away.

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

Defendant claimed at trial that the following events occurred in connection with the sales described above. He testified that McNair had met him in a liquor house on the afternoon of 27 October 1987 and asked him if he wanted to become involved in a scheme to sell a substance which they would represent to be cocaine but which would actually be baking soda. According to defendant, McNair said that he wanted to sell this substance to one of his acquaintances who was going to inherit a great deal of money. Defendant agreed to use his apartment to sell the counterfeit cocaine to McNair's acquaintance. McNair brought a powdery white substance to defendant's apartment later that day. Defendant testified that he sold the substance, which he believed to be baking soda, to Agent House later that night. McNair brought defendant a second batch of white powder on 28 March 1987. Defendant sold this second batch, which he believed to be baking soda, to Agent House later that night.

Defendant testified that he did not sell anything to Agent House on 2 November 1987. Defendant testified that he and Agent House had discussed a sale of one and one-half ounces of cocaine on the night of 2 November, and defendant testified that he had also done some of the other things which the State alleged that he had done that night, but defendant denied selling any white powder to Agent House that night.

Travis Drayton testified that he had participated in alleged discussions between defendant and McNair in which McNair suggested that the three men carry out a scheme to sell a substance which would be represented to be cocaine but which would actually be baking soda. Drayton indicated that the first of these discussions took place 27 October 1987. Drayton testified that McNair intended for defendant to sell the counterfeit cocaine on 27 October 1987, 28 October 1987, and a third date sometime after 28 October 1987. McNair did not testify at trial.

Defendant requested during the jury instruction conference that the defense of entrapment be submitted to the jury. The trial court denied defendant's request.

Defendant's first contention on appeal is that the trial court erred in denying defendant's request to submit the defense of entrapment to the jury. We agree that the trial court erred in refusing to submit the defense of entrapment to the jury for six of the eight charges for which defendant was being tried. Defendant's

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

counsel did not object at trial to the court's jury instructions, however, and since the court's failure to instruct on entrapment was not plain error we find that the court's error in instructing the jury does not entitle defendant to a new trial.

"A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant." *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983). In order for a defendant to receive an entrapment instruction, the evidence which supports the entrapment defense must be credible. *State v. Burnette*, 242 N.C. 164, 87 S.E.2d 191 (1955).

A defendant must present evidence that he was induced by a government agent into committing a crime which was conceived by the government agent in order to receive an entrapment instruction, and the evidence, viewed in the light most favorable to defendant, indicates that defendant was so induced to commit such a crime. There are two elements to the defense of entrapment:

- (1) acts of persuasion, trickery, or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978) (citations omitted).

Police informant McNair clearly was an agent of law enforcement officers, since Agent House testified that McNair was working under the direction of law enforcement officers and was being paid for expenses he incurred in his work as an informant. Defendant gave uncontradicted testimony that McNair persuaded him to participate in a scheme to sell a substance which they would represent to be cocaine, and since defendant and Drayton both testified that McNair initiated the discussion of this scheme there was also evidence that the criminal design originated in the mind of McNair rather than in defendant's mind. Drayton also testified that McNair had said that defendant should sell the counterfeit cocaine on 27 October, 28 October, and one occasion after 28 October, so there was evidence that McNair induced defendant to take part in all of the sales for which defendant was convicted.

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

[1] A defendant also must admit to having committed the acts underlying the offense with which he is charged in order to receive an entrapment instruction. Our Supreme Court has held that when a defendant "denies the commission of the acts underlying the offense charged, he cannot raise the inconsistent defense of entrapment." *State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (1981). The Court has also stated, however, that an entrapment defense may be employed by a defendant who denies having the *intent* required for the commission of a crime. *State v. Luster*, 306 N.C. 566, 581, 295 S.E.2d 421, 429 (1982). A defendant can deny intent and still claim entrapment because "the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Neville* at 626, 276 S.E.2d at 375. Therefore, although in general "North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged," *id.* at 625, 276 S.E.2d at 374, a defendant who denies an essential element which deals with intent but who admits committing the acts underlying the offense with which he is charged may employ an entrapment defense.

Defendant admitted committing the acts underlying six of the eight charges for which he was convicted. Defendant was charged, on the basis of his actions on 27 October 1987 and 28 October 1987, with two counts of possession with intent to sell or deliver cocaine, two counts of maintaining a dwelling house to keep or sell a controlled substance, and two counts of selling cocaine. Defendant admitted selling a substance which was later found to be cocaine to Agent House on 27 October 1987 and 28 October 1987. Defendant also admitted that he made these sales in the apartment where he lived. Defendant therefore admitted committing the acts underlying all six offenses which he was charged with committing on 27 October and 28 October 1987.

[2] A defendant must have knowledge that the substance in question is a controlled substance in order to be convicted of the following: possession with intent to sell or deliver a controlled substance, *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984); maintaining a dwelling house to keep or sell a controlled substance, G.S. sec. 90-108(a)(7); or sale of a controlled substance, *State v. Stacy*, 19 N.C. App. 35, 197 S.E.2d 881 (1973). Defendant testified that he thought that the substance he sold to Agent House was baking

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

soda, however, so defendant denied the essential element of knowledge that the substance which he was selling was cocaine. By denying this essential element defendant did not deny selling cocaine; he merely denied having the *intent* to sell cocaine. Since the denial of an essential element dealing with intent does not prevent a defendant from raising the defense of entrapment, defendant's claim that he thought he was selling baking soda did not preclude him from raising an entrapment defense.

Since the evidence when viewed in the light most favorable to defendant indicates that defendant admitted committing the acts underlying six of the offenses for which he was convicted, and since this evidence also indicates that defendant was induced by a government agent into committing these offenses, defendant was entitled to a jury instruction on entrapment for these offenses. We therefore find that the trial court erred in refusing to include an entrapment instruction when it instructed the jury on the two counts of possession with intent to sell or deliver cocaine, two counts of maintaining a dwelling house to keep or sell a controlled substance, and two counts of selling cocaine.

The charges of trafficking in cocaine and conspiracy to traffic in cocaine were based on defendant's alleged actions on 2 November 1987, and defendant admitted undertaking some potentially incriminating actions on that day. Defendant testified that on the night of 2 November he told Agent House that they would have to go to Jamestown so that defendant could obtain one and one-half ounces of cocaine which defendant would sell to Agent House for \$2,500. Defendant also testified that he went to a convenience store later that night after telling Agent House that he would use the telephone at the store to set up the cocaine sale. Defendant also admitted getting in the car driven by the woman who made the sale after the sale took place, and he admitting receiving \$300 of the money which Agent House paid for the cocaine which he bought that night.

Despite these admissions, however, defendant also specifically and explicitly denied at trial any involvement in the cocaine sale which took place on the night of 2 November 1987. Defendant testified that "I ain't sold him nothing that third time [November 2]. He got that from somebody else." Defendant also characterized the 2 November sale at trial by stating that "Clarence [McNair] and the girl transported that deal. I didn't have anything to do

STATE v. SANDERS

[95 N.C. App. 56 (1989)]

with that." These denials of involvement are in conflict with defendant's admissions about his actions on 2 November. It is clear, however, that when a defendant gives conflicting testimony in which he admits taking actions which could implicate him in a crime but denies actually committing that crime, he cannot be considered to have admitted committing the acts underlying the crime. Defendant's explicit denials of any involvement in the 2 November cocaine sale indicate that he did not admit committing the acts underlying the charges which were based on his alleged role in that sale. The trial court therefore did not err in refusing to instruct the jury on entrapment when it issued jury instructions on the charges of trafficking in cocaine and conspiracy to traffic in cocaine.

[3] The trial court erred in failing to include an entrapment instruction with its instructions to the jury for six of the charges for which defendant was tried, but this failure to instruct does not entitle defendant to a new trial unless it constitutes plain error. Defendant's counsel claims in an affidavit submitted on appeal that he objected to the trial court's jury instructions after the jury instruction conference was held. A careful analysis of the record on appeal, however, reveals that defendant's counsel did not object at any time to the trial court's jury instructions. A party who does not object at trial to the trial court's instructions cannot assign as error the trial court's failure to issue a proper instruction unless this failure constitutes "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). A defect in the court's jury instruction constitutes plain error if it "probably had an impact on the defendant's conviction." *State v. Wrenn*, 316 N.C. 141, 152, 340 S.E.2d 443, 450 (1986).

We do not believe that the trial court's failure to instruct the jury on entrapment probably had an impact on defendant's conviction. In order to find defendant guilty the jury had to find that defendant knew he was selling cocaine, so the jury must have disbelieved defendant's claim that he thought he was selling baking soda. Since the jury clearly did not believe defendant's claim that he thought he was selling baking soda, we find no reason to think that the jury probably believed defendant's related claim that he was induced by a government agent to sell a white, powdery substance. We do not believe, therefore, that defendant probably would have been acquitted of the six applicable charges if the trial court had instructed the jury on entrapment. We therefore hold that the trial court's failure to issue an entrapment instruction

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

for these charges does not constitute plain error and does not entitle defendant to a new trial.

Defendant also assigns as error the trial court's sustaining of the State's objection to defendant's questions at trial concerning the purity of normal cocaine. Defendant has not cited any authority in support of this assignment of error, and we therefore find that this assignment of error is abandoned. N.C. Rules of App. P., Rule 28(b)(5); *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

Affirmed.

Judges COZORT and GREENE concur.

MICHAEL M. AMICK, JUDY J. AMICK, ROBERT V. ARONE, MARIAN B. ARONE, ROY E. BENNETT, PEGGY B. BENNETT, RALPH M. BOUNDS, CONSTANCE W. BOUNDS, BILLY D. BOWERS, CAROL L. BOWERS, ROLLA G. BRYANT, CAROL J. BRYANT, YUNG KI CHANG, SOON SUN CHANG, THOMAS EVANS, BRENDA H. EVANS, HENRY E. FERGUSON, SR., ENRICO GALLINARO, DONALD E. GOESSEL, KATHLEEN F. GOESSEL, G. TED HADDEN, ROBIN C. HADDEN, FREDRICK D. JUDSON, STEPHANIE JUDSON, DAVID C. KNOX, MARIE K. KNOX, RONALD MENICHELLI, DEBORAH L. MENICHELLI, JAMES F. NICHOLS, ELAINE NICHOLS, JEAN A. ROGERS, RANDY S. SINKOE, MARCI A. SINKOE, SIDNEY F. SOOUDI, KAZUYO K. SOOUDI, NORMAN F. STAMBAUGH, III, WILLIAM H. THURSTON, FAYE C. THURSTON, CRAWFORD B. WATSON, HAZEL J. WATSON, ROY ALLEN WILEY, KIM W. WILEY, BRUCE JOHNSON, NANCY JOHNSON, CARY LAWRENCE, GWEN LAWRENCE, FRANK FLOYD, PATRICIA FLOYD, GAILE GORDON, JOANNE GORDON, IRA BOSTIC, HELEN BOSTIC, JACKIE E. PURSER, JR., ZONE C. PURSER, EDWARD SMITH, GIRTHEL SMITH, JAMES K. BOSSBACH, SHIRLEY C. BOSSBACH, JOHN E. ARANT, AND DELORES D. ARANT v. TOWN OF STALLINGS

No. 8820SC1016

(Filed 15 August 1989)

Municipal Corporations § 2.1 — annexation of subdivisions — requirement that area abut pre-annexation boundary — boundaries of proposed area contrived to meet requirement

Though the area proposed to be annexed by respondent town did "abut directly" the pre-annexation boundary of the town and thus literally complied with N.C.G.S. § 160A-36(b)(1),

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

the purpose of the statute would clearly be contravened by allowing the annexation where respondent's main purpose for the annexation was to annex three subdivisions, none of which were contiguous to the pre-annexation boundaries of the town, and the literal requirements of the statute were to be met by means of gerrymandering or shoestring annexation using very narrow corridors of land to connect the proposed areas for annexation to the town.

APPEAL by respondent from *Albright (W. Douglas), Judge*. Order entered 16 June 1988 in Superior Court, UNION County. Heard in the Court of Appeals 13 April 1989.

Thomas, Harrington & Biedler, by Larry E. Harrington, for petitioner-appellees.

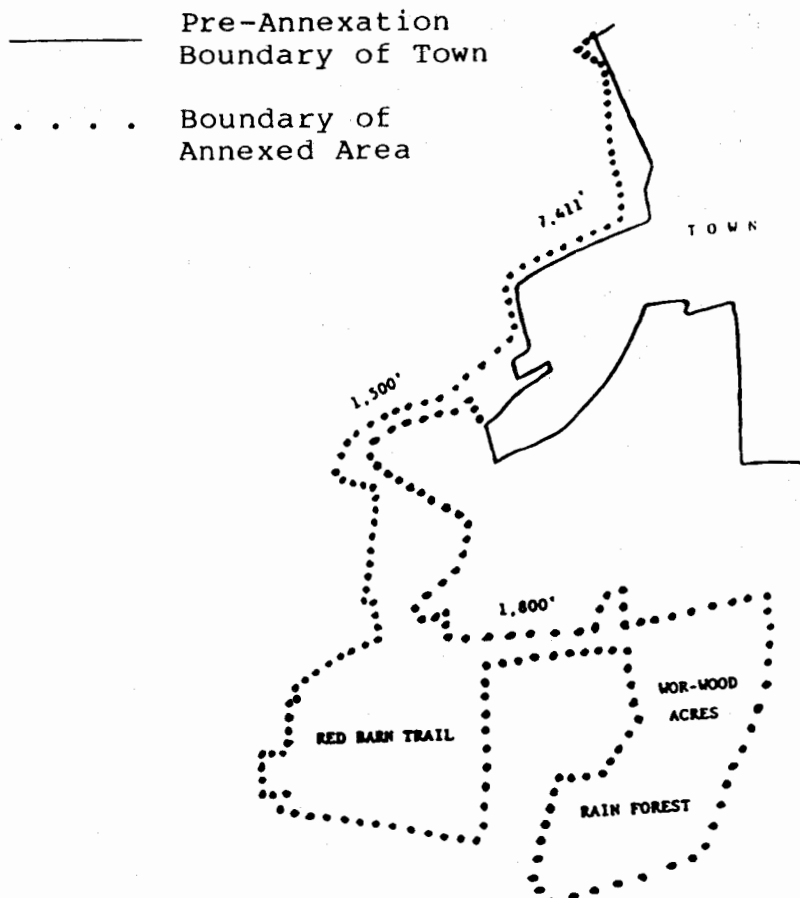
Dawkins & Lee, P.A., by W. David Lee, for respondent-appellant.

GREENE, Judge.

The Town of Stallings, North Carolina (the "Town") appeals the superior court's judgment remanding a proposed annexation ordinance for amendment of the annexation boundaries to conform to the provisions of Section 160A-36. The record shows the Town, a municipality with a population of less than 5,000, adopted an ordinance extending its corporate limits to include: (1) a strip of land bordering the Town which was 7,411 feet long and varied in width from 50 feet to 200 feet; (2) several tracts known as Wor-Wood Acres, Red Barn Trail, and Rain Forest subdivisions; (3) a corridor to Red Barn Trail subdivision measuring approximately 1,500 feet long and 150 feet wide; and (4) another corridor connecting Red Barn Trail and Wor-Wood Acres approximately 1,800 feet long which varied in width from 165 feet to 250 feet. Only the 7,411 foot strip of land was contiguous to the Town's pre-annexation limits. The following diagram is similar to a trial exhibit and shows the general area to be annexed compared to the pre-annexation Town boundaries:

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]



The trial court entered the following pertinent findings of fact:

3. The area annexed as described begins at the Mecklenburg County line at the existing Stallings boundary and thence along the Mecklenburg County line for 140 feet, thence in an irregular line roughly parallel with the border of Stallings for 7,411 feet.

4. The width of the 7,411 foot strip bordering Stallings varies from 50 to 200 feet, calculated by the most convenient "intercept lines" as said term is used in the description.

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

5. The territory located in the "strip" or "loop" of 7,411 feet bears no relationship to any useful or proper municipal need or purpose except satisfying the statutory requirement that $\frac{1}{8}$ of the external boundary be contiguous to the annexing municipality, and was included and thereby annexed for no other purpose.

6. The boundary then proceeds approximately 1,500 feet to the Red Barn Trail Subdivision.

7. The 1,500 feet corridor is approximately 150 feet wide so determined by the most convenient "intercept lines."

8. The territory located within the 1,500 feet strip served no useful or proper municipal need or purpose except to extend the annexed territory to the Red Barn Trail Subdivision.

9. The width of the 1,500 feet strip was narrowed to satisfy the statutory requirement that at least 60% of the total number of lots and tracts in the area at the time of annexation be used for residential, commercial, industrial, institutional, or government purposes and for this reason only.

10. The Red Barn Trail Subdivision is then attached to a second subdivision, Wor-Wood Acres by another narrow corridor approximately 1,800 feet long and varying from 165 to 250 feet wide.

11. The territory located in the 1,800 feet strip bears no relationship to any useful or proper municipal need or purpose but exists solely for the purpose of connecting the Red Barn Trail and Wor-Wood Subdivisions.

12. The width of the 1,800 feet strip was narrowed to satisfy the statutory requirement that 60% of the total number of lots be utilized at [the] time of annexation for residential purposes.

13. The subdivisions of Red Barn Trail, and Wor-Wood Acres—Rain Forest are not contiguous to Stallings nor is Red Barn Trail contiguous to Wor-Wood Acres and Rain Forest.

.....

Based on these findings, the trial court concluded:

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

1. The annexed subdivisions of Red Barn Trail, Rain Forest, and Wor-Wood Acres were not contiguous to Stallings at the time of annexation.

2. The subdivision of Red Barn Trail was not contiguous to Rain Forest and Wor-Wood Acres at the time of annexation.

3. The area annexed consisting of 7,411 feet bordering Stallings purporting to give contiguity to the annexed area to conform to G.S. 160A-36(2) bore no relationship to any urban or municipal purpose, benefit, or objective, and was configured and included, for no other purpose than to meet the letter of 160A-36.

4. The strip of annexed area connecting Stallings with Red Barn Trail exists and was configured to make the connection only, and benefits Stallings in no other way, and bears no relationship to any urban or municipal purpose, benefit or objective.

5. The strip of annexed area connecting Red Barn Trail with Wor-Wood Acres and Rain Forest exists and was configured to make the connection only and bears no relationship to any proper or useful urban or municipal purpose, benefit or objective.

6. The annexed area and Stallings, when viewed as a whole, represent several bodies, not a collective body, distinct masses, not a unified mass; divergent interests, not a common interest; segregation, not plurality, compactness or contiguity; diverse enclaves, not a unified whole.

7. Such contiguity as exists in the Stallings Plan of Annexation amounts at worst to a subterfuge in effect whereby an attempt is made to circumvent the contiguity requirement and at best . . . a strategy using abstract mathematics to meet the statutory requirement of contiguity, but said Plan does not confer contiguity where no contiguity otherwise existed. As a whole the Stallings Plan of Annexation amounts to a "land grab" by means of a "gerrymandered" or "shoestring" annexation using very narrow corridors of land to connect the proposed areas for annexation to the municipality, resulting in a lack of contiguity.

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

Pursuant to its authority under Section 160A-38(g)(2), the superior court remanded the ordinance so that the proposed "shoe-string" corridors could be amended to conform with the contiguity requirements of Section 160A-36. The Town appeals.

The dispositive issue presented by the Town's assignments of error is whether the Town complied with the provisions of Section 160A-36(b) which provides in part:

The total area to be annexed must meet the following standards: (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun; (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary. . . .

N.C.G.S. Sec. 160A-36(b)(1), (2) (1987). When the record submitted in superior court demonstrates on its face substantial compliance with the applicable annexation statutes, "the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988). On appeal from the superior court to this court, the findings of fact made by the trial court "are binding on the appellate court if supported by competent evidence, even if there is evidence to the contrary; conclusions of law drawn from the findings of fact are, however, reviewable *de novo*." *Id.*

Section 160A-36(b)(1) requires the annexed property be "adjacent or contiguous" to the municipality's boundaries and Section 160A-36(b)(2) requires that one-eighth of the external boundaries of the annexed area "coincide" with the municipality's pre-annexation boundary. Section 160A-36(b) requires contiguity since:

Contiguity has always been viewed as synonymous with the 'legal as well as the popular idea of a municipal corporation in this country,' which is one of 'oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

idea of a city is one of unity, not of plurality, of compactness or contiguity, not separation or segregation.' . . . Contiguity, then, is an essential component of the traditional concept of a municipal corporation, which is envisioned as a governmental unit capable of providing essential governmental services to residents within compact borders on a scale adequate to insure 'the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, and government purposes or in areas undergoing such development.' G.S. 160A-33(2). . . . Imposition of the contiguity requirement is one means of insuring that the annexation process remains consistent with principles of 'sound urban development.' G.S. 160A-33(1).

Hawks v. Town of Valdese, 299 N.C. 1, 12-13, 261 S.E.2d 90, 97 (1980) (citations omitted); *cf.* N.C.G.S. Sec. 160A-33(1) (1987) ("sound urban development" deemed essential to continued economic development); N.C.G.S. Sec. 160A-58.1 (1987) (providing for annexation of non-contiguous areas if landowners petition and other requirements met).

A "contiguous area" is defined as:

any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina.

N.C.G.S. Sec. 160A-41(1) (1987). The literal contiguity requirements of Section 160A-36(b) and Section 160A-41(1) are apparently satisfied by the Town's ordinance. The proposed annexed area does "abut directly" the pre-annexation boundary of the Town and thus literally complies with Section 160A-36(b)(1). Furthermore, the record indicates the aggregate external boundary line of the area to be annexed is 52,503 feet, of which 7,411 feet are contiguous with the pre-annexation municipal boundary line. This 7,411 foot-long contiguous strip literally complies with Section 160A-36(b)(2) which requires that at least one-eighth of the aggregate external boundaries of the annexed area coincide with the municipal boundary.

AMICK v. TOWN OF STALLINGS

[95 N.C. App. 64 (1989)]

Nonetheless, the Town's compliance with the literal requirements of these statutes results in the subversion of the purposes underlying Section 160A-36(b) discussed in *Hawks*. "Where a literal reading of a statute 'will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.'" *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975) (quoting *Freeland v. Orange Co.*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968)). From the testimony offered at trial, it is clear the main purpose of the proposed annexation was to annex the subdivisions of Red Barn Trail, Wor-Wood Acres and Rain Forest, none of which were contiguous to the pre-annexation boundaries of the Town. The Town employee who prepared the annexation plan testified that the only purpose of the narrow corridors shown on the map depicted earlier was compliance with the statutory contiguity standards. The use of narrow "shoestring" corridors to connect a municipality to outlying territory contravenes the policies set forth in *Hawks* in a manner that is not favored by the courts of other jurisdictions. See 56 Am. Jur. 2d *Municipal Corporations* Sec. 69 at 126 (1971). The Town's intentional gerrymandering of the annexation boundary creates isolated islands connected to the Town by a single narrow corridor of land: such a "crazy-quilt" boundary is not consistent with "sound urban development" of a municipality "capable of providing essential governmental services to residents within compact borders" *Hawks*, 299 N.C. at 12, 261 S.E.2d at 97.

We therefore will not construe Section 160A-36(b) to permit a result which would clearly contravene the purpose of the statute. Our holding that the Town's annexation ordinance does not comply with the contiguity requirements of Section 160A-36(b) is consistent with our previous holding in *Huyck*. Unlike this case, the property in *Huyck* which was the "real objective" of that annexation, as well as two other tracts, were all contiguous to the town's pre-annexation boundary. 86 N.C. App. at 17-18, 356 S.E.2d at 602. We recognized in *Huyck* that several jurisdictions disapprove "gerrymandered" or "shoestring" annexation, but found that:

those cases involve the use of narrow corridors of land to connect the proposed areas for annexation to the municipality, resulting in a lack of contiguity. They are not applicable to the facts before us. In the present case, each of the three portions included in the proposed annexation area is contiguous

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

to the existing Town boundary, and, by using the "railroad strip" as a connector, they are contiguous to each other.

Id. at 18, 356 S.E.2d at 602.

The instant case presents a clear example of "shoestring" annexation which was neither presented nor approved in *Huyck* and which we reject as contravening the purposes underlying Section 160A-36(b). Accordingly, we hold the superior court properly remanded the Town's annexation ordinance for amendment of its proposed boundaries, if possible, to conform to the contiguity requirements expressed in Section 160A-36(b).

Affirmed.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. MAJOR GIVENS

STATE OF NORTH CAROLINA v. CLEVELAND CANTY

No. 885SC1318

(Filed 15 August 1989)

1. Narcotics § 4.4— possession with intent to sell or deliver cocaine—constructive possession—insufficiency of evidence

The trial court erred in failing to dismiss charges against one defendant of possession with intent to sell or deliver cocaine and manufacturing cocaine where the State relied on the theory of constructive possession of cocaine seized from a "drink house" and pool hall, but there was no evidence that the building was under the control of defendant and no evidence that he owned or leased the building; and there was some evidence that defendant knew that there was cocaine in the building and that he had come to receive some drugs, but this was not substantial evidence that defendant had the capability to maintain control and dominion over one gram or more of cocaine.

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

2. Narcotics § 4.3— constructive possession of cocaine— sufficiency of evidence

Evidence was sufficient to allow the jury to find that one defendant had constructive possession of cocaine found in a "drink house" and pool hall where it tended to show that, prior to officers' entry to execute a search warrant, defendant answered a knock at the door and informed the person outside that they were closed and were not selling beer; defendant was arrested in the same room where police found cocaine in plain view; defendant had arrived at the building with cocaine in his possession, used cocaine while on the premises, and "dumped" his cocaine in the building when police arrived; and police found a set of scales on defendant's person when he was searched.

3. Narcotics § 3.1— possession with intent to sell and deliver cocaine—prior sales of alcohol at scene of arrest—evidence improperly admitted—defendant not prejudiced

In a prosecution for possession with intent to sell and deliver cocaine and manufacturing cocaine, the trial court erred in admitting evidence concerning prior sales of alcohol at the building where defendant was arrested and searched, but defendant failed to show that there was a reasonable possibility that he was prejudiced as a result of the admission of this testimony. N.C.G.S. § 8C-1, Rule 401.

4. Narcotics § 3.1— scales found on defendant— characterization as common drug paraphernalia—defendant not prejudiced

Defendant was not prejudiced by testimony of a police officer that scales found on defendant's person were used "to weigh very light objects" and were "common drug paraphernalia." N.C.G.S. § 8C-1, Rule 701.

5. Narcotics § 3.1— cocaine seized outside building where defendant arrested—limiting instruction proper—cocaine found inside building properly admitted

The trial court properly instructed the jury not to consider as evidence cocaine seized from a car parked outside the building where defendant was arrested, and any possible prejudice to defendant by admission of the evidence was cured by the court's instructions; furthermore, evidence was sufficient to infer defendant's constructive possession of other co-

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

caine found in the building where he was arrested, and cocaine seized from the building was therefore properly admitted.

APPEAL by defendants from *Fountain, Judge*. Judgments entered 13 July 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 May 1989.

These are criminal cases involving constructive possession of cocaine. Defendants were charged and tried jointly for possession with intent to sell or deliver cocaine and manufacturing cocaine. Defendants Givens and Canty were both at a "drink house" and pool hall when police entered the building and executed a search warrant. Two others, Mallette and Allen, were in the building as well. Mallette and Allen previously pled guilty to charges stemming from the search of the premises and testified here on behalf of the State.

The State's evidence tended to show that on the evening of 20 November 1987 Mallette and Allen were in the back room of a building located at 620 Campbell Street, Wilmington, North Carolina. Mallette had a key to the building that he testified he received from Allen. Defendant Canty arrived at the building some time later. The State's evidence tended to show that Allen was going to give Canty some cocaine. Givens arrived some time after Canty. Mallette and Allen testified that Givens had in his possession a few small bags of cocaine when he arrived and that he "dumped" the bags when the police knocked on the door. Allen testified that he, Mallette, Givens and Canty were all in the back room of the building, the cocaine was on the table and they were "getting high." Allen also testified that Canty was "waiting for his" at the time the police arrived.

The State's evidence also tended to show that the white powder found during the search of the building and a Volkswagen automobile parked outside the building was cocaine. Exhibit #4 consisted of a total of 1.16 grams of undiluted cocaine packaged in eighteen (18) bags which were found in a jacket pocket. At trial, Mallette testified that the jacket belonged to him. Exhibit #5 consisted of five (5) bags, each containing approximately 1.25 grams of undiluted cocaine. The total weight of the powder in Exhibit #5 was 5.9 grams. These five (5) bags were found lodged among the spokes of a bicycle wheel in the building. There was no evidence presented regarding ownership of the bicycle. When the police entered the

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

building, Canty was the person standing nearest to the bicycle. Exhibit #6 consisted of undiluted cocaine in two (2) bags of approximately seven (7) grams each and two (2) bags of approximately one and one-half (1.5) grams each. The total weight of Exhibit #6 was approximately 18 grams. Exhibit #6 was found in the Volkswagen automobile parked outside the building. Allen testified that he was driving the Volkswagen the evening of the search.

At the close of the State's evidence defendants Canty and Givens made motions to dismiss the charges for lack of evidence. The trial court denied both motions. Both defendants offered evidence. Defendant Givens testified that he did not have any cocaine with him when he arrived that evening but he admitted using some cocaine while he was there. Defendant Canty testified that he was driving to his girlfriend's house when he observed Allen's car parked at 620 Campbell Street. Canty stopped to see Allen because Allen owed him \$35.00. Canty testified that when the police knocked on the door and the four men left the back room where they had been sitting, Allen walked behind Canty and placed some cocaine in the bicycle wheel. Canty also testified that he did not have any drugs in his possession at any time.

At the close of defendants' evidence and the close of all the evidence both defendants renewed their motions to dismiss. The motions were denied but the trial court submitted to the jury only the charge of unlawful possession of more than one gram of cocaine. The jury found both defendants guilty. Both defendants appeal from judgments entered on the verdicts.

Attorney General Thornburg, by Assistant Attorney General Kathryn Jones Cooper, for the State.

Kenneth B. Hatcher for defendant-appellant Canty.

J. H. Corpening, II, for defendant-appellant Givens.

EAGLES, Judge.

Among other arguments both defendants assign as error the denial of their motions to dismiss. After careful review of the record we find that the trial court erred in denying Canty's motion to dismiss. Accordingly, we reverse the judgment in defendant Canty's case. As to the denial of defendant Givens' motions to dismiss, we find no error. Additionally, Givens argues that his motion for appropriate relief was erroneously denied. He also ar-

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

gues that testimony by an arresting officer regarding prior visits to the premises searched and the "common use" of scales found on Givens' person was erroneously admitted. Givens also assigns as error the admission of exhibits 4, 5 and 6 into evidence. We are not persuaded by Givens' arguments and accordingly in his trial find no error.

I. Canty's Appeal

[1] Canty argues that the trial court erred in failing to dismiss the charges against him. G.S. 90-95(a)(3) provides that it is unlawful for any person to possess a controlled substance. Possession of one gram or more of cocaine is a Class I felony. G.S. 90-95(d)(2). "Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be 'knowingly' possessed." *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). The State relies on the theory of constructive possession by Canty of the 1.16 grams of cocaine seized from the jacket found in the small back room and 5.9 grams found in the bicycle wheel. Defendant argues there was no evidence that he possessed one gram or more of cocaine.

"The doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance." *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E.2d 34 (1985). Where controlled substances are found on the premises under the defendant's exclusive control, this fact alone may be sufficient to give rise to an inference of constructive possession and take the case to the jury. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). However, "where possession of the premises [by defendant] is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984).

In ruling on a motion to dismiss, all evidence admitted must be considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences which can be drawn therefrom. *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 333 (1987). If there is "substantial evidence" of each element of the charged offense, the motion should be denied. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). " 'Substantial evidence'

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E. 2d 476, 480 (1986).

Considering the evidence in the light most favorable to the State, there is no substantial evidence that the building was under the control of defendant Canty. First, there is no evidence that Canty owned the building. Furthermore, there is no evidence that Canty leased the premises or otherwise exercised any control over the building. The only key found that fit the lock on the front door was found in Mallette's possession. Mallette testified that he received the key from Allen. Although there is evidence that Canty knew that there was cocaine in the building, that he was "waiting for his" and "he come [sic] to receive some drugs," this is not substantial evidence that Canty had the capability to maintain control and dominion over one gram or more of cocaine. *See Brown*, 310 N.C. at 569-70, 313 S.E.2d at 589 (sufficient control shown where defendant had on his person a key to the residence being searched and on every occasion the police observed defendant prior to the date of the search defendant was at the residence in question); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684-85 (1971) (sufficient control shown where utilities at the residence were in defendant's name, personal papers including an Army identification card bearing defendant's name were found on the premises and evidence that drugs belonged to defendant and were being sold at defendant's direction); *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (sufficient control shown where defendant was seen on the premises the evening before the search, seen cooking dinner on the premises on the night of the search, mail was found on the premises addressed to the defendant and an insurance policy listing the premises in question as defendant's residence was also found on the premises). For this reason the trial court erred in denying Canty's motion to dismiss. Because of our determination of this issue we need not discuss the other issues raised in Canty's appeal.

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

II. Givens' Appeal

[2] Givens' first argument is that the trial court erred in denying his motions to dismiss. Givens asserts there was insufficient evidence on which his conviction could be based. For the same reason, Givens argues his motion for appropriate relief was erroneously denied. We disagree.

The State relied on the theory of constructive possession. As stated above, where control of the premises is nonexclusive, constructive possession may not be inferred "without other incriminating circumstances." *Brown*, 310 N.C. at 569, 313 S.E.2d at 589. Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband. *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480.

There is some evidence that Givens exercised some control over the premises searched. The evidence showed that prior to the officers' entry to execute the search warrant, Givens answered a knock at the door and informed the person outside that they were closed and were not selling beer. Additionally, there are other incriminating circumstances sufficient to permit the jury to infer constructive possession. Defendant was arrested in the same room where police found cocaine in plain view. A defendant's presence on the premises and close proximity to a controlled substance is a circumstance which may support an inference of constructive possession. See *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). Additional incriminating circumstances were shown through evidence tending to show that Givens arrived with an amount of cocaine in his possession, that he used cocaine while on the premises and he "dumped" his cocaine in the building when the police arrived. We also note that when Givens was searched, officers found a set of scales in his pocket. We find that these circumstances when considered together are sufficient to allow a reasonable mind to conclude that Givens had constructive possession of the cocaine found in the building. Givens' motions to dismiss and for appropriate relief based on insufficient evidence were properly denied.

[3] Givens also argues that the trial court erred in allowing testimony regarding an officer's prior visits to the premises searched. The officer testified that on two occasions prior to the search he had gone to 620 Campbell Street and purchased alcohol. The officer also testified that Givens was not on the premises on either occa-

STATE v. GIVENS

[95 N.C. App. 72 (1989)]

sion. Givens asserts that the evidence was prejudicial to him. The State argues that the testimony was background in nature and was admitted to show the basis for obtaining the search warrant. Additionally, the State asserts that even if the testimony was erroneously admitted, Givens has not shown he was prejudiced.

Rule 401 provides that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. The testimony regarding prior sales of alcohol at the premises searched was irrelevant in Givens' trial for manufacturing cocaine and possession of cocaine with intent to sell or deliver. The testimony was erroneously admitted. The test for prejudicial error, however, "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974). See also G.S. 15A-1443. Givens has not shown that there is a reasonable possibility that he was prejudiced as a result of the admission of this testimony.

[4] Givens' third argument is that the trial court erred in allowing testimony regarding the "common use" of scales found by the police during the search of Givens. Givens asserts the testimony was not responsive to the prosecutor's question and the officer's opinion was without "qualification . . . or foundation." Defendant's arguments are without merit.

The question presented to the officer by the prosecutor was "can you describe what that object is?" The officer answered, after Givens' objection was overruled, that the exhibit was "a scale commonly used to weigh very light objects." The officer went on to relate that the scales were "common drug paraphernalia." The officer's answer was responsive to the question asked.

Rule 701 provides that opinion testimony from a lay witness is limited to opinions which are "rationally based on the perception of the witness" and are helpful to the jury. G.S. 8C-1, Rule 701. A lay witness must have a basis of personal knowledge for his opinion. However, a "[p]reliminary determination of personal knowledge need not be explicit but may be implied from the witness' testimony." G.S. 8C-1, Rule 602, commentary. There is no showing in the record that the officer had a basis for his opinion testimony.

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

However, defendant Givens has not shown he was prejudiced by the admission of the testimony.

[5] Defendant Givens' final argument is that the trial court erred in admitting State's exhibits 4, 5, and 6 into evidence. These exhibits consisted of the cocaine that was seized during the search of 620 Campbell Street and the Volkswagen car parked outside. Givens' argument is based on the asserted lack of evidence of Givens' possession of the cocaine. With respect to exhibit 6, the cocaine found in the car, the trial court correctly instructed the jury not to consider that evidence. "It is well-settled in this jurisdiction that when the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 855 (1981). We find that any possible prejudice to defendant was cured by the court's instructions. We also find that the evidence presented was sufficient to infer Givens' constructive possession of the other cocaine which was found inside the building. Therefore exhibits 4 and 5 were properly admitted.

For the reasons stated above, defendant Canty's conviction is reversed and we find no prejudicial error in defendant Givens' trial.

Canty—reversed.

Givens—no error.

Judges PARKER and ORR concur.

CHARLES QUATE AND WIFE, PATSY QUATE v. BENNIE G. CAUDLE D/B/A BEN
CAUDLE CONSTRUCTION COMPANY

No. 8821SC981

(Filed 15 August 1989)

1. Reference § 8— exceptions to referee's findings of fact and law—requirements of trial judge

Though N.C.G.S. § 1A-1, Rule 53(g)(2) does not require a review of findings upon objection to a referee's report, *Thompson v. Smith*, 156 N.C. 345, does require the judge to consider

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

the evidence and give his own opinion and conclusion when exceptions are taken to a referee's findings of fact and law. In this case, defendant alleged no facts in support of its contention that the trial judge failed to review the evidence and the referee's findings of fact and law; rather, the trial judge's modification order itself clearly established that the judge made a review of the referee's findings.

2. Unfair Competition § 1—breach of contract to build log house—practice of misquoting cost of construction—unfair trade practice—damages properly trebled

The trial court properly trebled the damages awarded to plaintiffs under N.C.G.S. § 75-16, and there was no merit to defendant's contention that contract damages could not be trebled, since defendant in this case not only breached his contract to construct a log house for a stated sum but also repeatedly misquoted the cost of constructing log homes to his customers, thereby gaining sales and misleading the consuming public; these actions together constituted a violation under N.C.G.S. § 75-1.1; and the fraudulent misrepresentation by defendant directly and proximately caused plaintiffs' expenditure of an additional \$15,727.11 to complete the house.

3. Unfair Competition § 1—unfair trade practice—cost overruns—interest expense as damages

Interest expense on a loan obtained by plaintiffs to finance cost overruns was recoverable by plaintiffs as an item of damages for defendant's unfair trade practice in intentionally underestimating the cost of constructing a log home for plaintiffs, and this amount should have been trebled under N.C.G.S. § 75-16.

APPEALS by plaintiffs and defendant from *Rousseau (Julius A., Jr.), Judge*. Order entered 3 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 March 1989.

Defendant, Bennie G. Caudle, doing business as Ben Caudle Construction Company appeals from a judgment finding that it breached a contract with plaintiffs and engaged in unfair or deceptive acts or practices and awarding treble damages. Plaintiffs, Charles Quate and wife, Patsy Quate, cross-appeal from a judgment disallowing interest costs on the loan in question.

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

Roy G. Hall, Jr. for plaintiff-appellees, cross-appellants.

Finger, Parker & Avram, by Raymond A. Parker, II, for defendant-appellant.

ORR, Judge.

During the spring of 1982, defendant represented to plaintiffs that he would build a log home for them at a total cost of \$66,300.00. The parties entered into an agreement out of which this action arises for the purchase and complete construction of a log home.

Construction began in June 1982. By early August 1982, the foundation had been poured and the logs had been stacked. The structure, however, lacked a roof, rafters, basement, flooring, insulation, plumbing, electrical and heating systems.

Defendant stopped construction of the log home by 14 August 1982. Plaintiffs had paid approximately \$35,645.08 to defendant and his suppliers for the work completed to that point. Plaintiffs were forced to spend an additional \$15,727.11 over and above the stipulated contract price of \$66,300.00 to have another contractor complete construction.

Plaintiffs instituted this suit against defendant for breach of contract, fraud and unfair and deceptive trade practices. The matter was heard before a referee appointed in accordance with a consent order. The referee found the defendant breached the contract by failing to complete construction of the log home. The referee also found that defendant violated G.S. 75-1.1 when it intentionally underestimated the cost of the project and that "[t]he Plaintiffs were damaged by the Defendant in the amount of Twenty-One Thousand Eight Hundred Seventy-One Dollars and Twenty-Eight Cents (\$21,871.28 [15,727.11 in cost overruns and \$6,144.17 in interest to finance the cost overruns] and are further entitled to have the said sum to be trebled pursuant to the provisions of N.C.G.S. Section 75-1.1 et seq."

Judge Rousseau, presiding over the Superior Court of Forsyth County, affirmed the referee's findings in part and modified the findings in part. Judge Rousseau ruled that "[t]he interest expense of \$6,144.17 labeled 'cost of financing cost overruns' by the Referee, is not as a matter of law, recoverable and that portion of the Referee's Report is not approved. . . ." Both parties appeal.

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

I.

[1] Defendant first contends the trial court erred in failing to review the findings of fact and conclusions of law in the report of the referee. We disagree.

Defendant argues G.S. 1A-1, Rule 53(g)(2) requires a review of findings upon objection to the referee's report. The rule states, in pertinent part: "The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge." G.S. 1A-1, Rule 53(g)(2) (1983). Defendant's reliance upon Rule 53(g)(2) is misplaced.

The unambiguous wording of Rule 53(g)(2) reveals the options available to a judge with respect to a report filed after a hearing. There is nothing in the plain language of the statute from which defendant could infer a mandatory review of the referee's findings of fact and conclusions of law. However, the North Carolina Supreme Court has set forth the duties of a judge when exceptions are taken to a referee's report in *Thompson v. Smith*, 156 N.C. 345, 72 S.E. 379 (1911). In its decision, the Court held:

When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot *review* the referee's findings in any other way.

Id. at 346, 72 S.E. at 379. (Emphasis original.)

Thompson clearly establishes the duties of a judge in reviewing the referee's findings. However, "[u]nless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed." *State v. Johnson*, 5 N.C. App. 469, 471, 168 S.E.2d 709, 711 (1969), quoting 1 Strong's N.C. Index 2d, *Appeal and Error*, sec. 46, p. 191.

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

Defendant has alleged no facts in support of its contention that the trial judge failed to review the evidence and the referee's findings of fact and law. On the contrary, the record discloses in the judgment and order that "the Court, having heard argument of Counsel, being fully advised in the premises, and being of the opinion: 1. That the Report of the Referee should be affirmed in part and modified in part as follows"

The modification clearly establishes that the presiding judge made a review of the referee's findings. Defendant offers no evidence to support its conclusion that the court failed to review these findings. Rule 53(g)(2) allows the judge to adopt as well as modify or reject the referee's findings. The record reveals that the trial judge acted within the bounds of this rule. G.S. 1A-1, Rule 53(g)(2). Therefore, we find defendant's argument to be without merit.

II.

[2] Defendant next contends that the trial court erred in trebling the damages awarded to plaintiffs under G.S. 75-16. G.S. 75-1.1(a) reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." When acts are found to be within this section, the resulting damages are entitled to be trebled under G.S. 75-16.

G.S. 75-16 reads:

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Defendant cites the case of *Stone v. Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978), for the proposition that contract damages cannot be trebled. In *Stone*, the parties entered into a contract for the purchase of a home under construction. The purchaser discovered defects in workmanship in the house and brought suit for breach of warranty, fraud and unfair trade practices. This Court held, "Breach of

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

such warranties alone does not constitute a 'violation of the provisions' of Chapter 75 of the General Statutes. Hence, we conclude that it is inappropriate to treble damages resulting solely from breach of warranties." *Id.* at 106, 245 S.E. 2d at 807.

The case *sub judice* is clearly distinguishable from *Stone*. There, the breach of warranty claim was the sole factor in determining damages. The court found that there was insufficient evidence to support a claim for fraud. *Id.* Therefore, there was no foundation upon which to base a claim under Chapter 75. There must be some conduct which is found to be unfair or deceitful to violate Chapter 75-1.1.

In the case *sub judice*, the record clearly establishes the fraudulent acts performed by defendant in the Memorandum Report of the Referee:

[T]he Defendant made a practice of quoting unrealistically low prices for the cost of erecting a log home so as to entice his customers to purchase his log home packages. The consuming public, including the Plaintiffs, relied upon the Defendant's false or careless assertions and thereby became involved in a painful morass of cost overruns and unexpectedly high cash outlays.

...

By repeatedly misquoting the cost of constructing log homes to his customers and by failing to fully explain important details to his customers so as to gain sales, the Defendant misled the consuming public. The Defendant was thereby engaging in fraudulent misrepresentations which clearly had an adverse impact on business and commerce.

Defendant's breach of contract coupled with the fraudulent misrepresentation constitute a violation under G.S. 75-1.1.

Defendant also relies upon the case of *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980), *modified*, 302 N.C. 539, 276 S.E.2d 397 (1981). An erroneous jury instruction permitted the jury to assess damages against the defendant twice for the same default. Once trebled, the effect was a quadrupling of damages. To prevent this, the court held:

Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.

Id. at 542, 268 S.E.2d at 103.

There is no possibility of such an excessive damage award in the case at bar. As plaintiffs maintain, the fraudulent misrepresentation by defendant directly and proximately caused the expenditure of an additional \$15,727.11. The damage award below reflects the amount of their injury as a result of the Chapter 75-1.1 violation. Thus, the damage verdict was properly trebled in accordance with G.S. 75-16.

III.

[3] On cross-appeal, plaintiffs argue that the lower court erred in ruling, as a matter of law, that they could not recover, nor treble, the \$6,144.17 cost of borrowing extra funds to complete their log home. We agree.

Plaintiffs rely upon *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E.2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984), to determine the measure of damages resulting from fraudulent misrepresentation. In *Bernard*, the plaintiff entered into a contract to purchase a tractor which produced numerous problems. Thereafter, plaintiff stopped making payments on the tractor. The court found defendant breached the contract, made fraudulent misrepresentations with regard to the tractor and engaged in unfair trade practices. In finding damages for expenses incurred and trebling the same, the court held:

We do not believe, however, that the only available measure of damages is that for fraudulent inducement. As previously stated, an action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. 'To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.'

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

Bernard, 68 N.C. App. at 232, 314 S.E.2d at 585, quoting *Marshall v. Miller*, 302 N.C. at 547, 276 S.E.2d at 402. Further, the goal sought in awarding damages is "to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950). (Citation omitted.) A damage award consisting of merely the principal amount of a loan and not including financing costs and interest charges for obtaining that loan will not "restore the victim to his original condition . . . as far as it may be done by compensation in money." *Id.*

Defendant relies upon G.S. 24-5 which states in part:

(a) Contracts.—In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. Interest on an award in a contract action shall be at the contract rate, if the parties have so provided in the contract; otherwise, it shall be at the legal rate.

Defendant's reliance upon G.S. 24-5 is misplaced. "Interest" as used in this statute, refers to interest accruing upon a judgment award, whether in terms of pre-judgment interest from the time of wrongdoing or post-judgment interest until the judgment is paid. Defendant mistakenly applies this statute and misinterprets the referee's findings as allowing interest in the form of a damage award from the time of breach. The interest in question in the case *sub judice* refers solely to interest charges as part of the debt undergone by the plaintiffs in obtaining financing above the original costs of the home as represented by defendant.

The general rule in measuring damages is that "the injured party may recover all of the damages which were *foreseeable* at the time of the contract as a probable result of the breach either because they were a *natural* result or because they were a *contemplated* result of the breach." *Pipkin v. Thomas & Hill, Inc.*, 33 N.C. App. 710, 718, 236 S.E.2d 725, 731 (1977), *aff'd in part, rev'd in part*, 298 N.C. 278, 258 S.E.2d 778 (1979). (Citation omitted.) (Emphasis original.) "Special damages [arising out of special circumstances] may also be awarded for injury which occurred after the breach if such an injury was within contemplation of the parties

QUATE v. CAUDLE

[95 N.C. App. 80 (1989)]

at the time the contract was made." *Pipkin*, 33 N.C. App. at 719, 236 S.E.2d at 731. These rules "would seem to allow the injured borrower to recover any money spent to make himself whole, including the cost of negotiating a new loan . . . if such costs are a natural or contemplated consequence of the breach." *Id.*

At the time the contract between the parties was made, it is reasonable to expect that if, as a result of defendant's breach, plaintiffs were required to spend an additional \$15,727.11 over and above the original contract price to complete the log home, additional financing would be necessary. The interest was part of the cost of negotiating new financing and was foreseeable as a natural and contemplated result of borrowing money. Therefore, these costs were a proximate result of defendant's breach and are entitled to be recovered along with the principal of the loan.

Plaintiffs also contend that the financing costs for obtaining the loan should be trebled. Since we have determined that the financing costs should be included with the principal as damages, we agree.

"Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown." *Marshall v. Miller*, 302 N.C. at 547, 276 S.E.2d at 402. Therefore, we hold that the "financing costs" (\$6,144.17) should be combined with the loan principal (\$15,727.11), for total damages of \$21,871.28. This amount should be trebled accordingly under G.S. 75-16.

For the reasons stated above, we conclude the trial court did not err with respect to reviewing the referee's findings of fact or law; and furthermore, the trial court did not err in trebling assessed damages under G.S. 75-16. However, the trial court did commit reversible error by ruling, as a matter of law, there could be no recovery of interest costs on monies borrowed by the plaintiffs to meet "cost overruns."

Affirmed in part; reversed in part.

Judges BECTON and JOHNSON concur.

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

JANIE P. PULLEY, PLAINTIFF v. REX HOSPITAL, DEFENDANT

No. 8810SC1188

(Filed 15 August 1989)

Negligence § 49— uneven sidewalk outside hospital— contributory negligence of plaintiff

In an action by an invitee to recover for personal injuries which she sustained when she fell on the uneven sidewalk outside defendant hospital, the trial court properly granted summary judgment in favor of defendant where plaintiff testified that neither overhanging branches nor any other object obscured her view of the sidewalk; the section of the sidewalk where she fell was illuminated by canopy lights, ground lights, and pole lights around the driving circle; plaintiff admitted that, when she returned about two hours later to the spot where she fell, there was enough light to see the condition of the sidewalk; plaintiff admitted that she was not looking at the sidewalk and, had she been paying attention, she would have seen the unevenness; and defendant's evidence was uncontradicted that the sidewalk was properly constructed, that natural settlement of the soil beneath the concrete caused one of the sections to sink, and that this condition is common to sidewalks everywhere.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *James H. Pou Bailey, Judge*. Judgment entered 6 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 11 May 1989.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk and Donna S. Stroud, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Susan K. Burkhart, for defendant-appellee.

BECTON, Judge.

The question presented by this appeal is whether summary judgment on plaintiff's personal injury claim was properly entered in favor of defendant Rex Hospital. We hold that it was.

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

I

The following facts are taken from the parties' pleadings, affidavits, and depositions.

At about 10:00 p.m. on 15 July 1984, plaintiff, Janie Pulley, a visitor at Rex Hospital, tripped and fell on the sidewalk outside the hospital's emergency room entrance. The fall occurred on an uneven part of the sidewalk where two sections of the sidewalk joined. One of the sections was, according to Ms. Pulley, two to three inches higher than the other. (A hospital representative contended that the difference was only one-half inch.)

Ms. Pulley brought suit against the hospital, alleging that her fall was caused by the unevenness of the sidewalk, inadequate lighting, and overhanging tree limbs which obscured her view of the sidewalk. She further alleged that by maintaining these conditions, Rex Hospital breached its duty to her as an invitee to keep the sidewalk area in a reasonably safe condition and to warn of hidden perils. The hospital alleged in defense that the premises were reasonably safe and that Ms. Pulley was contributorily negligent.

The trial judge granted summary judgment in favor of the hospital. Ms. Pulley appealed to this court.

II

Summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that no genuine issue of material fact exists and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56(c) (1983). Summary judgment is a drastic remedy and generally is inappropriate in negligence cases. See *Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 335, 307 S.E.2d 412, 414 (1983). However, summary judgment may be granted in a negligence case when the forecast of the evidence shows either that the defendant was not negligent, or that a complete defense to the claim exists as a matter of law. See, e.g., *Sink v. Andrews*, 81 N.C. App. 594, 596, 344 S.E.2d 831, 832 (1986); *Jacobson v. J.C. Penney Co., Inc.*, 40 N.C. App. 551, 557, 253 S.E.2d 293, 297, *disc. rev. denied*, 297 N.C. 454, 256 S.E.2d 807 (1979).

To establish a prima facie case of negligence, Ms. Pulley must show that: (1) Rex Hospital owed her a duty of care; (2) the hospital breached that duty; (3) the breach was the actual and proximate

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

cause of her injury; and (4) her injury resulted in damages. See *Jacobs v. Hill's Food Stores, Inc.*, 88 N.C. App. 730, 732, 364 S.E.2d 692, 693 (1988). After reviewing the materials in the record on appeal, we conclude that Ms. Pulley was contributorily negligent and that the hospital breached no duty of care owed to her.

Ms. Pulley, as a visitor, was an "invitee" of Rex Hospital. A hospital, like any other business, owes its invitees the duty (1) to exercise ordinary care to maintain the premises in a safe condition, and (2) to warn of hidden dangers or unsafe conditions known to or discoverable by the hospital. See *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987); *Stoltz v. Burton*, 69 N.C. App. 231, 234, 316 S.E.2d 646, 647 (1984). However, a hospital is not an insurer of an invitee's safety, and has "no duty to warn an invitee of a hazard obvious to any ordinarily intelligent person using [her] eyes in an ordinary manner, or one of which the [invitee] had equal or superior knowledge." *Branks*, 320 N.C. at 624, 359 S.E.2d at 782-83 (citing *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967)). Thus, an invitee is charged with a corresponding "duty to see that which could be seen in the exercise of ordinary prudence, and to use reasonable care to protect herself." *Prevette v. Wilkes Gen. Hosp.*, 37 N.C. App. 425, 428, 246 S.E.2d 91, 93 (1978).

Ms. Pulley's own account of the conditions surrounding her fall establish that she could not recover on her claim. First, Ms. Pulley testified at her deposition that the branches overhanging the sidewalk did not prevent her from looking at the sidewalk, and that she "had already passed the tree limb [and was walking upright] before [she] stumbled." She further stated that "nothing obscur[ed] her view of the sidewalk." Thus, it is clear that the condition of the tree adjoining the sidewalk was not a proximate cause of her injury. *Accord Jacobson*, 40 N.C. App. at 556, 253 S.E.2d at 296 (because plaintiff fell after walking off ramp at entrance of store, absence of handrail on ramp was not proximate cause of injury).

Second, Ms. Pulley testified at the deposition that the section of the sidewalk where she fell was illuminated by canopy lights, ground lights, and pole lights around the driving circle. She also admitted that when she returned two hours later to the spot where she fell, "there was enough light at this time [about midnight] to see the sidewalk condition." We are convinced by this testimony

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

and by our review of the photographic exhibits showing the lighting conditions as they existed at the time of the fall that the light was ample to allow Ms. Pulley to walk in safety. *Accord id.* at 555, 253 S.E.2d at 296 (lighting held to be sufficient since plaintiff admitted "there was enough light to see the floor in front of me").

Finally, Ms. Pulley, who had been on that section of sidewalk many times in the past, admitted that she was not looking at the sidewalk as she walked, and that "had [she] been focusing [her] full attention on the sidewalk, [she] would have seen the unevenness." Under these circumstances, we are constrained to hold that Ms. Pulley's own contributory negligence entitled Rex Hospital to judgment as a matter of law.

Our decision is in accord with *Prevette*, 37 N.C. App. 425, 246 S.E.2d 91, in which a hospital visitor was injured when she fell at a "busted up place" at the end of a ramp leading from the hospital's emergency room. The plaintiff admitted that she was not paying attention to the ramp as she walked. Noting that "such defects as may have existed in the ramp were all of a nature which should have been readily apparent to anyone who looked to see what was there to be seen," this court held that the evidence supported the conclusion that the plaintiff was contributorily negligent. *Id.* at 427-28, 246 S.E.2d at 92-93. *See also Little v. Wilson Oil Corp.*, 249 N.C. 773, 777, 107 S.E.2d 729, 731 (1959) (invitee should have seen concrete slab protruding almost two inches above sunken asphalt); *Houston v. City of Monroe*, 213 N.C. 788, 790-91, 197 S.E. 571, 572 (1938) (plaintiff could have seen two and one-half inch dip in crosswalk had she been looking); *Jacobs*, 88 N.C. App. at 733, 364 S.E.2d at 694 (plaintiff should have seen concrete block since walkway was adequately lit and nothing prevented her from seeing it); *Joyce v. City of High Point*, 30 N.C. App. 346, 350, 226 S.E.2d 856, 858 (1976) (plaintiff failed to observe two-inch difference in height of sidewalk slabs). *Cf. Kutz v. Koury Corp.*, 93 N.C. App. 300, 377 S.E.2d 811, 814 (1989) (hotel guest, injured when he slipped and fell in shower, was contributorily negligent because he failed to look in bathtub before getting in).

We note, in addition, that no evidence was presented to show "some special circumstance, such as poor construction of the [sidewalk], poor lighting, or a diversion of attention created by defendant" sufficient to constitute negligence by the hospital. *Frendlich*, 64 N.C. App. at 337, 307 S.E.2d at 415. Here, the side-

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

walk was well lighted, and the view of it was unobstructed. The hospital's evidence was uncontradicted that the sidewalk was properly constructed, that natural settlement of the soil beneath the concrete caused one of the sections to sink, and, significantly, that this condition is common to sidewalks everywhere.

We agree with the view expressed in *Evans v. Batten* that "[s]light depressions, unevenness, and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons." 262 N.C. 601, 602, 138 S.E.2d 213, 214 (1964). In our view, a requirement that sidewalks be maintained in perfect condition, devoid of even minor defects, would be overly burdensome if not impossible to comply with. See *Stoltz*, 69 N.C. App. at 235, 316 S.E.2d at 648. Sidewalks cannot be kept "free from all inequalities and from every possible obstruction . . . [such as] depressions or differences in grade, or a slight deviation from the original level of a walk due to the action of frost in the winter or spring. . . ." *Houston*, 213 N.C. at 790, 197 S.E. at 572 (citation omitted).

In this case, we conclude that the unevenness of the sidewalk, from one-half to three inches in height, was not unreasonably dangerous under the circumstances and was not a hidden peril of which the hospital should have warned. We further conclude that there is no breach of duty to an invitee when, as here, a defect in a sidewalk is minor, the defect is one which could have been seen had the plaintiff been paying attention, and no special circumstances existed to make the condition unreasonably hazardous. *Accord Falatovich v. City of Clinton*, 259 N.C. 58, 60, 129 S.E.2d 598, 599 (1963) (no breach of duty in failing to correct "minor defect" in sidewalk consisting of hole ten inches by three inches, filled to sidewalk level with dirt, sand, and trash); *Bagwell v. Town of Brevard*, 256 N.C. 465, 466, 124 S.E.2d 129, 130 (1962) (no breach of duty in failing to correct "slight irregularity" consisting of one-inch difference in elevation between two sidewalk sections); *Little*, 249 N.C. at 777, 107 S.E.2d at 731 (no duty to warn invitee of concrete slab protruding one and three-fourths inches above sunken asphalt); cf. *Jacobs*, 88 N.C. App. at 733, 364 S.E.2d at 694 (no breach of duty since concrete block in walkway was obvious condition); *Stoltz*, 69 N.C. App. at 235, 316 S.E.2d at 648 (shopping center owner did not breach duty to invitee by maintaining sidewalk which gradually increased in height due to slope of land); *Frendlich*,

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

64 N.C. App. at 335, 307 S.E.2d at 413 (storekeeper breached no duty to invitee by maintaining second step down at street curb).

III

On the record before this court, Rex Hospital was entitled to judgment as a matter of law. Accordingly, the order granting summary judgment is

Affirmed.

Judge LEWIS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion whether defendant was negligent and plaintiff was contributorily negligent are issues of fact for the jury and the summary judgment holding otherwise should be vacated.

The section of sidewalk plaintiff tripped on, according to her evidence, "approximately two to three inches higher" than the adjoining section (Rp 29), was no slight imperfection impossible to correct in my opinion, but a hazard that obviously could have been removed or minimized by the exercise of due care. Also of significance is that the sidewalk led to the emergency room—a place frequented not by idle strollers, but by persons urgently in need of medical care and those who accompany and visit them; persons who can reasonably be expected to be anxious, hurried, and preoccupied.

As to the contributory negligence issue the opinion does not state the evidence bearing thereon in the light most favorable to plaintiff. Though it states that Ms. Pulley "had been on that section of the sidewalk many times in the past," the evidence indicates this was the first time she had walked to the emergency room on it; as her testimony was that on prior visits to the hospital she had entered either through the main lobby or by riding to the emergency room entrance in a car or ambulance. (Rp 14). And not mentioned in the opinion is plaintiff's critical testimony that: As she was walking towards the entranceway *several people were leaving the hospital*, which caused her to move to the right side of the sidewalk and duck below some low, overhanging tree limbs; *after passing under the limbs she raised back up, took two steps,*

PULLEY v. REX HOSPITAL

[95 N.C. App. 89 (1989)]

and tripped over the protruding section of sidewalk, at which time some of the people leaving the hospital had passed her and some were still approaching her on the sidewalk; immediately before she tripped she was looking in front at those people and not down at her feet. (Rp 15-17). This testimony, when viewed in its most favorable light for the plaintiff, renders completely irrelevant the abstract legal principles quoted in the opinion and refutes the majority's conclusion that the overhanging tree limbs could not have proximately contributed to her fall and that the only cause was her inexcusable inattention. Obviously, the tree limbs, the approaching people, and plaintiff's ducking, looking, and tripping were all tied together in one brief instant and each could have been a factor in causing her injury, and no one can properly say as a matter of law that during that brief instant she should have looked at the sidewalk, rather than the people she was meeting. The law, of course, does not require pedestrians to constantly focus their eyes upon the streets and sidewalks they walk upon lest being deemed contributorily negligent as a matter of law. For the law is based upon the realities of life, one of which is that as they walk about people sometimes look at other people, at passing traffic, in store windows, at trees and birds, and even up at the sky. Thus, whether in looking away from the sidewalk while ducking under the tree limb and meeting other people on the sidewalk plaintiff was negligent is not a legal question, but a question of fact that can be answered only after considering that under our law, absent indications to the contrary, plaintiff had the right to act upon the assumption that defendant had not been and would not be negligent, and was therefore maintaining the sidewalk properly. *Chaffin v. Brame*, 233 N.C. 377, 64 S.E.2d 276 (1951).

Plaintiff's statement, quoted in the opinion—"If I had been focusing my full attention on the sidewalk, I would have seen the unevenness"—is without significance since immediately before then she said, "Had I been looking at the sidewalk as I was walking, I don't know whether or not I could have seen the unevenness." But assuming *arguendo* that she might have seen the defect if she had focused on it, she had no positive duty to focus on it and the issue is still the one of fact stated above.

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

ANGEL L. OSBORNE, A MINOR, BY HER GENERAL GUARDIAN, HELEN O. WILLIAMS v. ANNIE PENN MEMORIAL HOSPITAL, INC., ROSEMARY M. MARTIN, EXECUTRIX OF THE ESTATE OF DONION M. MARTIN; BONNIE A. ROBERTSON; AND FRANK LEWAND

No. 8817SC623

(Filed 15 August 1989)

Limitation of Actions § 11— professional malpractice case—minor claimant—time for bringing action—effect of appointment of guardian

A claimant in a professional malpractice case must file the action within the time limitations contained in N.C.G.S. § 1-15(c) *unless* that period expires before the claimant reaches 19 years of age, and in that case the claimant may bring the action at any time before he or she reaches age 19; moreover, appointment of a guardian does not cause the statute to begin to run against a minor claimant.

APPEAL by plaintiff from *John (Joseph R.), Judge*. Judgments entered 4 February 1988 and 14 March 1988 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 13 February 1989.

Bailey & Dixon, by Gary S. Parsons and Alan J. Miles; and Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, Jr., for plaintiff-appellant.

Poyner & Spruill, by Susanne F. Hayes and Mary Beth Johnston, for defendant-appellees Annie Penn Memorial Hospital and Bonnie A. Robertson.

Newsom, Graham, Hedrick, Bryson & Kennon, by Lewis A. Cheek, for defendant-appellee Rosemary M. Martin, Executrix of the Estate of Donion M. Martin.

ORR, Judge.

This case was initiated by Helen O. Williams, guardian of Angel Osborne, a minor. The evidence tended to show that on 10 February 1978, Linda Faye Osborne was admitted to Annie Penn Memorial Hospital for delivery of a baby. Despite the fact that she was in active labor, Ms. Osborne was provided with a sandwich by a hospital nurse, sometime after her admission.

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

When plaintiff's mother was ready to give birth, she was taken to a preoperative examination room where defendant nurse Robertson administered a general anesthetic agent to her without an anesthesiologist or a doctor being present. Further, it is alleged that the general anesthetic was administered to plaintiff's mother by nurse Robertson, who was at that time employed at defendant hospital, without her having contacted any other hospital personnel regarding the type of anesthetic to be applied.

During the delivery of the minor plaintiff by defendant Dr. Donion Martin, Linda Osborne began vomiting and thereafter aspirated a substantial portion of her vomitus. At that time, defendants Robertson and Martin requested the assistance of defendant LeWand, an anesthesiologist, to help deal with the critical condition of plaintiff's mother. It is alleged that after a significant period of time had elapsed, defendant LeWand came to the aid of Robertson and Martin. Thereafter these three defendants allegedly interrupted the delivery of plaintiff in order to reverse the critical condition of the mother despite the readily apparent fact that plaintiff was not receiving adequate oxygenation.

As a result of this occurrence and the substantial delay by defendants in suctioning the minor plaintiff after her delivery, it is alleged that she was severely injured and suffers from brain damage. More specifically, the complaint alleges that plaintiff's ability to concentrate and learn is impaired; she is clumsy and has decreased muscle strength in her body; she has a deformity; she is handicapped in performing normal daily activities; and as a result of these impairments she has had to undergo both physical and occupational therapy. Likewise, she alleges that significant medical expenses have been and will continue to be incurred for her treatment. She will likely have to undergo surgery to correct some of her reversible impairments; however, she alleges that her neurological injuries are permanent. Additionally, plaintiff alleges that she has suffered physical and mental anguish and will continue to suffer the same for the remainder of her life and that she has suffered a permanent partial loss of her earning capacity.

Plaintiff's complaint alleges that these injuries were directly and proximately caused by the negligence of the hospital, and defendants Martin, Robertson and LeWand. Her complaint contains numerous specific allegations of negligence which we will not set out in detail, but rather we acknowledge that such allegations

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

are sufficient to state a cause of action under the theory of negligence against Annie Penn Memorial Hospital, Donion Martin, Bonnie Robertson and Frank LeWand.

Rosemary Martin answered as executrix of the Estate of Donion Martin. She denied all material allegations of wrongdoing on behalf of Dr. Martin as stated in plaintiff's complaint. She further moved for a dismissal of the action against Dr. Martin.

The hospital and Bonnie Robertson filed an answer jointly, moving for a dismissal pursuant to G.S. 1A-1, Rule 12(b)(6). Their answer also set up a statute of limitations defense in complete bar to plaintiff's recovery and further denied all material allegations of negligence as asserted against them.

After the filing of the hospital and Bonnie Robertson's joint answer, defendant Rosemary Martin moved to amend her answer approximately three months after she filed it. The court granted her motion and her answer was amended to allege, by way of a second defense, the statute of limitations as a bar to plaintiff's claim. Defendants Annie Penn and Bonnie Robertson moved for summary judgment. Thereafter, defendant Martin similarly made a motion for summary judgment.

Plaintiff, in opposition to those two motions, filed four affidavits from her physicians stating that they had discussed plaintiff's diagnosis and proposed methods of treatment with plaintiff's guardian. Each physician also stated individually that he had never made any suggestion that plaintiff's health problems had resulted from the wrongful conduct of any persons.

A third physician's affidavit was submitted. It stated that the affiant was familiar with the standards of practice among medical professionals with training and experience similar to that of Dr. Martin, and that in his opinion, based upon a review of relevant information, there were marked deviations from the applicable standards of practice by each of the defendants. Plaintiff's guardian filed an affidavit which, *inter alia*, stated that plaintiff was about two years old when she appeared to have health problems. However, it was not until 1985 that she was informed by one of plaintiff's doctors that plaintiff's medical problems were probably present at birth and possibly related to plaintiff's delivery.

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

Ms. Williams specifically noted that she had not been informed by the delivering physician or any other hospital personnel that there were irregularities regarding plaintiff's delivery other than the incident involving plaintiff's mother who died. Ms. Williams stated that it was not until after 1985 when she became aware that plaintiff might have a potential claim for personal injury against the named defendants. Furthermore, Williams stated that she certainly had no knowledge that as plaintiff's appointed guardian she might have had a duty to pursue potential actions on plaintiff's behalf.

On 4 February 1988 and 5 March 1988, the court granted defendant's motion for summary judgment. From these judgments, plaintiff now appeals.

I.

The first issue which we shall address is whether the court erred in granting the two motions for summary judgment. The rule regarding a motion for summary judgment states that:

[t]he judgment sought shall be rendered forthwith 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) (1983 & Supp. 1988). This motion, which is designed to give a forecast of the proof which the parties intend to offer on behalf of their claims and defenses, requires the court to view all facts in "the light most favorable to the nonmoving party." *L. C. Williams Oil Co., Inc. v. Exxon Corp.*, 625 F.Supp. 477, 480 (M.D.N.C. 1985). See, also, *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981).

Based upon the particular facts of this case, it must be noted at the outset that "[i]t is only in the exceptional negligence case that the [summary judgment] rule should be invoked." *Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E.2d 147, 150, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971). Furthermore, the completion of discovery is ordinarily required in a malpractice suit so that plaintiffs can explore issues of malpractice. *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E.2d 881 (1978). Consequently, it is only after it becomes clear to the court that the facts are established or admitted, and the issue of negligence has been reduced to a mere question of law that courts should grant such extreme remedies.

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973).

In the instant case, defendants have asserted the statute of limitations as a complete bar to plaintiff's claim. As previously noted, they contend that because Ms. Williams was appointed as plaintiff's guardian on 7 May 1982, she was empowered to take any legal action including the instant action and was required to bring this action within four years after her appointment as guardian.

Specifically, defendants assert that the applicable statute of limitations and repose is contained in G.S. 1-15. According to that statute:

(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

...

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, . . . which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action

Defendants further contend that G.S. 1-17, dealing with disability, does not toll the running of the statute of limitations in this matter. G.S. 1-17 (1983 & Supp. 1988), "Disabilities," states:

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

(a) A person entitled to commence an action who is at the time the cause of action accrued . . .

(1) Within the age of 18 years;

. . .

may bring his action within the time herein limited, after the disability is removed,

. . .

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years.

In the case at bar, we are called upon to interpret the language of G.S. 1-17(b), and to determine its applicability to the statute of limitations covering malpractice actions as set forth in G.S. 1-15(c). The very language of G.S. 1-17(b) requires that these two statutes be construed *in pari materia*. G.S. 1-17(b) applies specifically to "an action on behalf of a minor for malpractice." G.S. 1-17(b) states that notwithstanding the language in subsection (a), malpractice actions brought by minors are to be brought within the time limitations specified by G.S. 1-15(c), *except* that the minor claimant may bring the action before attaining the age of 19.

Appellant contends that a claimant in a professional malpractice case must file the action within the time limitations contained in G.S. 1-15(c), *unless* that period expires before the claimant reaches 19 years of age. In that case, appellant argues the claimant may bring the action at any time before he or she reaches age 19. Appellees contend, however, that the appointment of a guardian causes the statute to begin to run against a minor claimant and G.S. 1-17(b) does not toll it. So, in this case, according to appellee's argument, the statute of limitations began running on 7 May 1982 when Helen Williams was appointed guardian. Since this action was filed more than five years after that date, appellees argue that the claim is barred by G.S. 1-15(c).

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

[95 N.C. App. 96 (1989)]

Our examination indicates that the language contained in G.S. 1-17(b) is quite clear. First, it refers specifically to malpractice actions brought on behalf of a minor plaintiff—the exact circumstances in the case *sub judice*. Secondly, it requires the action to be commenced within the time limitations specified in G.S. 1-15(c), but then provides for the exact situation before us. *If* the time limitations (as set forth in G.S. 1-15(c)) expire “before such minor attains the full age of 19 years, the action may be brought *before* said minor attains the full age of 19 years.” (Emphasis added.) Here, the time limitation *has* expired and the minor *has not* attained the full age of 19 years. The statute, therefore, expressly allows the minor plaintiff in this case to commence the action. When the language of a statute is clear, such as the language in this case, we are required to give the statute its logical application. See *State v. Carpenter*, 173 N.C. 767, 92 S.E. 373 (1917).

Furthermore, we reject that part of defendants’ argument which is based upon *Johnson v. Insurance Co.*, 217 N.C. 139, 7 S.E.2d 475 (1940). Defendant asserts that the *Johnson* case, and cases which follow it, stand for the proposition that exposure to a suit by a guardian for the allotted time would constitute a bar to the action of the ward. Even if that assertion is a correct one, a fact of which we are not wholly convinced, the *Johnson* court was required to construe a different statute, C.S. 407, in order to reach its decision. Our decision is squarely based upon G.S. 1-17(b). The law as set forth in *Johnson* cannot control the specific language contained in G.S. 1-17(b) which deals exclusively with minors and their rights to commence a malpractice action prior to attaining the full age of 19, *when* the statute of limitations in G.S. 1-15(c) has nevertheless expired.

We note that defendant’s contention, if accepted, would work an unfair hardship on an orphaned minor. Based upon defendant’s argument, the statute would begin running upon the guardian’s appointment for an orphaned minor while a minor with a living parent would not be similarly faced with the running of the statute of limitations. This Court cannot conceive that the General Assembly intended to limit the time in which an orphaned minor could bring a malpractice action, yet extend the time to bring a suit for those minors with parents as natural guardians.

Accordingly, we find that the trial court erred in dismissing plaintiff’s cause of action. The action was not barred by G.S. 1-17.

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

Finally, plaintiff raises the issue of whether the lower court erred in granting defendant Martin's motion to amend her answer. In light of our decision to remand this case to the trial court for appropriate action, it is unnecessary to address that issue.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

STAR AUTOMOBILE COMPANY, PETITIONER v. JAGUAR CARS, INC.,
RESPONDENT

No. 8810SC1236

(Filed 15 August 1989)

1. Automobiles and Other Vehicles § 5— nonrenewal of automobile franchise—reasons required in written notice—only information in written notice considered in evaluating sufficiency of notice

The trial court properly determined that written notice of nonrenewal to an automobile dealership franchisee must state reasons for nonrenewal "with sufficient specificity to inform the dealer of the legal grounds" for nonrenewal, and the court properly held that information the franchisee has received, other than that included in the written notice, may not be taken into account in evaluating the legal sufficiency of the written notice to the franchisee. N.C.G.S. § 20-305(6)c2.

2. Automobiles and Other Vehicles § 5— nonrenewal of automobile franchise—sufficiency of written notice

Written notice of nonrenewal given by respondent distributor to petitioner dealer was sufficient notification under N.C.G.S. § 20-305(6)c2 where the notice stated that respondent had made the decision not to renew petitioner's franchise as part of an "overall effort" to "upgrade and reorganize"; the letter also recited as factors in its nonrenewal determination "facilities, location, after-sales service, financial resources and managerial skills and commitment"; and petitioner's alleged deficiencies in these areas were respondent's reasons for nonrenewal.

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

APPEAL by defendant from *Barnette, Judge*. Order entered 14 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 12 May 1989.

This case involves Jaguar Cars Inc.'s attempted nonrenewal of Star Automobile Company's (Star's) Jaguar franchise. Jaguar Cars Inc. (Jaguar) is the United States distributor of Jaguar automobiles. On 28 September 1984 Jaguar mailed a letter to Star indicating Jaguar's intent not to renew the franchise agreement between Jaguar and Star. Star received this letter on 1 October 1984. In pertinent part, the letter stated:

We have previously advised you both by letter and in person of our intention not to offer your dealership a renewal contract for the sale and servicing of Jaguar products when the present arrangement between us expires on December 31, 1984. Pursuant to Section 20-305 of the General Statutes of North Carolina, this letter constitutes formal notification to you of that decision.

As you know from our previous correspondence and discussions, our decision not to offer you a renewal of your dealer agreement has been taken as part of an overall effort by this company to upgrade and reorganize its retail sales and service representation in major market areas throughout the United States. It is our judgment that if the recent success of Jaguar is to continue, we must act now to remedy the serious deficiencies which exist in our dealer network. To accomplish that objective, we must reduce the size of our dealer body and upgrade the quality of representation we are receiving from many of the dealers who will continue to represent us.

Our decision not to offer your dealership a renewal contract was made after careful consideration. In each market affected by our program, an evaluation of each dealership's facilities, location, after-sales service, financial resources and managerial skills and commitment was undertaken. Based upon our evaluation of that data and our assessment of what we require for effective representation in your market area, we have concluded that we cannot justify continuing with your dealership.

Star filed a petition with the Commissioner of Motor Vehicles seeking a hearing on whether Jaguar had good cause for nonre-

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

newal and had acted in good faith. Star also challenged the sufficiency of the notice it received in the letter Jaguar sent on 28 September 1984. In addition, Star sought damages from Jaguar for alleged unfair and deceptive trade practices and fraud. After a hearing the Commissioner found that proper notice had been given and that Jaguar had good cause for nonrenewal and had acted in good faith. The Commissioner denied Star's other claims.

Star appealed to superior court pursuant to G.S. 20-300 and Chapter 150B. The superior court reversed the Commissioner's decision stating in its order the following "reasons": (1) the notice required by G.S. 20-305(6) must state reasons for nonrenewal with sufficient specificity to inform the dealer of the legal grounds for nonrenewal; (2) the subjective knowledge of the dealer (franchisee) and information he has beyond that included in the written notice cannot be taken into account in determining the legal sufficiency of notice; (3) the letter of 28 September 1984 was legally insufficient to comply with G.S. 20-305(6); and (4) because the notice was insufficient, the Commissioner's determination of good cause and good faith is void because without valid notice the Commissioner had no jurisdiction to decide the issues. The superior court also found that Star's claims for unfair and deceptive trade practices and fraud "ruled on by the Commissioner were done without authority, statutory or otherwise, in that the Commissioner did not have jurisdiction to rule in that these matters are within the exclusive original jurisdiction of the General Court of Justice." Jaguar appeals.

Rivenbark, Kirkman, Alspaugh and Moore, by James B. Rivenbark, John W. Kirkman, Jr. and Rodney D. Tigges, and Burr and Forman, by D. Frank Davis, F. A. Flowers, III and Patrick F. Dye, Jr., for petitioner-appellee.

Townley and Updike, by Douglas C. Fairhurst, and Jordan, Price, Wall, Gray and Jones, for respondent-appellant.

Johnson, Gamble, Hearn and Vinegar, by Samuel H. Johnson and Richard J. Vinegar, for North Carolina Automobile Dealers Association, amicus curiae.

EAGLES, Judge.

G.S. 20-305 provides that

[i]t shall be unlawful . . . :

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

(6) . . . to terminate, cancel or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has: satisfied the notice requirements of subparagraph c.; and the Commissioner has determined, if requested in writing by the dealer . . . , and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise and that the manufacturer has acted in good faith as defined in this act regarding the termination, cancellation or nonrenewal.

The provisions of G.S. 20-305(6) apply to Jaguar because Jaguar is a "manufacturer" as defined in G.S. 20-286(8c) ("the term 'manufacturer' shall include the [term] 'distributor' . . ."). In order for Jaguar to lawfully exercise its right not to renew Star's franchise, Jaguar must have given Star proper notification and, if Star requests, the Commissioner must hold a hearing and find that Jaguar's nonrenewal decision was for good cause and made in good faith.

The superior court's judgment stated that:

The Order entered by the Commissioner of Motor Vehicles must be reversed for the following reasons:

1. The notification required by N.C.G.S. 20-305(6) must state the reasons for nonrenewal with sufficient specificity to inform the dealer of the legal grounds upon which the manufacturer is relying in refusing to renew the franchise agreement.

2. The subjective knowledge of the dealer as to its inadequacies as an automobile dealer, and the information given to it at other times or by other means by the manufacturer, cannot be taken into account in determining the legal sufficiency of the written notification required by N.C.G.S. 20-305(6); the notification standing alone must contain the necessary information in order to be legally sufficient.

3. Jaguar's "Notification of Nonrenewal" letter to Star, dated 28 September 1984, was legally insufficient to satisfy the requirements of N.C.G.S. 20-305(6) that the notification of intent to nonrenew inform the dealer "of the reasons for the . . . nonrenewal."

4. Since the notification of nonrenewal was legally insufficient, the Commissioner of Motor Vehicles' determination that

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

good cause existed for the nonrenewal of Star's franchise, and that Jaguar acted in good faith, is void because the delivery of a legally sufficient notice of nonrenewal by Jaguar to Star is a prerequisite for the Commissioner to have jurisdiction to consider the matters raised by Star's petition to the Commissioner.

Jaguar excepted to the "reasons" given by the superior court in its judgment reversing the order of the Commissioner. Jaguar first contends that the "statement of the reasons for . . . nonrenewal" required of Jaguar by G.S. 20-305(6)c is different from a statement of legal grounds and a statement of legal grounds is not required under G.S. 20-305(6) to be included in a written notice of nonrenewal. Jaguar's second argument is that, contrary to the trial court's finding, Star's subjective knowledge of the reasons for nonrenewal should be taken into account when determining the sufficiency of the written notice of nonrenewal. Finally, Jaguar argues that the letter dated 28 September 1984 provided sufficient notice under the statute. We disagree with Jaguar's first two arguments. However, we agree with their final argument and hold that the letter dated 28 September 1984 provided sufficient notice of the reasons for nonrenewal and that the Commissioner was not deprived of jurisdiction because of insufficient notice to Star. Accordingly, we reverse in part the decision of the superior court and remand for further proceedings.

This case is essentially one of statutory interpretation. Any error in interpreting a statute is an error of law. "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Appeal of North Carolina Savings and Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981). "Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding." *Id.* at 466, 276 S.E.2d at 410.

G.S. 20-305(6)c2 provides that

[n]otification under this section shall be in writing; shall be by certified mail or personally delivered to the new motor vehicle dealer; and shall contain:

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

- I. A statement of intention to terminate, cancel or not to renew the franchise;
- II. A statement of the reasons for the termination, cancellation or nonrenewal; and
- III. The date on which such termination, cancellation or nonrenewal takes effect.

The statement of reasons provision of G.S. 20-305(6)c2 has not been judicially interpreted in this State. There is a dearth of case law from other states with statutes comparable to G.S. 20-305. However, we note that the language of the federal Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C.A. section 2801, et seq., is similar to G.S. 20-305. The PMPA provides that notification of termination or nonrenewal of a franchise relationship

- (1) Shall be in writing;
- (2) shall be posted by certified mail or personally delivered to the franchisee; and
- (3) shall contain—
 - (A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;
 - (B) the date on which such termination or nonrenewal takes effect. . . .

15 U.S.C.A. section 2804(c). The notice provision of the PMPA has been the subject of a number of federal cases from which we draw in interpreting the notice provision of G.S. 20-305(6)c2.

In *Svela v. Union Oil Co. of California*, 807 F.2d 1494 (9th Cir. 1987), the court stated that the reasons given in the notice of nonrenewal must "be specific enough for the franchisee to determine whether nonrenewal rests on lawful grounds." *Id.* at 1498. The court in *Svela* distinguished between "reasons" and "grounds" for nonrenewal and stated that "the fact that the reasons stated in the notice are insufficient as grounds for nonrenewal under the PMPA does not mean the notice is insufficient." *Id.* In *Brach v. Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982), the court stated that "[t]he PMPA requires only that the franchisor articulate with sufficient particularity the basis for the decision not to renew so that the franchisee can determine his rights under the Act." *Id.*

STAR AUTO CO. v. JAGUAR CARS INC.

[95 N.C. App. 103 (1989)]

at 1226, citing *Davy v. Murphy Oil Corp.*, 488 F.Supp. 1013, 1015 (W.D. Mich. 1980). *Accord Kessler v. Amoco Oil Co.*, 670 F.Supp. 853 (E.D. Mo. 1987); *Loomis v. Gulf Oil Corp.*, 567 F.Supp. 591 (M.D. Fla. 1983).

[1] We agree with the language of these federal cases and affirm the portion of the superior court's order which requires the written notice to the franchisee to state reasons for nonrenewal "with sufficient specificity to inform the dealer of the legal grounds" for nonrenewal. We also agree with the trial court's holding that information the franchisee has received, other than that included in the written notice, may not be taken into account in evaluating the legal sufficiency of the written notice to the franchisee. See *Davy*, 488 F.Supp. at 1016. But see *Sutton v. Atlantic Richfield Co.*, 539 F.Supp. 658, 660 (C.D. Cal. 1982) ("[W]hen [the franchisor's] nonrenewal notice is considered in light of all facts known to [the franchisee], it appears that [the franchisor] provided sufficient information for [the franchisee] to verify [the franchisor's] compliance with PMPA.").

[2] The superior court also found the written notice given by Jaguar to Star was inadequate. We disagree. The notice stated that Jaguar had made the decision not to renew Star's franchise as part of an "overall effort" to "upgrade and reorganize." Jaguar's letter also recited the factors that it used to make its nonrenewal determination: "facilities, location, after-sales service, financial resources and managerial skills and commitment." Star's alleged deficiencies in these areas were Jaguar's "reasons" for nonrenewal. We hold that the letter of 28 September 1984 was sufficiently specific to inform Star of Jaguar's basis for nonrenewal and to inform Star of its rights under the statute. We note that Jaguar, in proceedings following the notice, is limited to proof of the deficiencies it alleged in its letter as it seeks to show good cause for the nonrenewal. See *Midwest Petroleum Co. v. American Petrofina, Inc.*, 603 F.Supp. 1099, 1123 (E.D. Mo. 1985), *aff'd*, 855 F.2d 857 (8th Cir. 1988). Because the superior court erred in determining that the 28 September 1984 letter was not sufficient notification under the statute and consequently that the Commissioner of Motor Vehicles was without jurisdiction to hear the matter, we reverse that portion of the court's order. We hold that the letter notice to Star from Jaguar was adequate to comply with the statutory notice requirement. However, we remand the cause to the superior

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

court for consideration on the merits the issues of the adequacy of the good cause alleged for nonrenewal and Jaguar's good faith.

We note that Jaguar assigned as error the finding by the superior court that the Commissioner did not have jurisdiction to consider Star's claims of unfair and deceptive trade practices and fraud. Jaguar has failed to argue this assignment of error in its brief. It is deemed abandoned. Rule 28(b), N.C. Rules of App. Pro.

For the reasons stated, the order of the superior court is affirmed in part, reversed in part and remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

Judges PARKER and ORR concur.

P.A.W., A NORTH CAROLINA GENERAL PARTNERSHIP v. TOWN OF BOONE BOARD OF ADJUSTMENT

No. 8824SC1028

(Filed 15 August 1989)

Municipal Corporations § 30.10— zoning ordinance requiring buffer zone—placement of buffer—interpretation not arbitrary or capricious

Respondent's interpretation of a zoning ordinance which required a 100-foot buffer zone between a high-density planned development and a low-density residential district was not arbitrary or capricious, was in keeping with the restrictive tenor of the ordinance, and was in line with the evident purpose of the ordinance where respondent's interpretation required that the 100-foot buffer must be measured inward from the outer edge of the high-density zone.

APPEAL by petitioner from *C. Walter Allen, Judge*. Judgment entered 10 June 1988 in Superior Court, WATAUGA County. Heard in the Court of Appeals 13 April 1989.

Miller & Moseley, by Paul E. Miller, Jr., for petitioner-appellant.

Paletta, Hedrick & Berndt, by David R. Paletta, for respondent-appellee.

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

BECTON, Judge.

The petitioner-appellant, P.A.W., is a general partnership engaged in the business of developing residential properties. P.A.W. challenges the Town of Boone Board of Adjustment's interpretation of a zoning ordinance which requires a 100-foot buffer zone between a high-density planned development and a low-density residential district. The trial court reviewed the Board's decision on certiorari and found no error. P.A.W. appeals, seeking reversal of the judgment below on the ground that the Board's interpretation was arbitrary and capricious and erroneous as a matter of law. We affirm.

I

P.A.W. obtained a special use permit to develop a certain tract of land in Boone as a "Planned Development Housing Project" ("PD-H"). The tract, zoned R-3 for high-density residential use, adjoins land zoned R-1 for single family residential use. P.A.W. planned to purchase a lot in the R-1 district bordering the PD-H tract, intending to use it to satisfy the 100-foot buffer requirement found in Section 12.8.5.4(a) of the Town of Boone Zoning Ordinance. However, when the partnership submitted plans to the Town showing that the buffer would be located partially on the PD-H tract and partially on the adjoining R-1 lot, the Town Planner informed P.A.W. that the proposed use of the R-1 lot was impermissible under Section 12.8.5.4(a).

P.A.W. sought administrative review of the Town Planner's decision at the Board of Adjustment's 3 March 1988 meeting. Residents of the R-1 zone came to the meeting, asking the Board to protect their neighborhood from the high-density PD-H project by upholding the Town Planner's interpretation. The residents argued that permitting the R-1 lot to be used for the buffer would enable P.A.W. to build more PD-H units near the R-1 zone, and that the ordinance was "intended to protect R-1 from R-3, not R-3 from R-1." Counsel for the partnership also testified, emphasizing that no PD-H development would occur within the buffer area. After lengthy discussion, the Board postponed its decision to permit additional consideration of the language and the intended meaning of Section 12.8.5.4(a).

At the Board's next meeting, on 7 April 1988, counsel for P.A.W. explained his view that the language of the ordinance permitted the buffer "to come from either the R-1 or the R-3 zone."

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

After more discussion, six of the Board members voted to uphold the Town Planner's decision "on the grounds that the intent behind [Section 12.8.5.4(a)] was to require the buffer strip to be located within the zoning district within which the [PD-H] project is located." One Board member voted to overturn the decision; another abstained from voting.

P.A.W. sought judicial review of the Board's decision pursuant to N.C. Gen. Stat. Sec. 160-388. The trial judge concluded that the Board's decision "contain[ed] no errors of law" and that it was "not arbitrary and capricious."

On appeal, P.A.W. contends that the Board acted arbitrarily and capriciously in that it (1) failed to strictly construe the ordinance in favor of free use of the property; (2) ignored the ordinary meaning of the words in the ordinance; and (3) failed to recognize that the language in the ordinance does not clearly prohibit locating the PD-H buffer zone in the adjoining district, and thus, that the ordinance should be read to permit it.

II

P.A.W. correctly states the general rule that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property, and that everything not clearly within the scope of the language used should be excluded from its operation. *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). However, this rule is not employed to the exclusion of all other rules of construction. *See Anderson*, 3 *American Law of Zoning* Sec. 18.07 (1986).

When construing a municipal ordinance, "the *basic rule* is to ascertain and effectuate the *intent* of the legislative body" that enacted the ordinance. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (emphasis added). The justification for this rule is that the legislative body may well have intended to restrict free use of property in order to separate incompatible uses or to preserve the character of an ongoing use. As our Supreme Court stated in *Blades v. City of Raleigh*,

[t]he whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole.

280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972).

The legislative intent behind an ordinance should be determined according to the same rules that govern statutory construction, that is, by examining (1) the language, (2) the spirit, and (3) the goal of the ordinance. *Coastal Ready-Mix*, 299 N.C. at 629, 265 S.E.2d at 385. The effect of proposed interpretations also may be considered. See generally *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 20 N.C. App. 347, 348-49, 201 S.E.2d 508, 509, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). Because a board of adjustment is vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its judgment for the board's in the absence of error of law, or arbitrary, oppressive, or manifest abuse of authority. See generally *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 54-55, 344 S.E.2d 272, 274 (1986).

III

Applying the foregoing principles to the case before us, we conclude that the Board's construction of Section 12.8.5.4(a) was neither arbitrary and capricious nor erroneous as a matter of law. We turn first to the language of the ordinance.

A. Language of the Ordinance

The words in a zoning ordinance must be read in light of surrounding circumstances and given their ordinary meaning and significance. *Penny v. City of Durham*, 249 N.C. 596, 600, 107 S.E. 72, 75 (1959). Despite P.A.W.'s assertions to the contrary, the "ordinary meaning and significance" of the language in Section 12.8.5.4(a) is not readily discernible; instead, we find the language convoluted and ambiguous. That section, with bracketed numerals added to simplify discussion, provides:

Where a PD-H zoning lot of ten (10) acres or more in area adjoins land zoned residential [1] *without intervening permanent open space at least one hundred (100) feet in width serving as a separation for building areas*, [2] *the portion of the perimeter of the PD-H zoning lot so adjoining shall be planned and developed only for uses permitted by right in the adjoining*

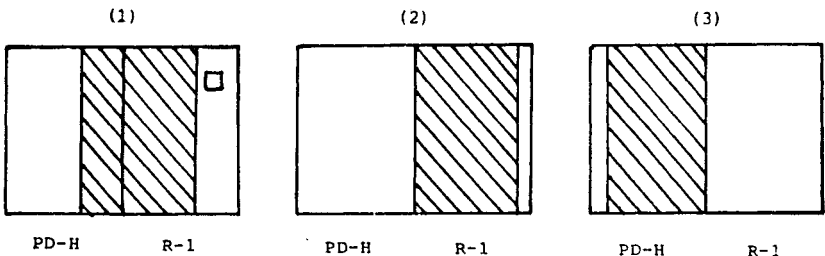
P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

residentially zoned land and in accord with all other requirements applicable to such land, [3] provided however that in lieu of development, *common open space for the PD-H to a depth of one hundred (100) feet from the district boundary* may be permitted. No intensive recreational use or off-street parking shall be permitted within seventy-five (75) feet of the PD-H zoning lot boundary in such circumstances

Boone, N.C., Zoning Ordinance Sec. 12.8.5.4(a) (emphasis added).

The ordinance obviously contemplates placement of a 100-foot buffer zone somewhere between the PD-H and the residential area. However, it is not entirely clear from what point the buffer area is to be measured. As illustrated by the diagram below, three different interpretations are possible: (1) the buffer could begin at a "building area" in the residential zone, overlapping into the PD-H zone; (2) the buffer could begin at the "perimeter" or "district boundary" of the PD-H zoning lot, extending from the outer limit of the PD-H zone into the residential zone, so that the entire buffer is located in the residential zone; or (3) the buffer could begin at the "perimeter" or "district boundary" of the PD-H zoning lot, extending only into the zone containing the PD-H, with no overlap into the residential zone.



P.A.W. argues that by choosing the third interpretation, the Board failed to give effect to the ordinary meaning of the words, ". . . without intervening permanent open space at least one hundred (100) feet in width serving as a separation for building areas" P.A.W. asserts that the plain meaning of that clause is that the 100-foot buffer must merely separate building areas, and therefore, that "the only reasonable interpretation" of the ordinance is that the buffer may be placed partially or totally outside the

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

PD-H zone. We disagree. In our view, the import of the quoted clause is that a buffer must be created if one does not already exist. However, nothing in that clause indicates where the buffer is to be located. The operative words are "intervening permanent open space"; we believe the words, "serving as a separation for building areas," simply explain the purpose, rather than the location, of the buffer.

Furthermore, P.A.W.'s interpretation fails to give effect to the second and third clauses in Section 12.8.5.4(a). *See State v. Jones*, 305 N.C. 520, 531, 290 S.E.2d 675, 681 (1982); *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978) (a provision in an ordinance may not be interpreted out of context but instead must be interpreted as part of the composite whole, giving effect to each provision). In contrast, the Board's interpretation is consistent with the language in the ordinance and is the only one that harmonizes all of the clauses. The second clause provides that any development of the buffer must be consistent with the adjoining residential zone, and indicates that the buffer so developed is to be located in the "portion of the *perimeter* of the PD-H zoning lot" adjoining the residential zone. The third clause provides that the buffer may remain undeveloped, and unequivocally places the buffer at "a depth of [100] feet from the *district boundary*." We believe that the references to "perimeter" and "district boundary" reasonably permitted the Board to conclude that the buffer is to be measured inward from the outer edge of the zone containing the PD-H project.

Finally, while P.A.W.'s interpretation of the ordinance is not irrational or unsupported, neither is the Board's. Our task on appeal is not to decide whether another interpretation might reasonably have been reached by the Board; instead, our task is simply to determine whether the Board's decision was arbitrary, capricious, or otherwise erroneous. When an ordinance is ambiguous and susceptible to differing interpretations, the ambiguity may be resolved, as here, by selecting the interpretation which yields a fair and reasonable result and which best promotes the intent of the body that adopted the ordinance. *See generally Pamlico Marine Co., Inc. v. N.C. Dept. of Natural Resources*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986); 3 *American Law of Zoning* Sec. 18.06.

B. Spirit of the Ordinance

The unmistakable spirit of the ordinance is that a PD-H is to be tightly controlled, especially as it relates to other residential

P.A.W. v. TOWN OF BOONE BD. OF ADJUSTMENT

[95 N.C. App. 110 (1989)]

districts, and in particular, as it relates to districts zoned R-1. For example, the ordinance provides that “[v]ehicular access to streets shall be limited and controlled,” and prohibits “intensive recreational use [and] off-street parking . . . within [75] feet of the PD-H zoning lot boundary.” See Boone, N.C. Zoning Ordinance Secs. 12.8.5.4(b), 12.8.5.4(a). The ordinance also sets out the minimum land area required for a PD-H in various zoning districts. *Id.* at Sec. 12.8.5.2. Significantly, the ordinance explicitly prohibits a PD-H in a district zoned R-1. *Id.* at Sec. 12.8.5.2(a). Finally, Section 12.8.5.4(a) requires a buffer to be located between a PD-H and *any* residential zoning district; R-1 is the Town’s most restrictive residential zoning classification. We conclude that the Board’s limiting interpretation of Section 12.8.5.4(a) clearly is in keeping with the restrictive tenor of the ordinance.

C. Goal Ordinance Seeks to Accomplish

The goal of the ordinance is to protect other residential districts, in particular, lower-density districts, from the effects of high-density multiple unit developments. With increased density comes increased traffic and noise, disruption of the quiet of an adjoining residential neighborhood, and, from time to time, a corresponding diminution in property values. Zoning ordinances must be adopted—and, we believe, should also be interpreted—“with reasonable consideration, among other things, as to the character of [a] district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout [a] city.” N.C. Gen. Stat. Sec. 160A-383 (1987). We conclude that the Board’s interpretation is in line with the evident purpose of the ordinance.

Were we to adopt P.A.W.’s stance and permit the buffer to be located in the R-1 zone, a greater number of PD-H units would be built closer to the R-1 single family structures, increasing the disruption attendant to the high-density development. This interpretation would, in our view, violate the legislative intent behind the ordinance. In addition, such a result would be tantamount to impermissibly substituting our judgment for the Board’s. No arbitrary action by the Board has been shown. To the contrary, “the record reveals that the Board made its final decision only after what appears to have been a thorough consideration of the merits” of P.A.W.’s contentions, the concerns of the residents of the adjoining neighborhood, and the language and intent of the ordi-

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

nance. *Chrismon v. Guilford County*, 322 N.C. 611, 639, 370 S.E.2d 579, 583 (1988). Under these circumstances, the Board's decision must stand.

IV

For the reasons stated, the decision of the trial court upholding the Board's interpretation of the ordinance is

Affirmed.

Judges JOHNSON and ORR concur.

WESTMINSTER COMPANY v. UNION MUTUAL STOCK LIFE INSURANCE
CO. OF AMERICA

No. 8818SC1221

(Filed 15 August 1989)

**Deeds § 19.3— development of business park—restrictive covenant
allowing retail use—bowling center included**

The term "retail" as used in a restrictive covenant between the parties could reasonably be construed to include a bowling center, and this construction was not contrary to the intent of the parties at the time they created the restrictions.

APPEAL by defendant from *Freeman, William H., Judge*. Judgment entered 22 July 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 May 1989.

This is a civil action instituted pursuant to the Declaratory Judgment Act, G.S. sec. 1-253 *et seq.*, in which the parties seek judicial construction of restrictive covenants entered into by them in connection with the development of a five phase business park.

Smith Helms Mulliss & Moore, by Larry B. Sitton, E. Garrett Walker, and Donna K. Smith, for plaintiff-appellee.

Bell, Davis & Pitt, P.A., by James R. Fox, for defendant-appellant.

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

JOHNSON, Judge.

After a trial on the merits of this action, the court made the following findings of fact to which defendant has not excepted. In December of 1983, plaintiff Westminster Company (Westminster) and defendant Union Mutual Stock Life Insurance Company (UNUM) entered into a real estate purchase agreement (the first agreement) whereby UNUM agreed to purchase from plaintiff 7.49 acres and also an office, warehouse and showroom building to be built by plaintiff, all to be known as Phase I of Oak Hollow Business Park. This was to be the first of five phases being developed by plaintiff on a parcel of real estate located in Greensboro, North Carolina to be known as Oak Hollow Business Park (the Park). The first agreement required, *inter alia*, that plaintiff subject all property within the Park to restrictive covenants acceptable to UNUM. Before closing the first agreement as to Phase I, the parties negotiated and agreed to the final form of their restrictive covenants which set forth certain generic categories of permitted uses. The recorded covenants, dated 20 December 1983, were to be applicable to all phases of the proposed Park and contained the following pertinent provision:

Section 1. Business Purposes. The property and all improvements thereon shall be used only for office, warehouse, showroom, service and repair centers (except motor vehicles), distribution facilities and centers, laboratories, research and development, manufacturing, *wholesale and retail as permitted under applicable zoning ordinances*, office equipment and supplies, sales and service, restaurants, copying and printing offices, office and secretarial service establishments and/or assembly uses, and for street and driveway purposes.

(Emphasis supplied.) UNUM acquired Phase I after the restrictive covenants were agreed to.

In December of 1985, the same parties entered into a second real estate purchase agreement (the second agreement) for the purchase of Phase II of the Park, which also included an office, warehouse and showroom building to be built by plaintiff.

Defendant UNUM is presently the owner of Phases I and II. Plaintiff owns Phases III, IV and V which have not yet been developed, although Phase V has been subdivided by recorded plat. Pursuant to both the first and second purchase agreements, UNUM

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

was granted a limited right of first refusal on all subsequent phases of the Park.

In September of 1987, plaintiff received an offer from Leiserv, Inc. (Leiserv) to purchase the property contemplated to be Phase V of the Park for the purpose of building a bowling alley thereon. In accord with the above noted right of first refusal, plaintiff notified UNUM of Leiserv's offer and offered Phase V to UNUM on the same terms as Leiserv's offer. Defendant UNUM declined to exercise its right of first refusal and also informed plaintiff of its position that the sale of Phase V for development as a bowling alley would violate section one (quoted above) of the restrictive covenants. The proposed sale of Phase V to Leiserv has not been consummated. However, Leiserv continues to be interested in acquiring Phase V if plaintiff can obtain a judicial determination that the development of that property as a bowling alley would not violate the terms of the restrictive covenants. To that end, plaintiff Westminster instituted this action.

We turn now to section one of the restrictive covenants, entitled "Business Purposes," which was agreed to by Westminster and UNUM. That section stated in part that one category of permitted uses was "wholesale and retail as permitted under applicable zoning ordinances." In reference to this clause, the trial court found as fact that at the time the covenants were recorded the Greensboro City Ordinances classified the entire Park property as Industrial H, and this classification continues to the present under the recodification of the ordinances. The court further found that bowling centers are, and were, a permitted use under Industrial H classification, and may be operated on Phase V without violating Greensboro zoning ordinances. The court also found that, during negotiation of the restrictive covenants, the parties' representatives reviewed the Table of Uses for property zoned Industrial H. Further, the court found that neither purchase agreement entered into by the parties obligated plaintiff to restrict Phase V solely for construction of an office building. The agreements also did not obligate plaintiff to build the proposed office building discussed and depicted in certain marketing materials Westminster provided to UNUM.

Lastly, the court found as fact the following:

17. The bowling center that Leiserv would construct and which would be operated by its parent, Brunswick Corporation, upon Phase V would be similar to other bowling facilities owned by

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

Leiserv. Leiserv's typical bowling facilities (including the one proposed to be located on Phase V) includes a pro shop in which bowling balls, shoes, gloves, clothing and other accessories are sold to the general public and a restaurant and bar at which food and beverages are sold to the general public. Thirty-two and two tenths percent (32.2%) of the 1987 revenues of Leiserv's present bowling center in Friendly Shopping Center, Greensboro, which would be relocated to Phase V, are derived from pro shop sales, restaurant and bar sales, vending machines sales, shoe rental and miscellaneous revenues. Leiserv pays North Carolina retail sales taxes on the revenues generated from these categories of activities. Such revenues are consistent with the past operations of Leiserv's typical facilities and are indicative of the operations of the bowling center that would be located on Phase V.

Based on these findings, the court concluded, as a matter of law, that a bowling center is a "retail" use as the term is used in the parties' covenants; that zoning ordinances applicable to the Park permit the operation of a bowling center; and that the parties' restrictive covenants do not prohibit the operation of a bowling center in the Park, including Phase V.

On appeal, defendant UNUM argues that the trial court erred in declaring that the restrictive covenants at issue permitted use of Phase V for a bowling alley because it was contrary to the stipulated evidence and applicable law. Specifically, defendant contends, *inter alia*, that the ruling was contrary to the manifest intent of the parties and the surrounding circumstances existing when the covenants were created.

Before addressing the merits of defendant's argument, we note again the fact that defendant did not except to any of the findings of fact made below. In a nonjury trial, such as this, findings of fact made by the court and not excepted to are "presumed to be supported by the evidence and are binding on appeal." *Jackson v. Collins*, 9 N.C. App. 548, 552, 176 S.E.2d 878, 880 (1970) (citations omitted). Our review is confined to determining whether the findings of fact support the conclusions of law and the judgment reached. *Salem v. Flowers*, 26 N.C. App. 504, 216 S.E.2d 392 (1975).

Turning now to the substantive law governing the construction of restrictive covenants, our Supreme Court has stated the following:

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions. *Callaham v. Arenson*, 239 N.C. 619, 80 S.E.2d 619

“Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.

“Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.” [*quoting* 20 Am. Jur. 2d, *Covenants, Conditions, etc.* sec. 187 (1965)].

Where the meaning of restrictive covenants is doubtful “the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the intention.” Annot., Maintenance, use, or grant of right of way over restricted property as violation of restrictive covenant, 25 A.L.R. 2d 904, 905 (1952).

Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238-39 (1967).

With these principles in mind, we consider the covenant at issue which states in pertinent part that one category of permitted uses includes “wholesale and retail as permitted under applicable zoning ordinances.” The parties have stipulated and the trial court found that bowling centers are a permitted use in the Table of Uses for the Industrial H zoning category in the Greensboro zoning ordinances. Therefore, the issue becomes whether the term “retail” can reasonably be construed to include a bowling center. We hold that it can be so construed and that a bowling center is a permitted use under the covenant at issue.

WESTMINSTER CO. v. UNION MUTUAL STOCK LIFE INS. CO.

[95 N.C. App. 117 (1989)]

Defendant urges that we apply a narrow meaning to the term "retail" to include only the business of selling tangible goods to the public. We are convinced, however, that "retail" has a broader connotation in both legal and everyday usage. In our increasingly service oriented economy, the term has come to mean any number of "retail activities" in which a product, service, or privilege is sold to the ultimate consumer. For example, the term "retail banking" or "retail financial services" are today in common parlance as well as legal usage. *See United States v. Manufacturers Hanover Trust Co.*, 240 F.Supp. 867, 896 (S.D.N.Y. 1965).

We also find support for a definition of "retail" which includes service activities in the North Carolina Retail Installment Sales Act, G.S. sec. 25A-1 *et seq.* which applies to sales of both goods and services. G.S. sec. 25A-1. Further, "service" is defined to include "privileges with respect to . . . recreation." G.S. sec. 25A-5(a)(2).

We believe that the term "retail" is legitimately susceptible of both the broader meaning discussed above and its more narrow definition of selling tangible goods to the public. In such a situation, under the principles set forth in *Long, supra*, we must favor the construction which allows for the free use of land.

Defendant urges, however, that finding the bowling center a permitted use is contrary to the intent of the parties at the creation of the covenants. To discern their intent, we must consider *all* the provisions in the instrument creating the restrictions, *Callaham, supra*, as well as the circumstances surrounding the creation of the covenants when language used is ambiguous. *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E.2d 824 (1971); *Long, supra*.

Defendant states in its brief that at the time of its two purchases, both parties intended the Park to be made up of "offices and traditional commercial enterprises," and not amusement enterprises. Defendant points to certain marketing materials supplied by plaintiff depicting the proposed design and landscaping of the entire Park. Nothing, however, in either purchase agreement required plaintiff either to subdivide the remaining property in the Park or to construct an office building on Phase V.

The restrictions at issue were created when defendant was involved in purchasing the Phase I office, warehouse and showroom building. The remainder of the Park was undeveloped. The parties

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

specifically did not at that time limit the Park only to office, warehouse or showroom use. Rather, the scope was expanded to fourteen generic uses which even included manufacturing. Under defendant's exhibit 18, a summary of the zoning ordinances' Table of Uses, "manufacturing" could include the manufacture of such things as acetylene gas, machine tools, paint, iron and steel products, and tar. Defendant also agreed to allow "wholesale . . . as permitted under applicable zoning ordinances." Again, under defendant's exhibit that would permit uses such as automobile dealerships, the sale of farm machinery, and lumberyards.

It is difficult to imagine that defendant agreed to permit uses such as manufacturing acetylene gas, and automobile dealerships, and at the same time intended to prohibit a bowling center as less compatible with its office, warehouse and showroom building. This is especially true of the proposed bowling center which the court found would derive about one-third of its revenue from sales.

To summarize, we find that the term "retail" as used in the covenant at issue may reasonably be construed to include a bowling center. We also do not consider this construction to be contrary to the intent of the parties at the time they created the restrictions. Therefore, we hold that the trial court was correct in holding that the operation of a bowling center is a permitted use under the parties' restrictive covenants.

Affirmed.

Judges COZORT and GREENE concur.

NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, A NORTH
CAROLINA CORPORATION, PETITIONER v. DUKE POWER COMPANY, A NORTH
CAROLINA CORPORATION, RESPONDENT

No. 8810SC1340

(Filed 15 August 1989)

Appeal and Error § 6.2— order compelling arbitration interlocutory—no right of appeal

An order compelling arbitration was interlocutory and plaintiff had no right of appeal; moreover, no substantial right

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

of plaintiff was affected since the parties' agreement provided that disputes as to the applicability of arbitration provisions should "without limitation" be submitted for arbitration, and plaintiff's complaint sought monetary damages only, a remedy which would not be affected by delaying review until a final judgment.

APPEAL by plaintiff from *Herring, D. B., Jr., Judge*. Order entered 9 September 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 8 June 1989.

This is a civil action in which plaintiff appeals from an order staying litigation and compelling plaintiff to arbitrate, pursuant to G.S. sec. 1-567.3(a), those issues determined by the arbitrator to be arbitrable.

Moore & Van Allen, by Joseph W. Eason and Elizabeth M. Powell, for plaintiff-appellant.

Kennedy Covington Lobbell & Hickman, by Clarence M. Walker and Myles E. Standish, and Senior Vice President and General Counsel, Steve C. Griffith, Jr., and Deputy General Counsel, Ellen T. Ruff, and Associate General Counsel, Ronald L. Gibson, for defendant-appellee.

JOHNSON, Judge.

Plaintiff instituted this action on 21 April 1988 by the filing of its complaint which alleged *inter alia* that defendant was in default under a contract known as the "interconnection agreement" which constitutes part of plaintiff's purchase from defendant of an interest in the Catawba nuclear generating station. Defendant responded on 15 June by serving a notice of intention to arbitrate issues raised in plaintiff's complaint. The notice also stated defendant's intent to arbitrate the issue of the applicability of arbitration to the issues raised by plaintiff. On 24 June, defendant filed motions to compel arbitration and to stay the court action. On 1 July, plaintiff filed a motion to stay the arbitration proceeding and a motion for a preliminary injunction and a temporary restraining order. Plaintiff was granted the temporary restraining order that day.

On 11 July, the trial court denied plaintiff's motion for preliminary injunction and ordered plaintiff to respond to defendant's

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

demand for arbitration. Plaintiff so responded. On 9 September, after considering arguments of counsel, briefs and affidavits, the trial court denied plaintiff's motion to stay arbitration and granted defendant's motion to stay the court action and compel arbitration. Plaintiff was ordered to arbitrate pursuant to G.S. sec. 1-567.3(a). The order also held that the arbitrator must decide the arbitrability of the issues raised by plaintiff's complaint.

Plaintiff filed an appeal on the 9 September order to this Court in apt time. On 12 September, plaintiff moved the trial court to stay its previous order of 9 September. This motion was denied on 22 September. On 21 October, plaintiff filed with this Court a petition for writ of certiorari to review the 9 September order and for writ of supersedeas to stay that order pending review. Both writs were denied.

Plaintiff North Carolina Electric Membership Corporation ("NCEMC") is a cooperative electric member corporation organized under North Carolina law. Defendant Duke Power Company ("Duke") is a public utility serving customers in both North and South Carolina.

NCEMC and Duke entered into three contracts in 1980 arising from Duke's sale of a 56.25% undivided interest in unit number one of the Catawba nuclear station near York, South Carolina to NCEMC. One of those contracts, the interconnection agreement (the "agreement") is the subject of this action.

Pursuant to the agreement, the energy produced by plaintiff's entitlement to power is known as "retained capacity and energy" when it is used by plaintiff. Plaintiff sells this retained capacity and energy to its member cooperatives. A portion of plaintiff's capacity and energy entitlement is sold to defendant and is designated under the agreement "purchased capacity and energy." One of the exhibits to the interconnection agreement sets forth the methodology for arriving at prices for purchased capacity and energy. All of the breaches of contract alleged by NCEMC relate to the pricing of purchased capacity.

The following provisions are relevant to the parties' dispute regarding the price of purchased capacity and the arbitrability of the discrepancies claimed by plaintiff. Section 17.3 of the agreement provides that "Duke shall compute the charge for Purchased Capacity actually due and payable to NCEMC for the preceding calendar year. . . . If NCEMC successfully challenges Duke's com-

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

putation pursuant to Article 24 and . . . a higher payment is determined, Duke shall make such payment to NCEMC.”

Article 24 deals with challenges and dispute resolution. Section 24.1 states in part the following:

(A) the classification, computation, and other actions and determinations called for by this Agreement are subject to challenge by any party not initially making such decision or taking such action. Except as provided in Section 24.1(B) hereof, any unresolved dispute arising out of or relating to the matters set forth in this Agreement shall be settled by arbitration in accordance with the procedures set forth in this Article, . . . *In addition, disputes relating to the arbitration provisions of this Agreement, including without limitation disputes as to the applicability of such provisions to a particular dispute, shall be submitted to arbitration.* (Emphasis added.)

. . . .

(B)(2) Any dispute arising out of or relating to Article 22 or 23 shall not be submitted to or determined by arbitration unless the affected parties agree to do so in writing.

The article 23 referred to above concerns defaults under the agreement.

On 7 August 1987, plaintiff wrote defendant a letter it termed a “notice of default” stating that defendant had incorrectly calculated the payments due plaintiff for purchased capacity for 1985 and 1986. In October of 1987, plaintiff again wrote defendant as to the amounts it considered to be due for 1985, 1986 and 1987. Plaintiff enclosed its recalculation of the purchased capacity charges, demanded payment of the difference, and informed Duke that plaintiff considered it to be in default.

NCEMC asserts in this civil action arising out of Duke’s refusal to pay the purchased capacity charges as recalculated by NCEMC that the nonpayment constitutes an “Event of Default” which under section 23.1(A) of the parties’ agreement is not subject to arbitration. Defendant, on the other hand, urges that plaintiff is actually challenging defendant’s calculation of purchased capacity charges and that such a dispute is arbitrable under section 24.1(a) of their agreement.

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

The initial question before us is whether plaintiff has the right to appeal an order compelling arbitration. We hold that the order is interlocutory and plaintiff has no right of appeal.

The 9 September 1988 order from which plaintiff seeks appeal compelled plaintiff to participate in arbitration proceedings pursuant to G.S. sec. 1-567.3(a). This precise question of the appealability of an order compelling arbitration has previously been decided by a different panel of this Court in *The Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984). This Court in *The Bluffs* held that an order compelling arbitration was interlocutory and did not affect a substantial right. We find the reasoning in *The Bluffs* persuasive and its holding dispositive of the case before us. Further, we are bound by it as precedent. In *the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

In *The Bluffs*, this Court analyzed relevant portions of the Uniform Arbitration Act as enacted by North Carolina in Article 45A. It noted that there are six situations under the Act in which an appeal may be taken:

- (1) An order denying an application to compel arbitration made under G.S. 1-567.3;
- (2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this Article.

The Bluffs, 68 N.C. App. at 285, 314 S.E.2d at 292. The Court noted the conspicuous absence from the list of an appeal from an order compelling arbitration. Such an order, the Court held, is interlocutory and not immediately appealable. *Id.* at 285, 314 S.E.2d at 293.

There is no appeal from an interlocutory order unless it affects a substantial right. G.S. sec. 7A-27(d) and G.S. sec. 1-277(a). Plaintiff contends that, unlike the situation in *The Bluffs* in which the Court found that no substantial right was affected by the order compelling

N.C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

[95 N.C. App. 123 (1989)]

arbitration, a substantial right is affected in the instant case. We disagree.

A substantial right is one which may be lost or irreparably affected if the order is not reviewed before final judgment. *Blackwelder v. State Department of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). NCEMC's complaint seeks monetary damages only. If it should prevail on the merits of its claim, plaintiff would be awarded all damages proved plus interest. This right will not be affected by delaying review until a final judgment.

Plaintiff argues, however, that lack of review will mean impairment of its right to withhold from arbitration an issue it did not agree to arbitrate, namely any dispute regarding default under article 23. We disagree.

Section 24.1, quoted in relevant part above, states first that any dispute under the agreement is to be arbitrated unless it arises out of articles 22 or 23. The section goes on to say that "in addition," disputes as to the applicability of the arbitration provisions shall "without limitation" be submitted for arbitration. Here the parties dispute whether plaintiff's claim against defendant is properly classified as a default which would be nonarbitrable, or a challenge to Duke's computation of purchased energy charges which under section 24.1 would be subject to arbitration. In a situation such as this where there is a question as to the applicability of the arbitration provisions, the language of the agreement clearly provides that a dispute as to the applicability of the arbitration provisions shall itself be submitted to arbitration. Plaintiff may present its argument that its dispute is nonarbitrable at the arbitration proceeding.

We are also unconvinced by plaintiff's argument that lack of immediate appeal will impair its asserted right to a timely judicial determination of its rights under section 23.4 of the agreement which deals with disputes concerning default. This section provides that in the event that Duke disputes an asserted default, it shall perform the disputed obligation or pay the amount at issue, but may do so under protest. Plaintiff's asserted right to this payment assumes the very point in issue, that the dispute in question is a default. Under the parties' agreement, the arbitrability, and therefore the nature, of the dispute must itself be submitted to arbitration. Further, plaintiff's objective under section 23.4 is the receipt of funds which it would receive if successful on the merits.

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

Delay in the possible payment due to arbitration would not be impairment of a substantial right. *See Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

By its third Assignment of Error, plaintiff claims the court erred in granting defendant's motion to require that the arbitrator determine the scope of the arbitration. We disagree. In accord with our analysis above of section 24.1 that disputes as to the applicability of the arbitration provisions be submitted to arbitration, it is clear that under the parties' own agreement, only the arbitrator could properly determine the scope of arbitration.

We find plaintiff's last Assignment of Error to be meritless and we do not address it.

This appeal is

Dismissed.

Judges COZORT and GREENE concur.

ISOM J. PEACE, EMPLOYEE, PLAINTIFF v. J. P. STEVENS COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC1159

(Filed 15 August 1989)

Master and Servant § 69 — workers' compensation — amount of compensation — statutes in effect at time of total disability controlling

The Industrial Commission erred in limiting plaintiff's award of compensation for total disability to the maximum total compensation payable pursuant to the Workers' Compensation Act in effect in 1973 when plaintiff became partially disabled rather than the statutes in effect in 1981 when he became totally disabled.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission filed 20 June 1988. Heard in the Court of Appeals 10 May 1989.

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

On 4 August 1982 plaintiff, Isom J. Peace, filed a claim for workers' compensation benefits alleging that he suffered from an occupational disease caused by his exposure to cotton dust and other substances. A hearing was conducted on 13 August 1984. After considering the depositions and medical reports of a doctor selected by the Industrial Commission (Commission) and a doctor chosen by plaintiff along with other exhibits, Deputy Commissioner Brenda B. Becton filed an opinion and award on 18 June 1987. She found and concluded that plaintiff, in fact, suffered from an occupational disease, chronic obstructive pulmonary disease. She also found that "plaintiff's employment with J. P. Stevens from 1966 until 1975 was his last injurious exposure to the hazards of his occupational disease." The Deputy Commissioner further concluded that plaintiff became partially disabled on 1 January 1973 and that he was entitled to an award of two-thirds of the difference between his average weekly wage and his actual earnings for a period of 300 weeks. In addition, the Deputy Commissioner determined that beginning 1 November 1981 plaintiff became totally incapacitated due to his occupational disease and, as a consequence, was entitled to compensation of \$139.79 per week beginning 1 November 1981 for so long as he remained totally disabled. Finally, the award and order required defendants to pay all plaintiff's medical expenses related to his chronic obstructive pulmonary disease. Defendants appealed this award to the Industrial Commission.

On 20 June 1988 the Commission issued its opinion and award. The Commission vacated the Deputy Commissioner's findings of fact and conclusions of law and, based upon its review of the record, made new findings and conclusions.

The full Commission concluded that plaintiff suffered from an occupational disease which resulted in his being partially disabled beginning 1 January 1973. They also found that on or about 1 October 1981 plaintiff became totally disabled as a result of his occupational disease. The Commission awarded plaintiff compensation "at the rate of \$56.00 per week beginning January 1, 1973" for his partial disability. In addition, as compensation for his total disability the Commission concluded that "[p]laintiff is entitled to compensation at the rate of \$56.00 per week for 400 weeks beginning October 1, 1981. G.S. 97-29. However, the total compensation due in this case cannot exceed \$20,000.00, the maximum in effect on January 1, 1973." The Commission also ordered that plaintiff's continuing medical expenses be paid by defendants so long as the

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

treatment provided relief. Finally, the Commission noted that in the event "plaintiff's cause of action for total disability is a new claim when he became totally disabled on October 1, 1981, his average weekly wage at that time would entitle him on [sic] to 66 $\frac{2}{3}$ percent of \$52.42 per week, this being his earnings for the 52 weeks prior thereto." From the full Commission's award and opinion, plaintiff appeals.

Charles R. Hassell, Jr. for plaintiff-appellant.

Mullen, Holland, Cooper, Morrow, Wilder & Sumner, by H. Randolph Sumner, for defendant-appellees.

EAGLES, Judge.

Plaintiff complains that the Commission erred in limiting his award of compensation for total disability to the maximum total compensation payable pursuant to the Workers' Compensation Act in effect in 1973 rather than the statutes in effect in 1981 when he became totally disabled. We agree and reverse the Industrial Commission's opinion.

The facts here are not in dispute. Plaintiff was born in 1911 and completed the eighth grade in school. During 1939 plaintiff first became employed in the textile industry and he continued to work in the mills until 1975. During this time he worked primarily as a loom fixer or mechanic. While working in the mills he was exposed to cotton dust and other synthetic materials. The Commission found that plaintiff had no respiratory problems as a child, but that he noticed a shortness of breath and productive cough sometime in 1966 when he was working for defendant Stevens at its Shelby plant. As he continued working in the mills his symptoms worsened causing him to miss significant amounts of work from 1973 through 1975. After April 1975 plaintiff's symptoms were so severe that he could no longer work in the mills. He obtained part-time work as a security guard and until October 1981 worked at various other jobs part time. Because his breathing problems had continued to worsen, he stopped working completely in 1981.

The Commission specifically found that plaintiff has "severe chronic obstructive pulmonary disease which was classified as Class IV according to AMA criteria or greater than 50% whole body impairment," and that "[h]is cumulative exposure to cotton dust in his several employments placed him at an increased risk of

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

developing chronic obstructive pulmonary disease compared to members of the general public without that exposure.”

The Commission’s opinion finds that plaintiff was disabled initially on 1 January 1973 and concludes that “[t]he rights and liabilities of the parties are controlled by the law in effect on that date.” As of 1 January 1973 G.S. 97-41 limited total compensation paid under the Workers’ Compensation Act (Act) to \$20,000. However, the General Assembly repealed G.S. 97-41 effective 1 July 1975. Here the Commission limited plaintiff’s total compensation award to \$20,000.

Plaintiff argues that this court’s decision in *Smith v. American and Efird Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *modified and affirmed*, 305 N.C. 507, 290 S.E.2d 634 (1982), requires that the Commission’s award be reversed. We agree.

In *Smith* the Court of Appeals described the issue as whether “an employee may recover under the Workers’ Compensation Act [the Act] for disability due to an occupational disease which at its inception was only partially debilitating, but which developed over time into a totally disabling condition.” *Id.* at 485, 277 S.E.2d at 86-87. Like the instant case the plaintiff in *Smith* had initially been declared partially disabled due to an occupational disease. The Commission awarded plaintiff compensation for his partial disability. All of the evidence before the Commission further indicated that as a result of plaintiff’s disease he subsequently became totally disabled. However, the Commission in *Smith* failed to make an explicit finding that plaintiff was totally disabled and no compensation was awarded to plaintiff as a result of his total disability. While recognizing that the case had to be remanded for this critical finding, our court’s opinion discussed the ultimate issue of plaintiff’s entitlement to compensation for his total disability so as to avoid further costs and delay. The court determined that if upon remand plaintiff was found totally disabled, then he would be entitled to full compensation for *both* his partial disability and his total disability so long as the periods of partial and total disability did not overlap. *Id.* at 490, 277 S.E.2d at 89.

The *Smith* court next addressed whether the plaintiff should be compensated for his total disability under the 1970 or 1978 version of the Act. The employee had first become disabled in 1970, but was not permanently and totally disabled until 1978. There we stated the following:

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

We are well aware that the law of this jurisdiction is that the applicable version of the statute is the one in effect when the disability occurs. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979). As applied to the present facts, however, this simple rule can become difficult to apply unless one bears in mind the rationale for the rule as stated in the case: The date of disability is the date upon which the employee's claim accrues and the date upon which the employer becomes liable. *Id.* at 644, 650, 256 S.E.2d at 697, 701. We read *Wood* to require that a given statute within the Act be applied as it read at the time plaintiff first gained rights and defendant first became liable under that statute. We do not understand the *Wood* holding to require that the entire Workers' Compensation Act be applied as it existed at the time plaintiff's right to proceed under any provision of the Act first accrued. We believe plaintiff could become disabled, for the purpose of determining the applicable version of a statute, at different times under different statutes.

In 1970, plaintiff became partially disabled under G.S. 97-30 and thus became entitled to recover for partial disability under the 1970 version of that statute. Plaintiff had no right to claim compensation, nor was the employer exposed to liability, under G.S. 97-29 until 1978 when plaintiff appears to have become totally disabled; therefore, plaintiff became disabled, for purposes of G.S. 97-29, on the date in 1978 when his disability became total, and the version of G.S. 97-29 then in effect should be applied in determining the compensation to be awarded thereunder.

Id. at 491, 277 S.E.2d at 90.

On appeal our Supreme Court "approve[d] and adopt[ed] as [their] own the well-reasoned and well-documented decision of the unanimous panel of the Court of Appeals." *Smith v. American & Efirid Mills*, 305 N.C. 507, 510, 290 S.E.2d 634, 636 (1982). We find no distinction between the instant case and *Smith* and, accordingly, we hold that when determining plaintiff's compensation for his total disability the 1981 version of the Act applies.

Defendants contend that two cases subsequent to *Smith* require a contrary result: *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E.2d 215 (1983), and *Gregory v. Sadie Cotton Mills*, 90 N.C. App. 433, 368 S.E.2d 650, *disc. rev. denied*, 322 N.C. 835, 371 S.E.2d

PEACE v. J. P. STEVENS CO.

[95 N.C. App. 129 (1989)]

277 (1988). Both are distinguishable. In *Dowdy* plaintiff employee quit his job in 1976 because of breathing problems. He had missed work due to those breathing problems beginning in 1973. Employee did not file a claim for workers' compensation benefits until 1978. The employer argued that the employee's claim was not timely filed pursuant to G.S. 97-58. The Industrial Commission entered an award in favor of the employee due to his total disability beginning 1 March 1976. The Court of Appeals affirmed the Commission's ruling. The Supreme Court found "that the plaintiff was disabled within the meaning of G.S. 97-58(c) no later than 1974 and that the claim filed by him on 24 February 1978 does not establish timely filing required to confer jurisdiction on the Industrial Commission to hear the claim." *Id.* at 705, 304 S.E.2d at 218. In the instant case defendants do not contend that plaintiff's claim for workers' compensation benefits was not timely and, accordingly, *Dowdy* does not apply here.

Our decision in *Gregory* is distinguishable on its facts. There the employee was found to be totally disabled on 1 October 1968 and was awarded compensation based on the version of the statute, G.S. 97-29, in effect in 1968. The employee argued that she was only partially disabled on 1 October 1968 and was not totally disabled until 13 January 1980. She sought total disability compensation pursuant to the 1980 version of G.S. 97-29. In *Gregory* we held that the record supported the Commission's finding that the total disability began 1 October 1968 and, accordingly, we upheld the Commission's award. Here defendants do not assign as error the Commission's findings about the nature and extent of plaintiff's disabilities.

Plaintiff also excepted to the Commission's determination of his average weekly wage on 1 October 1981. Because plaintiff failed to address that issue in his brief, he has abandoned that issue. N.C. App. R. 28(a).

In summary, we reverse the portion of Commission's opinion and award which ordered that plaintiff's total disability compensation be based on the 1973 version of the Act and remand the case to the Commission for computation of plaintiff's compensation benefits in accordance with this opinion.

Reversed and remanded.

Judges PARKER and ORR concur.

GEORGE W. KANE, INC. v. BOLIN CREEK WEST ASSOC.

[95 N.C. App. 135 (1989)]

GEORGE W. KANE, INC., PLAINTIFF v. BOLIN CREEK WEST ASSOCIATES, A NORTH CAROLINA LIMITED PARTNERSHIP; ALAN E. RIMER, ARTHUR R. COGSWELL, WERNER HAUSLER AND RAYMOND H. LANGE, INDIVIDUALLY AND AS GENERAL PARTNERS OF BOLIN CREEK WEST ASSOCIATES, DEFENDANTS

No. 8814SC1344

(Filed 15 August 1989)

1. Arbitration and Award § 7— partners not named in arbitration proceeding—individual liability for award

The former general partners of a limited partnership could be held jointly and severally liable for an arbitration award against the limited partnership, although they were not named individually as parties to the arbitration proceeding, where plaintiff sued the partnership and the former partners both individually and in their representative capacity, and the prayer for relief asked for enforcement of the arbitration award against all defendants jointly and severally; the former partners were thus aware that plaintiff's complaint sought to hold them individually liable for any arbitration award; and, with this knowledge, the former partners filed an answer requesting that plaintiff's action be stayed pending determination of the claims in the arbitration proceeding.

2. Estoppel § 4.3— equitable estoppel to deny joint and several liability

The former general partners of a limited partnership are equitably estopped from denying joint and several liability for an arbitration award against the partnership where they were aware that plaintiff's complaint sought to hold them individually liable for any arbitration award, and the general partners requested in their answer that the action be stayed and that the court order arbitration of all matters raised in plaintiff's complaint.

APPEAL by defendants from Order of *Judge Thomas H. Lee*, entered 4 August 1988 in DURHAM County Superior Court. Heard in the Court of Appeals 8 June 1989.

GEORGE W. KANE, INC. v. BOLIN CREEK WEST ASSOC.

[95 N.C. App. 135 (1989)]

Mount White Hutson & Carden, P.A., by Stephanie C. Powell, for plaintiff appellee.

Poyner & Spruill, by David W. Long, Susan K. Nichols, Kenneth L. Burgess, Mary Beth Johnston, and Donna Richter, for defendant appellants.

COZORT, Judge.

This appeal is from an Order of the Superior Court enforcing an arbitration award against general partners who were removed as partners while the arbitration proceeding was pending. We find that the former general partners were allowed to participate at the arbitration hearing, and we affirm the trial court's Order. The facts follow.

Plaintiff contracted to build an office building for defendants. A dispute arose concerning the amount plaintiff was owed under the parties' contract. Under their agreement arbitration of all disputes was required.

In June 1986, the plaintiff filed a demand for arbitration against defendant Bolin Creek West Associates (Bolin Creek), a North Carolina Limited Partnership. The partnership asserted a counterclaim in arbitration. The four general partners of defendant Bolin Creek are the individual defendants named in this action. The individual defendants/general partners were not named as parties to the arbitration proceeding plaintiff filed against defendant Bolin Creek.

In the summer of 1986, defendant Bolin Creek filed suit in the United States District Court seeking to remove the individual defendants as general partners of the partnership. The federal magistrate recommended that the individual defendants be enjoined from acting as general partners and be required to follow the removal provisions of the partnership agreement. His findings and recommendation were adopted by the District Court. The magistrate specifically found, however, that, even if the individual defendants were removed as general partners, they retained sufficient interest in the arbitration with plaintiff to participate in it, since each individual defendant would be absolved of liability if the partnership won the arbitration.

In January of 1987, plaintiff filed this action, which requested payment on various promissory notes. Plaintiff also requested a

GEORGE W. KANE, INC. v. BOLIN CREEK WEST ASSOC.

[95 N.C. App. 135 (1989)]

stay of the action until after the arbitration and further requested enforcement of the arbitration award. The individual general partners were named as defendants in their individual capacity and in their representative capacity, along with the defendant Bolin Creek.

The defendant Bolin Creek and the individual defendants/general partners answered and moved to stay the proceedings and to compel arbitration. Defendants stated in their answer that no partners could be liable to plaintiff unless the partnership itself was liable to plaintiff. They further stated that, pending determination of the partnership's liability in arbitration, plaintiff's suit against any individual partner was barred.

The arbitration proceeding was held in May 1987. In June, the arbitration panel awarded plaintiff \$439,735.80, plus interest, fees and costs. The partnership was awarded nothing on its counterclaim. Plaintiff then moved to have the arbitration award confirmed by the trial court and gave notice of the motion to the partnership and the individual defendants. The trial court confirmed the arbitration award against the partnership.

Plaintiff moved for summary judgment to hold the individual defendants jointly and severally liable under the arbitration award. The trial court granted summary judgment for plaintiff. From that Order the individual defendants appeal.

Summary judgment is proper when there is no genuine issue of material fact and when the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1988).

[1] Defendants contend on appeal that they had no notice of the arbitration proceeding since they were not named as parties in that proceeding. Citing *Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), defendants argue that plaintiff's judgment binds them only to the extent of the partnership assets and not jointly and severally on the partnership's debt because they were not named individually in the arbitration proceeding. In *Stevens* we noted that "[a]ctual notice of a suit against the partnership will not cure the requirement that a partner must be served with a summons to be held individually liable." *Id.* at 352-53, 346 S.E.2d at 181. Defendants argue that nothing in plaintiff's demand for arbitration put defendants on notice that plaintiff sought to impose on them individual liability. We find *Stevens* distinguishable.

GEORGE W. KANE, INC. v. BOLIN CREEK WEST ASSOC.

[95 N.C. App. 135 (1989)]

In *Stevens*, plaintiff sued a law partnership and one of two partners individually. After the claim against the partner named individually was dismissed, Stevens attempted to amend his complaint, after the statute of limitations had expired, to name the other law partner individually. This Court affirmed summary judgment for the unnamed partner, holding that he had not been sued individually. He had no opportunity to protect his individual interests. By the time he was on notice individually, the statute of limitations had expired.

In this case, defendants were sued individually, and the prayer for relief asked for enforcement of the arbitration award against all defendants, including the individual defendants, *jointly and severally*. Thus, the individual defendants were on notice that plaintiff's complaint sought to hold them liable for any award made in the arbitration. With that knowledge, the defendants filed an answer requesting that this action be stayed pending determination of the claims in the arbitration proceeding. Therefore, defendants were on notice that the arbitration proceeding would affect them *individually*, and not only as partners, as was the case in *Stevens*.

[2] We further find that defendants should be equitably estopped from denying joint and several liability. Our Supreme Court has stated:

"Equitable estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

American Exchange Nat'l Bank v. Winder, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929) (quoting 21 C.J., 1113, sec. 116).

Estoppel principles are appropriately applied in this case because defendants specifically requested in their answer that this action

GEORGE W. KANE, INC. v. BOLIN CREEK WEST ASSOC.

[95 N.C. App. 135 (1989)]

be stayed and that the court order arbitration of all matters raised in plaintiff's complaint. Defendants cannot now complain that they are bound by the arbitration that they requested.

We also find no merit to defendants' argument that they had no opportunity to be heard. Defendants had notice six months before the arbitration hearing that plaintiff intended to hold them jointly and severally liable for the partnership's debts. Furthermore, defendants were not barred from representing their *individual* interests in the arbitration proceeding, as the federal magistrate so found when he recommended that defendants be enjoined from representing the partnership *as general partners*:

[T]he Court finds no reason why [defendant Rimer] could not participate in the arbitration against Kane even if he were not a general partner.

* * * *

. . . Even if they are removed as general partners, defendants will retain an interest in holding the general contractor [plaintiff] solely responsible for the construction delays since this will relieve them from liability either as members of the architectural firm or as general partners.

The record is clear that defendant Rimer did appear and participate in the arbitration hearing. Defendants clearly were not judicially precluded from participating in arbitration in their individual capacities. In sum, we find that defendants had ample notice and opportunity to protect their interests, chose not to do so in the arbitration proceeding, and cannot now complain of their decision.

Defendants admitted in their answer that they were general partners at the time plaintiff filed this suit and were jointly and severally liable for the debts of the partnership. The arbitration award by the trial court constitutes an adjudication of the amount owed plaintiff under its contract with defendants. *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 676, 242 S.E.2d 785, 794 (1978). Therefore, there was no genuine issue of material fact, since the confirmation order was evidence of the debt. Plaintiff was entitled to judgment as a matter of law because defendants admitted joint and several liability. *See also* N.C. Gen. Stat. § 59-45 (Replacement 1982); N.C. Gen. Stat. § 1A-1, Rule 56 (1988). The court's Order of summary judgment is affirmed.

STATE v. FENNELL

[95 N.C. App. 140 (1989)]

The parties stipulated at oral argument that the judgment contains a clerical error in that it mistakenly provides for interest at 10.5% per annum. The parties agreed that interest should run at 10.25% per annum, as the arbitration award and the Order confirming the award provide. Therefore, we remand for correction of the judgment to provide for interest at 10.25%.

Summary judgment affirmed; remanded for correction of clerical error.

Judges JOHNSON and GREENE concur.

 STATE OF NORTH CAROLINA v. JEFFREY FENNELL

No. 888SC1177

(Filed 15 August 1989)

1. Constitutional Law § 17; Weapons and Firearms § 2— right to bear arms—no right to carry sawed-off shotgun

A charge against defendant for possessing a sawed-off shotgun in violation of N.C.G.S. § 14-288.8 did not violate defendant's right to bear arms under the Second Amendment of the United States Constitution or Article I, Section 30 of the North Carolina Constitution, since the Second Amendment does not protect defendant's right to carry a sawed-off shotgun but instead guarantees the right to bear arms only in connection with a "well regulated militia"; the statute does not completely ban a class of weapons protected by the N.C. Constitution, but permits possession of shotguns with the exception of short-barreled ones; this regulation is reasonable and bears a fair relation to the preservation of the public peace and safety; the State can regulate more than just the time, place, and manner in which a firearm is borne; and the State can regulate the length of a particular firearm as long as there is a reasonable purpose for doing so.

2. Weapons and Firearms § 1— possessing sawed-off shotgun— operability not an element

Operability is not an element of the crime to be proved by the State in a prosecution for possession of a "weapon of mass

STATE v. FENNEL

[95 N.C. App. 140 (1989)]

death and destruction" in violation of N.C.G.S. § 14-288.8; rather, defendant bears the initial burden of producing evidence of inoperability, and simply raising the issue of potential inoperability is not sufficient to shift the burden of proof to the State.

3. Weapons and Firearms § 2— possession of disassembled sawed-off shotgun—weapon of mass death and destruction

A disassembled sawed-off shotgun qualifies as a weapon of mass death and destruction under N.C.G.S. § 14-288.8, and defendant was therefore properly tried under that statute rather than under N.C.G.S. § 14-288.8(c)(4) which merely defines what weapons qualify as weapons of mass death and destruction.

APPEAL by defendant from *Samuel T. Currin, Judge*. Judgment entered 10 June 1988 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 May 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Donald R. Teeter, for the State.

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

BECTON, Judge.

On 10 June 1988, defendant, Jeffrey Fennell, was convicted of possession of a "weapon of mass death and destruction," in violation of N.C. Gen. Stat. Sec. 14-288.8, and was sentenced to five years imprisonment. Fennell appeals, contending that the trial judge erred by: (1) denying his motion to dismiss on the ground that the charges abridged his constitutional right to bear arms; (2) denying his motion to dismiss because the State failed to show that the firearm was operable as a weapon of mass death and destruction; and (3) failing to instruct the jury that a weapon which will not fire cannot be a weapon of mass death and destruction. We find no error.

I

The State's evidence tended to show that on 3 March 1988, three Goldsboro police officers were dispatched to a community recreation center to investigate a report of a man carrying a "sawed-off shotgun." Two of the officers spotted Fennell, who fit the de-

STATE v. FENNELL

[95 N.C. App. 140 (1989)]

scription of the suspect, outside the center. When Fennell saw them, he ran toward the front door of the center, pulling an object that "resembled a rifle or a shotgun from his pants." Moments later, the officers found Fennell inside the center, without any weapon and without the jacket he had been wearing when first spotted. After a brief search, the jacket was found behind a bench in the center with a disassembled sawed-off shotgun in its pocket. At this point, Fennell tried to run but was apprehended by the officers.

Fennell put on no evidence.

Fennell appeals from his conviction of possession of a weapon of mass death and destruction, raising seven assignments of error but only offering authority as to three.

II

[1] The first of Fennell's assignments of error concerns the constitutionality of N.C. Gen. Stat. Sec. 14-288.8 (1986). The statute provides:

- (a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction.

. . .

- (c) The term "weapon of mass death and destruction" includes

. . .

- (3) . . . [A]ny shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches. . . .
- (4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled. . . .

Fennell contends that the statute is an overly-broad restriction of his constitutional right to bear arms under both the Second Amendment to the Constitution of the United States and Article I, Section 30 of the North Carolina Constitution. Each declares that "[a] well regulated [m]ilitia[,] being necessary to the security

STATE v. FENNEL

[95 N.C. App. 140 (1989)]

of a free State, the right of the people to keep and bear [a]rms[,] shall not be infringed. . . ." N.C. Const. art. I, sec. 30; U.S. Const. amend. II.

Fennell concedes that the Second Amendment does not protect his right to carry a sawed-off shotgun. Indeed, it is generally understood that the Second Amendment guarantees the right to bear arms only in connection with a "well regulated militia." See generally 37 A.L.R. Fed. 696 (1978) (Supp. 1988). In *United States v. Miller*, for example, the Supreme Court rejected the argument that the National Firearms Act of 1934, which outlawed the possession or use of a sawed-off shotgun, was unconstitutional, stating:

[i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

307 U.S. 174, 178, 83 L.Ed. 1206, 1209 (1939).

It is true, however, that the North Carolina Constitution has been interpreted to guarantee a broader right to individuals to keep and bear arms. "North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense—similar to the concept of a militia—and also to individuals." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968). Yet, as the Supreme Court of this state also noted, "These decisions have . . . consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation." *Id.* The regulation must be "reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety." *Id.* at 547, 158 S.E.2d at 10 (citation omitted).

Fennell argues that the statute in question is an absolute prohibition on short-barreled shotguns and, therefore, is unconstitutional. He adds that the State may regulate firearms only as to time, place or manner. These contentions are without merit.

First, the statute does not completely ban a class of weapons protected by the Constitution. Rather, it permits possession of shotguns, with the exception of those which have been tampered with so as to shorten the barrel. "[A] sawed-off shotgun seems a most plausible subject of regulation as it may be readily concealed

STATE v. FENNELL

[95 N.C. App. 140 (1989)]

and is especially dangerous because of the wide and nearly indiscriminate scattering of its shot." *Commonwealth v. Davis*, 369 Mass. 886, 889-90, 343 N.E.2d 847, 850 (1976). *Accord*, *State v. Astore*, 258 So.2d 33 (Fla. Dist. Ct. App. 1972); *State v. Hamlin*, 497 So.2d 1369 (La. Ct. App. 1986). Accordingly, we hold that this regulation is reasonable and bears a fair relation to the preservation of the public peace and safety.

Second, the State can regulate more than just the time, place and manner in which a firearm is borne. As the court stated in *State v. Kerner*,

[i]t is . . . a reasonable regulation . . . to require that a pistol shall not be under a certain length, which, if reasonable, will prevent the use of pistols of small size, which are not borne as arms, but which are easily and ordinarily carried concealed. To exclude all pistols, however, is not a regulation, but a prohibition, of arms, which come under the designation of "arms" which the people are entitled to bear.

181 N.C. 574, 578, 107 S.E. 222, 225 (1921). Thus, the State can regulate the length of a particular firearm as long as there is a reasonable purpose for doing so. We are not convinced by Fennell's argument that such a restriction leads us down the "slippery slope" and gives the legislature full license to restrict any and all firearms possessed by individuals. We overrule this assignment of error.

III

In his last two assignments of error, Fennell contests the sufficiency of the State's evidence. Fennell argues that: (1) the statute requires that the firearm be operable; (2) the State had the burden to prove operability; and (3) the State charged Fennell under the wrong section of the statute.

A. Inoperability of a Weapon of Mass Death and Destruction is an Affirmative Defense

[2] "The term 'weapon of mass death and destruction' does not include any device . . . which the Secretary of the Treasury finds is not likely to be used as a weapon, [or] is an antique. . . ." N.C. Gen. Stat. Sec. 14-288.8. Thus, devices listed in the statute lose their status as weapons of mass death and destruction once they

STATE v. FENNEL

[95 N.C. App. 140 (1989)]

are found to be totally inoperable and incapable of being readily made operable.

We must determine which party has the burden of proof concerning the issue of operability. We hold that operability is not an element of the crime to be proven by the State. It is, rather, an affirmative defense. Though this issue is one of first impression in this state, our holding is consistent with *State v. Baldwin*, 34 N.C. App. 307, 237 S.E.2d 881 (1977). In *Baldwin*, the defendant was charged with violating Section 14-415.1 (1986), which makes it unlawful for anyone convicted of a crime to possess a sawed-off shotgun. There, we held that when the defendant fails to produce any evidence of *inoperability*, the State does not have to submit evidence of *operability*. *Id.* at 309, 237 S.E.2d at 882. Given that the statute in question in *Baldwin* and the one at issue here are materially the same, it logically follows that the burden of proof regarding inoperability of a weapon of mass death and destruction falls on the defendant.

Moreover, other jurisdictions considering the question have held that the State does not have to prove operability. Instead, they have held that the defendant bears the initial burden of producing evidence of inoperability. *State v. Rosthenhausler*, 147 Ariz. 486, 711 P.2d 625 (1985); *People v. Gaines*, 103 Cal. App. 3d 89, 162 Cal. Rptr. 827 (1980), *overruled on other grounds by People v. Nelums*, 31 Cal. App. 3d 355, 82 Cal. Rptr. 515 (1982); *People v. Mason*, 96 Mich. App. 47, 292 N.W.2d 480 (1980). Thus, in this case, the State would have had to prove operability only if the defendant had offered evidence of the weapon's inoperability.

B. The Evidence of Inoperability was Not Sufficient to Shift the Burden of Proving Operability to the State

Fennell offered no evidence that the weapon was inoperable. He merely raised the possibility that the weapon was incapable of being fired. Significantly, no witness opined that the weapon was inoperable. Instead, the only opinion concerning operability was that offered by one of the police officers that the weapon was operable. We hold that simply raising the issue of potential inoperability is not sufficient to shift the burden of proof to the State.

STATE v. MEADLOCK

[95 N.C. App. 146 (1989)]

C. A Disassembled Sawed-off Shotgun Qualifies as a Weapon of Mass Death and Destruction

[3] Fennell was charged under the correct statute. He argues that he should have been charged, not under Section 14-288.8, but under 14-288.8(c)(4). Subsection (c) merely defines what weapons qualify as weapons of mass death and destruction. Included in this list are sawed-off shotguns and, under subsection (c)(4), any combination of parts that may be readily assembled into weapons listed in the other subsections. The fact that the weapon had been disassembled by the time it was found by the officers does not lessen its quality as a weapon of mass death and destruction. This assignment of error is without merit.

IV

Fennell's four remaining assignments of error are not discussed in the brief. Thus, we deem them abandoned. N.C.R. App. P. 28(a) (1989).

V

For the reasons stated, we hold that defendant Jeffrey Fennell received a fair trial, free from error.

No error.

Judges PHILLIPS and LEWIS concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. WAYNE CROWSON
MEADLOCK, DEFENDANT-APPELLANT

No. 8922SC417

(Filed 15 August 1989)

Homicide § 21.9— victim allegedly shot by hunter—insufficiency of evidence of involuntary manslaughter

Evidence was insufficient to be submitted to the jury in a prosecution for involuntary manslaughter where it tended to show only that the victim was killed sometime between 6:00 a.m. on 25 November 1987 and 9:20 a.m. on 26 November 1987 when he was struck in the head by a bullet from a

STATE v. MEADLOCK

[95 N.C. App. 146 (1989)]

high-powered rifle fired from a distance; based on defendant's stipulations and statements, defendant was hunting on the morning of 25 November 1987 in the area where the victim's body was found the following day; defendant fired his rifle at a running deer and missed; the shell casing from this shot was found 453 feet from the victim's body; the shot was embedded in a tree 97 feet from the victim's body and this bullet bore no evidence of having struck flesh; defendant later shot and killed a deer; and there was no evidence that defendant was negligent in firing his rifle or that a bullet from his gun was the proximate cause of the victim's death.

Judge PHILLIPS concurring in the result.

APPEAL by defendant from *Gray, Judge*. Judgment entered 19 January 1989 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 31 July 1989.

This is a criminal action wherein defendant was charged in a proper bill of indictment with the involuntary manslaughter of Paul Spencer in violation of G.S. 14-18.

The evidence at trial tends to show the following: On 25 November 1987, the day before Thanksgiving, Paul Spencer, 18 years of age, five feet three inches tall and weighing 95 pounds, left his home at about 6:00 a.m. to hunt deer on property adjoining property where he lived with his parents. When Spencer failed to return home at "about dark" that same day, a party was organized to search the area. His body was found the following morning 26 November 1987, Thanksgiving Day, at about 9:20 a.m. lying in a ditch. Spencer was completely dressed in camouflage clothing and was lying partially on top of his 30.30 rifle. A pathologist testified that the cause of death was a "distant" gunshot wound to the head caused by a high-powered rifle. No determination could be made as to the time of Spencer's death. Searchers subsequently found a 30.06 rifle shell casing 453 feet from the body and a bullet embedded in a tree 97 feet from the body. Defendant stipulated that the shell casing and bullet came from his 30.06 rifle. A firearms and hunting expert, William Long, testified that because the bullet found in the tree had no blood or tissue on it, he believed the bullet had not "pierced or penetrated any animal flesh."

Detective Hayden Bentley of the Alexander County Sheriff's Department testified for the State that he spoke to defendant on

STATE v. MEADLOCK

[95 N.C. App. 146 (1989)]

26 November 1987 and that defendant went with him to the area where Spencer's body was found. He further testified as follows:

. . . When we got to this area, he stated he had driven his Jeep and parked right next to this tree line in this open field. He stated that he got out of the vehicle; that he had the gun that was in the Jeep, which was 30.06; and that a deer had been laying in the grassy area somewhere in this area here; that the deer jumped up and ran towards this fenceline here; that he fired one round at the deer as it was coming down through here; and he was not sure if he hit it or not, but he thought he had. I asked him what he did next. We walked from there down through the field.

. . .

[H]e stated this was the exact route that he had took hunting the deer that he thought he had shot. After we crossed the fenced area just about at the corner, we walked on up to the corner of the fence down through the small ravine we have been talking about, over to the road area and down to the restroom area of the block buildings of the amphitheatre. Mr. Meadlock stated that he had walked down in behind the amphitheatre and had started back; and when he got to the back corner of the amphitheatre or the restrooms, that he observed what he thought was the same deer standing in the roadway approximately right in this area; that he raised the gun; and that he shot the deer in the buttocks area; that the deer ran up the road and into the woods; and he hunted the deer and was able to locate it later; and he, I believe, got Randy Pennell to help him haul the deer off.

Randy Pennell testified for the State that he went to the area where defendant was hunting in order to also hunt deer. He saw defendant's Jeep and then heard a shot. He then yelled loud enough for defendant to hear him, and he saw defendant. Defendant told him he had shot a deer. Pennell and defendant located the deer and loaded it onto defendant's Jeep. Pennell continued to testify on direct examination:

Q: Did he tell you whether or not that was the first shot he had fired that day?

A: No, sir, he said he saw the deer out in the field when he got out of his Jeep, and he shot at it.

STATE v. MEADLOCK

[95 N.C. App. 146 (1989)]

Q: What else, if anything, did he say about that day?

A: He said he thought he mi-sed [sic] it; he didn't know. He couldn't find no blood or nothing, he said.

Defendant did not testify. The jury found defendant guilty of involuntary manslaughter. He appealed from a judgment imposing a prison sentence of three years which was suspended.

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

Edward Jennings for defendant, appellant.

HEDRICK, Chief Judge.

Involuntary manslaughter is the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty. *State v. Everhart*, 291 N.C. 700, 231 S.E.2d 604 (1977). In this case, the State sought to show that defendant was culpably negligent in discharging his 30.06 rifle on 25 November 1987, and that such negligence proximately caused the death of Paul Spencer. Culpable negligence in criminal law requires more than the negligence required to sustain a tort recovery. *Id.* It must be such reckless or careless behavior that the act "imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *Id.* at 702, 231 S.E.2d at 606.

When evidence introduced by the State consists of exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by those statements. *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972); *State v. Wagner*, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

When the evidence in the present case is considered in light of the foregoing principles of law, we hold that evidence is insufficient to permit the jury to find that defendant's conduct in firing his 30.06 rifle at a deer on 25 November 1987 was culpable negligence, or even that defendant's firing of his rifle proximately caused the death of Paul Spencer.

STATE v. MEADLOCK

[95 N.C. App. 146 (1989)]

The State's evidence, excluding defendant's stipulations and his statements made to Detective Bentley and Randy Pennell, tends to show only that Paul Spencer was killed sometime between 6:00 a.m. on 25 November 1987 and 9:20 a.m. on 26 November 1987 when he was struck in the head by a bullet from a high-powered rifle fired from a "distance." The State necessarily relied upon defendant's stipulations and defendant's statements to Detective Bentley and Randy Pennell to involve defendant in any way in the tragic death of Spencer. When defendant's stipulations and statements are considered, the State's evidence tends to show only that defendant was hunting on the morning of 25 November 1987 in the area where Spencer's body was found the following day. Defendant stated that he fired his rifle at a running deer and missed. The shell casing from this shot was found 453 feet from Spencer's body. Defendant's stipulations and statements tend to show the bullet from this shot was embedded in a tree 97 feet from Spencer's body, and this bullet bore no evidence of having struck "flesh." Defendant's statements further tend to show he later shot and killed a deer. Defendant's statements account for both shots fired by him. There is no evidence in this record tending to show defendant was negligent in firing his rifle, and no evidence that a bullet from his gun was the proximate cause of Spencer's death. Under the existing law of this State, it is not negligent to hunt deer with a 30.06 rifle.

The case cited by the State to support its contentions, *State v. Hall*, 60 N.C. App. 450, 299 S.E.2d 680 (1983), is clearly distinguishable on its facts. In *Hall*, the evidence tended to show that the defendant fired "after he saw a brown and white spot on what he thought was a deer," and he immediately told a companion, "I think I shot a man."

The judgment is reversed.

Reversed.

Judge ARNOLD concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

I agree that the evidence is not sufficient to establish that defendant shot the decedent. For according to the evidence: Of

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

the only two shots defendant fired one lodged in a pine tree and was not shown to have any human blood or tissue on it, and the other hit a deer, apparently not on the line or in the vicinity where the decedent was; at least one other hunter, other than the defendant and decedent was in the area; the decedent could have been shot any time that day and no evidence was presented that defendant was the only one to shoot a rifle in that area during that time. While the testimony of the civil engineer, who made no microscopic or other scientific examination, that the bullet in the pine tree had no blood or human tissue on it establishes nothing since he was a witness for the defendant, the other evidence does not support the inference that the bullet that hit the decedent was one of the two that defendant shot.

But I do not agree that the evidence is not sufficient to establish defendant's culpable negligence. Shooting a high-powered rifle that can propel a lethal charge for upwards of a mile into an area where other people are likely to be, as defendant did here, is the very embodiment of culpable negligence in my opinion; and that he was on his own premises hunting deer when he fired the gun and there is no law against using such weapons for that purpose is beside the point.

WALLS & MARSHALL FUEL CO., INC. v. N.C. DEPARTMENT OF REVENUE

No. 8828SC1128

(Filed 15 August 1989)

Taxation § 31.1— discount for prompt payment of bill—“cash discount”—sales tax levied on discount

The conclusion of the Department of Revenue that the discount offered by the taxpayer for prompt payment constituted a “cash discount” within the meaning of N.C.G.S. § 105-164.3(6) was supported by substantial evidence in light of the whole record, and the Department could therefore properly make an assessment based on the discounts.

APPEAL by petitioner from *Lewis (Robert D.)*, Judge. Order entered 2 August 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 April 1989.

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

Adams, Hendon, Carson, Crow & Saenger, P.A., by Philip G. Carson and Lori M. Glenn, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

GREENE, Judge.

Walls & Marshall Fuel Co., Inc. (hereinafter "taxpayer") appeals an order of the Buncombe County Superior Court affirming Administrative Decision No. 243 of the Tax Review Board by which taxpayer was assessed sales tax in the amount of \$24,116.22 by the Department of Revenue.

The taxpayer is a corporation engaged in the business of selling fuel oil at retail based on a stated price per gallon. Its principal place of business is in Asheville, North Carolina. By means of a document entitled "Discount Notice" attached to each bill of sale or invoice, the taxpayer offered its customers the option to "deduct 8 cents per gallon it paid within 3 days from delivery." In practice, if a customer paid his bill within three days of the time limit, the taxpayer reduced the retail sales price by eight cents per gallon and the customer paid sales tax on the reduced sales price of the fuel oil. The taxpayer then remitted to the Department of Revenue the sales tax received on the reduced amount. The taxpayer's books and records accounted for this transaction as a payment received in the net amount after discount combined with a credit adjustment in the amount of the discount and the tax applicable to such discount.

An audit of the taxpayer's books and records conducted on behalf of the Department of Revenue for the period 1 February 1983 through 31 December 1985 was completed on 10 February 1986. Based upon the audit report and pursuant to N.C.G.S. Sec. 105-241.1, a Notice of Sales and/or Use Tax Assessment in the amount of \$24,116.22 was issued to the taxpayer on 27 February 1986.

The taxpayer timely objected to the proposed assessment, requested a written statement of the information and evidence upon which the proposed assessment was based, and requested a hearing before the Secretary of Revenue. The taxpayer's objection was only in regard to that portion of the proposed assessment which was based upon the taxation of the discounts. A hearing was held before a Deputy Secretary of Revenue on the question "[w]hether

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

discounts offered by a retailer as an incentive for prompt payment for retail sales of tangible personal property are 'cash discounts' within the meaning of G.S. 105-164.3(6)?" The Deputy Secretary concluded that the discounts offered by taxpayer are "cash discounts" within the meaning of the statute and therefore the assessment was sustained.

The taxpayer appealed to the Tax Review Board which entered Administrative Decision No. 243 affirming the final decision of the Deputy Secretary of Revenue. On appeal to the Superior Court of Buncombe County, the decision of the Tax Review Board was affirmed.

The issue presented for review is whether the Tax Review Board erred by affirming Deputy Secretary of Revenue because the administrative decision was not supported by substantial evidence in light of the whole record.

The scope of review of a decision of an administrative agency is governed by the Administrative Procedure Act. N.C.G.S. Sec. 150B-1-150B-64 (1987). Specifically, this appeal is governed by Chapter 150B as this case was commenced after 1 January 1986. *See Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 638, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). Under Section 150B-51, this court may "reverse or modify" the tax review board only if:

the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; 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. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

N.C.G.S. Sec. 150B-51(b) (1987). "Review in this court is further limited to the exceptions and assignments of error set forth to the order of the superior court" and by the arguments made in brief. *Watson*, 87 N.C. App. at 639, 362 S.E.2d at 296; App. R. 10(a) (exceptions not made the basis of an assignment of error may not be considered on appeal); App. R. 28(b)(5) (exceptions in support of which no argument is stated in brief will be abandoned). As taxpayer only argues in his brief that the decision is unsupported by substantial evidence in view of the "whole record" test, we decline to review this decision under the other standards of Section 150B-51. Under Section 150B-51(5), we review the agency's decision according to the "whole record" test. *Watson*, 87 N.C. App. at 639, 362 S.E.2d at 296. The "whole record" test requires the reviewing court to examine all the competent evidence and pleadings which comprise the "whole record" to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 497, 259 S.E.2d 373, 376 (1979); N.C.G.S. Sec. 150B-51(b)(5) (1987). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Commissioner of Insurance v. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). The "whole record" 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 heard before it *de novo*. *Community Sav. & Loan Ass'n*, 43 N.C. App. at 497, 259 S.E.2d at 376.

The taxpayer does not contest that its retail sales of fuel oil in North Carolina are subject to the combined state and local sales tax. The taxpayer likewise does not contest that the amount of tax is to be determined by application of the state and county rates to gross sales and rentals. See N.C.G.S. Sec. 105-164.4 (1985). Taxpayer's sole argument is that the conclusion of the Department of Revenue that the discount offered by the taxpayer for prompt payment constitutes a "cash discount" within the meaning of N.C.G.S. Sec. 105-164.3(6) is not supported by substantial evidence in light of the "whole record" test. We disagree with the taxpayer.

The term "gross sales" is defined by statute as:

the sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit *without allowance*

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

for cash discount and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, interest paid or any other expenses whatsoever and without any deductions of any kind or character except as provided in this Article.

N.C.G.S. Sec. 105-106.3(6) (1985) (emphasis added). "Usually, words of a statute will be given their natural, approved, and recognized meaning." *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 477 (1985). Black's Law Dictionary defines "cash discount" as "[a] deduction from billed price which seller allows for payment within a certain time; e.g., 10% discount for payment within 10 days." Black's Law Dictionary 196 (5th ed. 1979). Webster's Dictionary defines "cash discount" as "a discount granted in consideration of immediate payment or payment within a prescribed time." Webster's Third New International Dictionary (1968).

The taxpayer in this case offered an "8 cents per gallon" discount if the bill was paid "within three days from delivery." This price reduction option offered by the taxpayer to its customers falls within the recognized meaning of "cash discount" because it is a "deduction from billed price which seller allows for payment within a certain time." Taxpayer concedes that if the discount offered in this case were one or two percent off the invoice or billed price, it would be a "cash discount" because it would be the equivalent to a financing charge usually imposed on bills not paid within a certain period of time. Taxpayer argues, however, that because the reduction in price here is a 10 per cent reduction (8 cents reduction on fuel oil costing 80 cents per gallon) and therefore in excess of the usual finance charges, it is not a "cash discount." Instead, taxpayer contends it should be treated the same as a sales price reduction offered by department store merchants who use such price reductions to induce customers into their places of business. The size of the discount is irrelevant if it is given in consideration for payment within a prescribed time. Accordingly, we conclude the discount given by taxpayer to its customers is a "cash discount" under the plain language of N.C.G.S. Sec. 164.3(6).

Assuming *arguendo* that the language of N.C.G.S. Sec. 164.3(6) is not clear and unambiguous, we would still conclude the taxpayer has failed to show the agency's decision was not supported by substantial evidence. In interpreting an ambiguous statute, the construction adopted by those who execute and administer the statute

WALLS & MARSHALL FUEL CO. v. N.C. DEPT. OF REVENUE

[95 N.C. App. 151 (1989)]

is evidence of what it means. *Commissioner of Ins. v. N.C. Auto. Rate Administrative Office*, 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978). However, final interpretation of a statutory term is a judicial function. *Utilities Comm'n v. Public State-North Carolina Utilities Comm'n*, 58 N.C. App. 453, 458-59, 293 S.E.2d 888, 892 (1982).

North Carolina Administrative Code Title 17, Chapter 7, Subchapter 7B, Rule .0108(b) states in pertinent part that:

[a] cash discount is not a price reduction, and the tax must be computed and paid on the sales price before allowance for cash discount. Generally, a *cash discount is a deduction from the sales price which the seller allows the customer for prompt payment of the bill.*

N.C. Admin. Code Title 17, Chap. 7, Subchap. 7B, Rule .0108(b) (1988) (emphasis added). Under the language of this section of the Administrative Code, the discount given by the taxpayer in this case is a "cash discount" because the price reduction was a "deduction from the sales price which seller allow[ed] the customer for prompt payment of the bill." Therefore, we conclude there was substantial evidence to support the agency's decision that sales tax was due under N.C.G.S. Sec. 164.3(6).

We note that taxpayer's second issue presented for review which questions whether the Tax Review Board's decision was in excess of statutory authority was not argued in brief. Taxpayer's second argument consisted only of repetitious arguments on the first issue. Accordingly, we decline to discuss the second issue as the exceptions upon which it is based are deemed abandoned. App. R. 28(b)(5).

Affirmed.

Judges ARNOLD and LEWIS concur.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

[95 N.C. App. 157 (1989)]

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED JULY 1, 1987 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. 8810INS865

(Filed 15 August 1989)

Insurance § 79.3— automobile insurance rate filing— disapproval by Insurance Commissioner— insufficiency of findings

The Insurance Commissioner erred in disapproving the Rate Bureau's 1 July 1987 automobile insurance rate filing and ordering into effect overall decreases in the existing rates where the Commissioner's findings did not sufficiently explain the factual basis for his underwriting profit and contingency provisions, did not indicate how dividends and deviations were considered in his ratemaking formula, did not indicate how he resolved conflicting evidence, did not show what adjustments he found necessary to make, and did not indicate what calculations he considered more reliable.

APPEAL by North Carolina Rate Bureau from Order of North Carolina Commissioner of Insurance entered 1 February 1988. Heard in the Court of Appeals 15 March 1989.

Hunter, Wharton & Lynch, by John V. Hunter, III; and Parker, Sink, Powers, Sink, Potter & Nelson, by E. Daniels Nelson, for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr., Marvin M. Spivey, Jr., and R. Michael Strickland, for defendant appellants.

COZORT, Judge.

The North Carolina Rate Bureau has appealed to this Court an Order of the Commissioner of Insurance disapproving the Bureau's 1 July 1987 rate filing and ordering into effect overall decreases in the existing rates. The Bureau contends that the Commissioner's underwriting profit and contingencies provisions are not supported by substantial and material evidence, and that the Commissioner failed to make sufficient findings of fact and conclusions of law. We vacate and remand for further findings.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

[95 N.C. App. 157 (1989)]

In its 1 July 1987 rate filing, the North Carolina Rate Bureau proposed average rate level changes of + 15.8% for non-fleet private passenger automobile liability insurance and - 11.6% for physical damage, or an overall average rate increase of 3.5%. The Bureau also submitted a 5.2% increase in motorcycle liability insurance rates and a 2.7% decrease in motorcycle physical damage rates, or an overall average rate increase of 3.2%. Following his review of the filing, the Commissioner issued a Notice of Public Hearing pursuant to Article 12B of Chapter 58 of the General Statutes, in which he set forth what he contended were deficiencies in the filing. A hearing was thereafter held from 11 January 1988 until 21 January 1988. By Order issued 1 February 1988, the Commissioner ordered rate changes of + 8.6% for automobile liability insurance and - 18.7% for automobile physical damage insurance, with an overall average rate decrease of 3.9%. He further ordered rate changes of - 1.0% for motorcycle liability insurance and - 7.4% for motorcycle physical damage insurance, an overall average rate decrease of 2.6%. The Commissioner's actions in ordering into effect rates lower than those in the filing were based on his adoption of expense trends and underwriting profit and contingency provisions lower than those used by the Bureau. On appeal, the Bureau challenges those portions of the Order relating to the underwriting profit and contingency provisions. The Bureau does not contest the Commissioner's findings regarding expense trends.

The Bureau raises two assignments of error. First, it argues that the Commissioner's underwriting profit and contingency provisions will not enable insurers to achieve a fair and reasonable profit because the Commissioner (1) failed to take into account the effects of rate deviations and dividends to policyholders, (2) averaged the underwriting profit recommendations of the expert witnesses for the Department of Insurance, and (3) adopted underwriting profit provisions based on calculations which failed to distinguish between insurers' surplus and their net worth. Second, the Bureau contends that the Commissioner failed to make findings of fact and conclusions of law sufficient to allow judicial review.

N.C. Gen. Stat. § 58-124.32 provides, in part, the following:

If the Commissioner after the hearing finds that the filing does not comply with the provisions of this Article, he may issue an order disapproving the filing, determining in what respect the filing is improper, and specifying the appropriate

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

[95 N.C. App. 157 (1989)]

rate level or levels that may be used by the members of the Bureau instead of the rate level or levels proposed by the Bureau filing, unless there has not been data admitted into evidence in the hearing that is sufficiently credible for arriving at the appropriate rate level or levels.

N.C. Gen. Stat. § 58-124.32(d) (Cum. Supp. 1988). In approving or disapproving rates that are not "excessive, inadequate or unfairly discriminatory," the Commissioner must give due consideration to the statutory factors set forth in § 58-124.19, including "a reasonable margin for underwriting profit and to contingencies" and "dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers." See N.C. Gen. Stat. § 58-124.19(1), (2) (Replacement 1982). In reaching his ultimate determination, the Commissioner must make findings which clearly and specifically indicate the facts on which he bases his order, the resolution of conflicting evidence, and the consideration he has given to the material and substantial evidence that has been offered. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 75 N.C. App. 201, 228, 331 S.E.2d 124, 143, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985). See also N.C. Gen. Stat. § 58-9.4 (Replacement 1982).

In his 1 February 1988 Order, the Commissioner made the following findings with respect to underwriting profit and dividends and deviations:

7. The Commissioner has given due consideration to the 5% underwriting profit and contingencies factor contained in the Bureau's filing exhibits and other evidence and testimony put forth by the Bureau on the matter of an overall adequate profit during the course of the hearing.

8. The Commissioner has given consideration to the evidence put forth by the Department concerning the matter of a reasonable underwriting profit and contingencies factor and concerning investment income earned or realized by insurers from their unearned premium, loss and loss expense reserve funds generated from business in this State to ensure an overall adequate profit.

9. Expert testimony concerning the rate of return for industries of risk comparable to the property and casualty insurance industry was received at the hearing to assist the Com-

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

[95 N.C. App. 157 (1989)]

missioner in deciding the appropriate underwriting profit and contingencies factor. The appropriate underwriting profit and contingencies factor was determined in such a manner that the return on equity for insurance companies would be equivalent to those of businesses of comparable risk.

* * * *

11. When compared to other industries of comparable risk the property and casualty insurance industry writing private passenger car and motorcycle insurance, requires a rate of return on equity of approximately thirteen (13%) percent to ensure a reasonable profit to the insurance companies after considering investment income from reserves as allowed by Article 12B of Chapter 58 of the North Carolina General Statutes, and giving due consideration to the enumerated rating criteria of Article 12B of Chapter 58 of the North Carolina General Statutes including but not limited to dividends and deviations.

12. A five percent (5%) underwriting profit and contingencies factor for underwriting as filed by the Bureau in their Exhibit 1 and supporting evidence would produce a return on equity for liability and physical damage coverages in excess of thirty percent (30%) and would result in an excessive profit for the insurance companies.

13. A return on equity of approximately thirteen percent (13%) for private passenger car and motorcycle coverages would produce in North Carolina a reasonable profit for the Bureau's member companies when compared to other businesses of comparable risk. At least a thirteen percent return on equity can be achieved by the use of an underwriting profit and contingencies factor of minus one and nine tenths percent (-1.9%) for liability coverage and zero percent (0.0%) for physical damage coverage. This underwriting profit and contingencies factor of minus one and nine tenths percent (-1.9%) for liability and zero percent (0.0%) for physical damage would produce, without considering investment income from capital and surplus accounts, and considering investment income on reserves only as allowed by Article 12B of Chapter 58 of the North Carolina General Statutes, an overall adequate profit to the insurance companies.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

[95 N.C. App. 157 (1989)]

We agree with the Bureau that these findings do not sufficiently explain the factual basis for the Commissioner's underwriting profit and contingency provisions. We therefore must vacate and remand. On remand, the Commissioner must make findings which show how he has considered and resolved the evidence bearing on the issues raised by the Bureau on appeal.

The Bureau argues that the Commissioner did not consider dividends and deviations and thus the manual rates set by the Commissioner's Order will not in fact produce a 13% rate of return if dividends and deviations are allowed as they historically have been. The problem with the Bureau's argument is that the Commissioner found that he had given "due consideration" to dividends and deviations as required by statute. The problem with the Commissioner's finding is that it is so unspecific as to preclude judicial review. The Commissioner must on remand make specific findings indicating *how* dividends and deviations were considered in his ratemaking formula.

The Bureau further argues that the Commissioner's underwriting profit and contingency provisions are not supported by the evidence because he merely "averaged" the underwriting recommendations of the expert witnesses Wilson and O'Neill, who testified for the Department of Insurance. The Bureau contends that the Commissioner based his underwriting profit figures on evidence which calculated "net worth" as if it were "surplus," arguably a significantly lower figure. Again, we believe that the Commissioner must on remand make findings which indicate the basis of the underwriting provisions adopted in his Order.

Wilson testified that an underwriting profit provision of - 3.1% for liability and - 1.2% for physical damage would produce a return on net worth of 13%, which was the rate of return adopted by the Commissioner. O'Neill testified that underwriting provisions of - 0.7% for liability and a + 1.2% for physical damage would produce a 10.9% return. Furthermore, O'Neill's testimony indicated that she considered investment income on capital, which may not be considered in insurance ratemaking in this State. *See State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 444, 269 S.E.2d 547, 586 (1980).

The Commissioner adopted underwriting provisions different from those recommended by the witnesses. He is an expert in the field and was well within his authority in doing so. Furthermore,

ASHBURN v. WICKER

[95 N.C. App. 162 (1989)]

he found that his calculations did not include a consideration of investment income from capital and surplus accounts, and that his underwriting provisions would allow a return on net worth of 13%. We believe, however, that in his Order the Commissioner must make findings that clearly show *how* he has resolved the conflicting evidence, what adjustments he found necessary to make, and what calculations he considered more reliable.

The Commissioner is authorized to receive additional evidence if deemed necessary to comply with this opinion.

Vacated and remanded.

Judges EAGLES and GREENE concur.

WILLIAM ASHBURN v. PHILLIP D. WICKER AND RIVWIN, III, A NORTH CAROLINA CORPORATION

No. 881SC1056

(Filed 15 August 1989)

Corporations § 6— loan made by corporation— plaintiff not holder of beneficial interest— no standing of plaintiff to challenge

Plaintiff did not have standing to challenge a loan made by the corporate defendant to the individual defendant when plaintiff's beneficial interest, if any, in defendant corporation consisted of a pledge of stock which secured a debt which was paid by another pledgee of the stock before plaintiff filed suit. N.C.G.S. § 55-55(a).

APPEAL by plaintiff from Judgment of *Judge Herbert Small* entered 18 May 1988 in PASQUOTANK County Superior Court. Heard in the Court of Appeals 14 April 1989.

George S. Jackson for plaintiff appellant.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr., and John D. Leidy, for defendant appellees.

ASHBURN v. WICKER

[95 N.C. App. 162 (1989)]

COZORT, Judge.

Plaintiff sued defendant Wicker claiming that he wrongfully used funds of the defendant corporation to acquire its stock. The stock had been pledged to both plaintiff and defendant as security for separate loans each made to an employee of the corporation who used the funds to purchase the shares. In the first half of a bifurcated proceeding from which plaintiff took an appeal which was later abandoned, the trial court ruled that the debt owed plaintiff was paid, that plaintiff's interest in the stock was extinguished, and that defendant was entitled to possession of the stock. We hold that plaintiff now has no standing to challenge the loan made by the defendant corporation to defendant Wicker.

In 1984, defendant Wicker sold 100 shares of stock in defendant RIVWIN, III, Ltd., to George Sawyer for \$25,000.00. Sawyer was named as a defendant in this proceeding, but plaintiff has voluntarily dismissed the action against him. To pay a down payment on the stock, Mr. Sawyer borrowed \$11,500.00 from plaintiff, who was then Mr. Sawyer's brother-in-law. Mr. Sawyer pledged the stock purchased from defendant Wicker to plaintiff as security for the loan. He also entered into a contract with plaintiff which provided that, in the event of Mr. Sawyer's default, plaintiff was entitled to possession of the shares if the \$11,500.00 note was not paid in full within 30 days of plaintiff's giving Sawyer written notice of his default. Moreover, if Mr. Sawyer defaulted, the defendant corporation agreed to buy back from plaintiff for \$25,000.00 those shares he acquired as a result of the default.

For the remaining purchase price defendant Wicker received a promissory note from Mr. Sawyer for \$13,500.00 and a pledge of the 100 shares of stock. The parties agreed that plaintiff's security interest in the stock would have priority over defendant Wicker's security interest.

In 1985, Mr. Sawyer was discharged from his employment with the defendant corporation. On 30 July 1985, plaintiff gave Mr. Sawyer written notice of default and stated his intention to take possession of the 100 shares if Mr. Sawyer's debt was not paid. The next day defendant Wicker tendered full payment, with interest, of Mr. Sawyer's debt to plaintiff; but plaintiff refused to accept defendant's payment. *Defendant Wicker had obtained a loan from the defendant corporation to pay off Mr. Sawyer's obligation.*

ASHBURN v. WICKER

[95 N.C. App. 162 (1989)]

In 1986, plaintiff filed suit claiming that he was entitled to possession of the 100 shares of stock in the defendant corporation and that defendant Wicker wrongfully deprived plaintiff of his right to sell the stock back to the defendant corporation at a substantial profit. The parties consented to a bifurcated trial. The first trial concerned whether plaintiff was entitled to possession of the stock. In a bench trial the trial court ruled that plaintiff had to accept defendant Wicker's payment of Mr. Sawyer's debt, that defendant Wicker was entitled to redeem the collateral, and that defendant Wicker was entitled to keep the shares in satisfaction of his secured claims against Mr. Sawyer. Plaintiff gave notice of appeal but later abandoned his appeal and cashed the check defendant had written to pay Mr. Sawyer's obligation.

In this the second half of the bifurcated trial, plaintiff seeks to challenge the loan the defendant corporation made to defendant Wicker which allowed Mr. Wicker to pay Mr. Sawyer's debt and to gain control of the stock. At the close of plaintiff's evidence, the trial court granted defendants a directed verdict. The issue before us is whether plaintiff had standing to challenge the loan made by defendant RIVWIN III, to defendant Wicker when plaintiff's beneficial interest, if any, in the defendant corporation consisted of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit.

The standard of review on a motion for directed verdict is whether, viewing the evidence in a light most favorable to plaintiff, no reasonable juror could find for plaintiff. *West v. Slick*, 313 N.C. 33, 40-41, 326 S.E.2d 601, 606 (1985).

Initially, we note that plaintiff cannot now claim that he was a *de facto* shareholder and, therefore, that he held a beneficial interest and should be entitled to sue. Plaintiff abandoned his right to challenge the trial court's first judgment in the first trial when he abandoned his appeal of that judgment. That judgment had the effect of ruling that plaintiff held no beneficial interest in the defendant corporation. The trial court ruled that plaintiff was entitled to payment of Sawyer's debt and defendant was entitled to keep the stock because he paid Sawyer's debt. Since no appeal was perfected from that ruling, the findings and conclusions from the first trial are binding on this appeal because they represent the law of the case. *North Carolina National Bank v. Barbee*, 260

ASHBURN v. WICKER

[95 N.C. App. 162 (1989)]

N.C. 106, 112, 131 S.E.2d 666, 671 (1963); *Duffer v. Royal Dodge, Inc.*, 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981).

N.C. Gen. Stat. § 55-55(a) provides that “[a]n action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or *holder of a beneficial interest in shares of such corporation . . .*” (Emphasis added.) Defendants concede, and we agree, that a pledgee of corporate stock has a sufficient beneficial interest to have standing to sue the corporation derivatively for mismanagement, provided that he maintains an equitable interest in the collateral. *See generally* 19 Am. Jur. 2d *Corporations* §§ 2340-41, 2343 at 218-19, 220 (1986); *see, e.g., Federal Deposit Ins. Corp. v. Kerr*, 637 F.Supp. 828, 837 (W.D.N.C. 1986). Moreover, it is clear that the pledgee must hold a beneficial interest in the shares “at the time of the transaction of which he complains . . .” N.C. Gen. Stat. § 55-55(a) (1982).

In this case, plaintiff’s security interest and, therefore, his beneficial interest existed when, on 30 July 1985, defendant Wicker allegedly procured the improper loan. *See id.* But plaintiff’s security interest was discharged on 31 July 1985 when defendant Wicker tendered full payment of Mr. Sawyer’s debt to plaintiff’s attorney. 69 Am. Jur. 2d *Secured Transactions* §§ 530, 538 at 415, 423 (1973); *see also Parker v. Beasley*, 116 N.C. 1, 8, 21 S.E. 955, 959 (1895) (Clark, J., dissenting). Defendant Wicker was entitled to redeem the collateral pursuant to N.C. Gen. Stat. § 25-9-506 even though plaintiff’s security interest had first priority. Section 25-9-506 provides that

the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys’ fees and legal expenses.

N.C. Gen. Stat. § 25-9-506 (1988). In the first trial, the court ruled that defendant Wicker’s tender of \$11,626.79 to plaintiff was sufficient to redeem the collateral. Since plaintiff did not appeal from that ruling, plaintiff’s beneficial interest in the stock of the defendant corporation was lost some eight months before he filed suit.

ASHBURN v. WICKER

[95 N.C. App. 162 (1989)]

We hold that plaintiff had no standing to bring this suit because he failed to maintain his status as a holder of a beneficial interest throughout the pendency of the litigation. We find that such a requirement may be inferred from the language in N.C. Gen. Stat. § 55-55(a) and N.C. Gen. Stat. § 1A-1, Rule 23(b). N.C. Gen. Stat. § 55-55(a) provides that the "action may be brought . . . by a shareholder or holder of a beneficial interest in shares of such corporation" N.C. Gen. Stat. § 55-55(a) (1982) (emphasis added). Rule 23(b) provides that a shareholder derivative suit is "an action brought to enforce a *secondary right* on the part of one or more *shareholders or members* of a corporation" N.C. Gen. Stat. § 1A-1, Rule 23(b) (1988) (emphasis added); *see, e.g.*, 7C C. Wright and A. Miller, *Federal Practice & Procedure* § 1826 (1986) (citing *Lewis v. Knutson*, 699 F.2d 230 (5th Cir. 1983)); *Lewis v. Chiles*, 719 F.2d 1044 (9th Cir. 1983); and *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2d 323 (1971). The rationale for the rule was described in *Lewis v. Knutson*:

[F]or plaintiff to satisfy the standing requirements of Rule 23.1, he must demonstrate that he owned stock in the corporation at the time of the transaction of which he complains and *throughout the pendency of the suit, which includes the bringing of the suit and its prosecution*. *Schilling v. Belcher*, 582 F.2d 995, 999 (5th Cir. 1978). These ownership requirements are necessary because "[s]tanding [to bring a derivative action in behalf of a corporation] is justified only by the proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest." *Id.* at 1002 (quoting *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-36 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2d 323 (1971)). *See also* *Portnoy v. Kawecky Berylco Industries, Inc.*, 607 F.2d 765, 767 (7th Cir. 1979); *Papilsky v. Berndt*, 466 F.2d 251, 255 (2d Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 689, 34 L.Ed.2d 665 (1972). Thus, standing under Rule 23.1 concerns the plaintiff's relationship with the real party in interest, the corporation, and not the injury of the corporation.

Knutson, 699 F.2d at 238 (emphasis added). Since North Carolina's Rule 23(b) is substantially similar to Federal Rule 23.1 referred to above, we find the court's rationale persuasive. *See generally*

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

W. Shuford, N.C. Civil Practice and Procedure § 23-1 at 192 (2d ed. 1981).

In this case plaintiff lost his beneficial interest by operation of law months before he filed suit in March 1986, when defendant Wicker properly tendered payment on 31 July 1985, when the trial court upheld defendant's redemption of the collateral, and when plaintiff abandoned his appeal of that judgment. Plaintiff lacked standing to challenge the defendant corporation's loan to defendant Wicker and defendants were entitled to a directed verdict.

Affirmed.

Judges PHILLIPS and PARKER concur.

DEBORAH FRANCIS COCHRAN v. CHARLES WALLACE

No. 8818DC1150

(Filed 15 August 1989)

**1. Process § 9— paternity action—nonresident defendant—
personal jurisdiction pursuant to N.C.G.S. § 49-17**

There was no merit to defendant's contention that the lower court erred in finding that it had personal jurisdiction over him pursuant to N.C.G.S. § 49-17 because that statute is unconstitutional on its face in that it predetermines the standard for minimum contacts, since the intent of the statute is not to abrogate the second prong of the test set out in *Dillon v. Funding Corp.*, 291 N.C. 674; rather, the statute simply creates special jurisdiction under very limited circumstances in paternity actions.

**2. Process § 9.1— paternity action—nonresident defendant—no
hearing to determine contacts with North Carolina—due process
rights not violated**

There was no merit to defendant's contention that the trial court violated his due process rights by deciding that it had personal jurisdiction over him without affording him a hearing to determine his contacts with North Carolina and whether those contacts were sufficient to meet due process re-

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

quirements, since defendant filed a motion to dismiss for lack of personal jurisdiction; that motion came on for hearing at which time defendant was given ample opportunity to present evidence to persuade the court to grant his motion; it was then that defendant was expected to vigorously challenge the court's exercise of jurisdiction over him; defendant chose to forego this opportunity to present evidence and instead challenged the statute's constitutionality; and defendant was not entitled to another hearing.

APPEAL by defendant from *Vaden (William A.)*, Judge. Judgment entered 29 June 1988 in District Court, GUILFORD County. Heard in the Court of Appeals 7 June 1989.

Adams Kleemeier Hagan Hannah & Fouts, by *Clinton Eudy, Jr. and Trudy A. Ennis*, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by *Dolores D. Follin and Polly D. Sizemore*, for defendant-appellant.

ORR, Judge.

On 27 January 1988, plaintiff filed this paternity action. She alleged that she is single, a resident of North Carolina and that she has never been married. On 5 April 1985, while she and defendant were both employed by the Radisson Hotel in High Point, North Carolina, they engaged in a single act of sexual intercourse. The encounter, which took place at the home of an acquaintance in Guilford County, allegedly resulted in the birth of a child on 10 January 1986 in Greensboro, North Carolina. Plaintiff's complaint prayed for an adjudication that defendant is the father of her child. Plaintiff also requested permanent custody and child support for past and future expenses.

Defendant's answer admitted that he was a resident of North Carolina for a minimum of six months from the period of 1984 through April 1985. He also admitted the single act of intercourse but denied paternity. Furthermore, he contended that he is now a resident of Naples, Florida, and that North Carolina does not have personal jurisdiction over him. Defendant then moved for a dismissal of plaintiff's action pursuant to G.S. 1A-1, Rules 12(b)(2) and (6).

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

In the hearing, the court reviewed all materials submitted by each party. The court made the following findings of fact to which defendant did not except:

1. Based on plaintiff's allegations in her complaint and defendant's admissions in his answer, the Court finds that defendant was a citizen and resident of Guilford County, North Carolina, for a minimum of six months during the period 1984 through April 1985.

2. Based on plaintiff's allegations in her complaint and defendant's admissions in his answer, the Court finds that during the period of defendant's residence in Guilford County, North Carolina, he was an employee of the Radisson Hotel in High Point, North Carolina.

3. Based on plaintiff's allegations in her complaint and defendant's admissions in his answer, the Court finds that Defendant was the Director of Food and Beverage at the Radisson Hotel in High Point, North Carolina.

4. Based on plaintiff's allegations in her complaint and defendant's admissions in his answer, the Court finds that the parties had sexual intercourse on April 5, 1985, in High Point, Guilford County, North Carolina.

5. Based on plaintiff's allegations in her verified complaint and her attachment of a certified copy of the birth certificate of Williams Cochran, III, as Exhibit A to her Complaint and adoption therein by reference, the Court finds that Williams Cochran, III, plaintiff's son, was born on January 10, 1986, in Greensboro, Guilford County, North Carolina.

6. In his answer to plaintiff's complaint, defendant moved the court to dismiss plaintiff's complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, alleging that this court lacked jurisdiction over the person of the defendant because defendant had not had sufficient minimum contact with the State of North Carolina to satisfy standards of due process and traditional notions of fair play and substantial justice.

7. Plaintiff then filed a motion moving this court to deny defendant's motion to dismiss for lack of personal jurisdiction and showed unto the Court certain facts contained in the pleadings in support thereof.

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

Based upon these findings, the court made the conclusions set forth below:

1. This court has jurisdiction over the person of defendant pursuant to N.C. Gen. Stat. [sec.] 49-17.

EXCEPTION NO. 1

2. The assertion of the Court's jurisdiction over the person of the defendant under these circumstances as set forth in the foregoing FINDINGS OF FACT satisfies the standards of due process and traditional notions of fair play and substantial justice.

EXCEPTION NO. 2

3. Plaintiff has shown the existence of facts as outlined in the foregoing FINDINGS OF FACTS and, pursuant to N.C. Gen. Stat. [sec.] 49-17, no further hearing is required on the issue of whether defendant would be denied due process by the Court's assertion of jurisdiction over his person.

EXCEPTION NO. 3

The defendant's motion should, consequently, be denied.

EXCEPTION NO. 4.

I.

[1] Defendant's first argument, which essentially challenges the court's first conclusion, is that the lower court erred in finding that it had personal jurisdiction over him pursuant to G.S. 49-17 because that statute is unconstitutional on its face. Specifically, defendant contends that G.S. 49-17 pre-determines the standard for minimum contacts; therefore, it violates his Fourteenth Amendment Due Process right to a hearing on that issue. Moreover, he contends that the statute violates the two-part test for determining whether personal jurisdiction is proper as set out in the case of *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).

In *Dillon*, our Supreme Court set up a two-part test to determine questions regarding the exercise of personal jurisdiction over nonresident defendants. The Court said, "[t]he resolution of this question involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant. If so, does the exercise of this power

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

by the [State] courts violate due process of law." *Id.* at 675, 231 S.E.2d at 630. The court below focused on G.S. 49-17 and concluded that the first part of the *Dillon* test was met.

G.S. 49-17, entitled "Jurisdiction over nonresident or nonpresent persons.", states:

(a) The act of sexual intercourse within this State constitutes sufficient minimum contact with this forum for purposes of subjecting the person or persons participating therein to the jurisdiction of the courts of this State for actions brought under this Article for paternity and support of any child who may have been conceived as a result of such act.

(b) The jurisdictional basis in subsection (a) of this section shall be construed in addition to, and not in lieu of, any basis or bases for jurisdiction within G.S. 1-75.4.

We find that the court's conclusion is correct. G.S. 49-17 satisfies the first prong of the *Dillon* test by creating special jurisdiction under very limited circumstances. On its face, this statute is constitutionally sound. In the absence of some clear showing of unconstitutionality by defendant, we must defer to our long-standing rule that when the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." *Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970).

Although we recognize that the language in G.S. 49-17 which refers to "minimum contacts" is misleading and confusing in the context of the *Dillon* requirements, we conclude that the intent of the statute is not to abrogate the second prong of the *Dillon* test. Rather, the statute simply creates special jurisdiction in situations arising out of these facts.

II.

[2] Defendant's second issue relates to whether the court violated his due process rights by deciding that it had personal jurisdiction over him without affording him a hearing to determine his contacts with North Carolina. The final question raised by this appeal is whether the court erred in refusing to give defendant a hearing on whether his contacts with North Carolina were sufficient to meet due process requirements. For the purpose of this opinion, we will combine these issues and consider them together.

COCHRAN v. WALLACE

[95 N.C. App. 167 (1989)]

Defendant's challenge here relates to the second prong of the two-part *Dillon* test. The lower court was required to determine whether "defendant [had] certain minimum contacts with the forum state such that the maintenance of the suit [in the forum state] does not offend 'traditional notions of fair play and substantial justice.'" *Kaplan School Supply v. Henry Wurst, Inc.*, 56 N.C. App. 567, 571, 289 S.E.2d 607, 609, 610, *rev. denied*, 306 N.C. 385, 294 S.E.2d 209 (1982).

Defendant filed a motion to dismiss for lack of personal jurisdiction. That motion came on for hearing at which time defendant was given ample opportunity to present evidence to persuade the court to grant his motion. It was then that defendant was expected to vigorously challenge the court's exercise of jurisdiction over him because at that time the court made findings as to its statutory authority to exercise jurisdiction and as to defendant's contacts with our forum. Defendant chose to forego this opportunity to present evidence and instead challenged the statute's constitutionality. This was a tactical decision which defendant made with full knowledge of its consequences.

His contention that he was entitled to another hearing is not only unsupported but it is illogical as well. Defendant has not directed us to any authority which would have granted him a right to a hearing beyond the one which he received. Furthermore, it appears that an additional hearing would have been an unnecessary waste of time and money. Defendant has not argued that he would have had any additional evidence to put on at a second hearing. Nor has he argued that he has in his possession any evidence which would negate North Carolina's exercise of jurisdiction over him. The trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order, without objection of the defendant. Consequently, we find that the hearing which was held comports with all due process requirements.

Our decision is further supported by the fact that our courts have a legitimate interest in protecting our citizens under circumstances such as these. Moreover, it can neither be said that it is unfair or unduly inconvenient to require defendant to defend this action in our forum. All of the crucial witnesses and the material evidence are situated within North Carolina. *See Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

STATE v. EPPS

[95 N.C. App. 173 (1989)]

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS EPPS

No. 8816SC914

(Filed 15 August 1989)

1. Narcotics § 2— conspiracy to traffic in cocaine—failure to allege amount of cocaine—quashed required

The trial court erred in failing to quash the indictment in a prosecution for conspiracy to traffic in cocaine where weight was an essential element of the offense but the indictment failed to give any weight for the cocaine involved.

2. Narcotics § 2— trafficking in cocaine—two-count indictment—amount alleged in only one count—indictment sufficient to charge crime

Where defendant was charged in a two-count indictment with trafficking in cocaine by sale and the second count did not state the amount of cocaine involved, the trial court did not err in denying defendant's motion to quash the indictment, since the first count did allege the amount involved; the two counts, when read together, apprised defendant that he was being charged with trafficking in cocaine by the sale of 35.1 grams of that substance to an undercover officer; there was no possibility that defendant was confused about the offense charged; defendant did not claim any problem with his trial preparation; the two counts were based upon a single drug transaction; there was only one amount of cocaine involved; and the court did not encounter any problems in pronouncing defendant's sentence.

APPEAL by defendant from *Ellis (B. Craig), Judge*. Judgment entered 24 March 1988 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 21 March 1989.

STATE v. EPPS

[95 N.C. App. 173 (1989)]

Attorney General Lacy H. Thornburg, by Associate Attorney General Robert J. Blum, for the State.

Williamson, Dean, Brown & Williamson, by Richard T. Brown, for defendant-appellant.

ORR, Judge.

The State's evidence tends to show that on 6 April 1987, Lee Hecht, who was serving as an undercover narcotics agent with the Scotland County Sheriff's Office, and a confidential informant were introduced to a man claiming to be Allen Scott. Hecht told Scott he wanted to purchase an ounce and a quarter (1 1/4) of cocaine. Upon instruction from Scott, Hecht and the informant followed Scott to an abandoned business formerly known as Chico's Trading Post.

Officer Hecht was told by Scott to get out of his van and approach the abandoned building. He refused to, and Scott disappeared walking in the direction of the Benton Trailer Park. Hecht later learned that defendant lived in the trailer park. Shortly thereafter, Scott returned, with the defendant appearing a couple of seconds later. Before reaching Hecht's van, defendant and Scott stopped and had a brief dialogue. Officer Hecht testified that "I advised him [defendant] that I was there to purchase an ounce and a quarter of cocaine. I advised him [defendant] that the price agreed upon was \$2,000.00. At that point in time, he advised me, no, that the correct price was going to be \$2,100.00." The two then consummated the deal.

Officer Hecht left the area and made notes on the transaction. Thereafter Hecht met with an officer to whom he was reporting and turned over three plastic bags containing a white powdery substance which defendant had referred to as cocaine. The substance was later determined to be cocaine based on a chemical analysis.

Defendant was subsequently arrested and charged with conspiracy to commit the felony of trafficking in cocaine under G.S. 90-95(i); trafficking in cocaine by possession with the intent to sell or deliver cocaine under G.S. 90-95(h)(3)(a); and trafficking in cocaine by sale and delivery also under G.S. 90-95(h)(3)(a). Defendant was then tried before a jury and found guilty as charged. He was sentenced to a total of 18 and one-half years imprisonment. Defendant now appeals.

STATE v. EPPS

[95 N.C. App. 173 (1989)]

I.

The first issue which we will address is whether the court erred in denying defendant's motion to quash the indictments for conspiracy to traffic in cocaine and for trafficking in cocaine by sale. Defendant contends that the conspiracy indictment contains no reference to any particular statute and it fails to refer to any weight or volume of cocaine involved. He likewise contends that the trafficking by sale indictment fails to allege a weight; therefore, it fails to state a chargeable offense.

"An indictment is a written accusation of crime drawn up by the public prosecuting attorney and submitted to a grand jury, and found and presented by them on oath or affirmation as a true bill." 7 Strong's N.C. Index 3d *Indictment and Warrant* section 7 (1976). In order for an indictment to be valid,

there must be such certainty in the statement of accusation as will (1) identify the offense with which the accused is sought to be charged; (2) protect the accused from being twice put in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce sentence.

State v. Goforth, 65 N.C. App. 302, 305, 309 S.E.2d 488, 491 (1983). *Goforth* involved an indictment where defendants were alleged to have conspired to traffic in "at least 50 pounds of marijuana" in violation of G.S. 90-95(i). *Id.* There we held that weight is an essential element of that offense and we arrested the judgment on that charge because the indictment failed to allege that the amount of marijuana involved was "in excess of 50 pounds" as required by G.S. 90-95(h)(1). (Emphasis added.)

[1] Defendant correctly points out that the conspiracy indictment fails to give any weight for the cocaine involved. Our trafficking statutes were enacted with an aim toward the offender who facilitates the large scale transfer of drugs. *State v. Willis*, 61 N.C. App. 23, 42, 300 S.E.2d 420, 431, *modified and aff'd*, 309 N.C. 451, 306 S.E.2d 779 (1983). An indictment for conspiracy to traffic in cocaine must sufficiently demonstrate that the alleged offender was facilitating the transfer of "28 grams or more of cocaine." See G.S. 90-95(h)(3) and (i). Therefore, we find that because this indictment did not clearly allege all of the material elements to support a conviction for conspiracy to traffic in cocaine, the judgment on that

STATE v. EPPS

[95 N.C. App. 173 (1989)]

issue must be arrested. *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982); *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968).

II.

[2] As to the trafficking in cocaine by sale charge, the defendant was charged in a two-count indictment which states, *inter alia*, that:

[O]n or about the 6th day of April, 1987 . . . the defendant named above unlawfully and feloniously did possess with intent to sell or deliver a controlled substance, 35.1 grams of cocaine which is included in Schedule II of the North Carolina Controlled Substances Act

[O]n or about the 6th day of April, 1987 . . . the defendant named above unlawfully, willfully and feloniously did sell to Det. Lee Hecht a controlled substance, cocaine which is included in Schedule II of the North Carolina Controlled Substance Act

As previously indicated, defendant is challenging the second count. He claims that the indictment does not contain all of the requisite elements in order to validly charge him with a violation of G.S. 90-95(h)(3).

The State contends that since the amount of cocaine, 35.1 grams, was alleged in the "possess[ion] with intent to sell" offense, defendant could not have been misled or placed in double jeopardy by the indictments. We agree with the State's position on this issue and affirm the trial court's denial of the defendant's motion to quash this indictment for the reasons set forth below.

While we recognize that each count of an indictment should be complete in itself, "the fact that the first count charges the offense in general terms and is insufficient is not fatal when subsequent counts for specific violations sufficiently set out the offense complete within themselves." 7 Strongs N.C. Index 3d *Indictment And Warrant* section 9 (1976). Furthermore,

it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime[,] . . . [put] the accused on reasonable notice . . . and to protect the accused from being jeopardized by the State more than once for the same offense.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

STATE v. EPPS

[95 N.C. App. 173 (1989)]

Here, the two counts, when read together, apprise defendant that he is being charged with trafficking in cocaine by the sale of 35.1 grams of that substance to Officer Hecht. There is no possibility that defendant was confused about the offense charged, nor does defendant claim any problem with his trial preparation. The two counts in the indictment are based upon a single drug transaction between defendant and Officer Hecht. There was only one amount of cocaine involved—the 35.1 grams as was alleged in the first count. Furthermore, the court did not encounter any problems in pronouncing defendant's sentence.

This case does not involve the risk of abuse to defendant's constitutional rights which similar factual problems might present. The two-count indictment clearly alleges the offense of trafficking in cocaine by sale and trafficking in cocaine by possession. *Cf. State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983). There was no error in the court's denial of defendant's motion.

Defendant raised the additional issue of the trial court's alleged error in failing to dismiss the conspiracy to traffic in cocaine charge due to insufficient evidence. We see no need to consider that assignment of error in light of our decision to arrest judgment on that conviction.

Judgment is arrested on the conspiracy charge, case number 87CRS1738.

Judgment is affirmed on the trafficking in cocaine by sale charge, case number 87CRS1739.

Judges BECTON and JOHNSON concur.

AETNA CASUALTY & SURETY CO. v. NATIONWIDE MUT. INS. CO.

[95 N.C. App. 178 (1989)]

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, WILLIAM T. SAWYER, JR., JOHN WILLIAM SLATER, JR., AND RALPH LONDON McLEAN, DEFENDANTS

No. 895SC182

(Filed 15 August 1989)

Insurance § 90— automobile liability insurance— exclusion— driver's subjective reasonable belief that he was entitled to use vehicle— question of fact

In an action to determine insurance coverage on a truck driven by an employee of insured, the trial court erred in entering summary judgment for plaintiff insurer where plaintiff's policy provided coverage for persons who had a subjective reasonable belief that they were entitled to use the vehicle, and where there is a question as to a party's subjective belief, as here, the question should be submitted to the jury because state of mind is a question of fact. Moreover, plaintiff could not rely on the position that an absence of a driver's license demonstrated that the driver could not have reasonably believed that he was entitled to drive, because the driver may have known that he had no legal right to drive but nevertheless may have had a reasonable belief that he was "entitled" to drive based upon the permission of the person possessing the car.

Judge PARKER dissenting.

APPEAL by defendants Nationwide Mutual Insurance Company and Ralph Landon McLean from *Llewellyn (James D.)*, Judge. Order entered 14 October 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 May 1989.

Poisson, Barnhill & Britt, by James R. Sugg, Jr., for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, for defendants Nationwide Mutual Insurance Company and Ralph Landon McLean.

ORR, Judge.

On 3 October 1986, an auto collision occurred between John Slater and Ralph McLean. At the time, Slater was driving a truck

AETNA CASUALTY & SURETY CO. v. NATIONWIDE MUT. INS. CO.

[95 N.C. App. 178 (1989)]

owned by William Sawyer. Sawyer's truck was insured for liability through Aetna Casualty & Surety Company (Aetna). McLean filed an action against Slater for damages which he sustained in the crash.

Thereafter, Aetna filed this declaratory judgment action. Its complaint states that Slater is not an insured motorist under the terms of its policy with Sawyer, the owner of the truck. Instead, Aetna alleged that its policy does not cover Slater because Slater was "using [the] vehicle without reasonable belief that [he . . . was] entitled to do so" in contravention of section A(8) in the "EXCLUSIONS" portion of its policy. Aetna asked for a declaration that if it was liable to McLean at all, then its liability would be limited to \$25,000.00. That is the maximum amount of liability insurance which a motorist is required to carry under G.S. 20-279.21(b)(2). However, that amount is less than the amount provided for under Sawyer's policy with Aetna. Later on, Aetna amended its complaint and asked for a declaration that if McLean was awarded a judgment against Slater which exceeded \$25,000.00, then Nationwide Mutual Insurance Company (Nationwide) would pay McLean such amounts in accordance with its uninsured motorist coverage with McLean.

Defendants denied all material allegations and moved to strike plaintiff's amended complaint. Following defendant's answer, Aetna moved the court for summary judgment under G.S. 1A-1, Rule 56(c). The court reviewed the motion and its supporting affidavits and granted the motion. Nationwide and McLean appeal.

The sole question raised by defendants' appeal is whether summary judgment was improperly granted for plaintiff. According to appellants, Aetna's policy with Sawyer, the owner of the truck driven by Slater, must provide coverage to McLean if it is determined that Slater was driving Sawyer's truck with a reasonable belief that he was entitled to do so. Appellants contend that since Slater's subjective belief is a question of fact which was not resolved by Aetna's complaint or supporting affidavit, summary judgment in Aetna's favor was inappropriate. On the other hand, Aetna argues that Slater was driving without permission from Sawyer and that its policy does not extend to him. In the alternative, Aetna contends that Slater was driving without a license and he could not have reasonably believed that he was entitled to drive Sawyer's truck.

AETNA CASUALTY & SURETY CO. v. NATIONWIDE MUT. INS. CO.

[95 N.C. App. 178 (1989)]

Summary judgment may ' . . . 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.' G.S. 1A-1, Rule 56(c). . . . The rule does not contemplate that the court is to decide an issue of fact, but rather it impels the court to determine whether a real issue of fact exists.

Insurance Co. v. Chantos, 25 N.C. App. 482, 484-85, 214 S.E.2d 438, 441, *cert. denied*, 287 N.C. 465, 215 S.E.2d 624 (1975).

In the case at bar, Aetna's policy with Sawyer provides in Part A, entitled "LIABILITY COVERAGE," that a "covered person [is] . . . [a]ny person using your covered auto." However, under the exclusionary section of the policy, section A states "[w]e do not provide Liability Coverage for any person: . . . 8. Using a vehicle without a reasonable belief that that person is entitled to do so." Based upon this language, for an order of summary judgment to have been entered by the court below, Aetna's pleadings and/or other materials must have compelled the conclusion that Slater was not using Sawyer's truck under a reasonable belief of entitlement.

The record reveals that William Sawyer loaned his truck to one employee, Fall, who loaned it to another employee, Slater, who had the accident. The accident occurred while Slater was out running an errand at the request of Fall. Sawyer, the truck owner, had given Fall permission to drive the truck, but did not give Slater permission. A portion of the transcript testimony from Slater is as follows:

Q. Mr. Slater, when Mr. Faw [Fall] gave you the truck that night, did you believe that you were entitled to use the truck?

A. No, not really, because I know that it's wrong to be driving a car without a license regardless of what goes on,

Q. So the reason you didn't think you should be driving was because you didn't have a license; is that correct?

A. Right, I didn't tell him that. No, I didn't tell him.

Aetna contends that since Slater admits that he knew he was not entitled to drive because he did not have a license, no coverage

AETNA CASUALTY & SURETY CO. v. NATIONWIDE MUT. INS. CO.

[95 N.C. App. 178 (1989)]

can be extended to him as an uninsured motorist. We disagree with this position.

First of all, plaintiff's policy substantially broadens the coverage which it provides beyond those who use the covered vehicle with permission. It now covers persons who have a subjective, reasonable belief that they are entitled to use the vehicle. Consequently, in cases such as the one at bar, where there is a question as to a party's subjective belief, the question should be submitted to the jury because state of mind is a question of fact. See *Bank v. Belk*, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

Moreover, plaintiff incorrectly relies on the position that an absence of a driver's license demonstrates that Slater could not have reasonably believed that he was entitled to drive. While such an absence may demonstrate that he knew he had no legal right to drive, that is distinguishable from the dispositive question of Slater's reasonable belief of being "entitled" to drive the car based upon the permission of the person possessing the car.

Therefore, we find that the court erred in granting plaintiff's motion for summary judgment. The order below is reversed.

Reversed.

Judge EAGLES concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I respectfully dissent. The reasonable belief that a person is entitled to use a motor vehicle includes both permission to operate the vehicle and the legal right to operate the vehicle. The authority given by the person in possession to another to use a vehicle does not authorize an unlawful act. One may have permission without having the legal right to do an act. Therefore, the word "entitle" in the context of an automobile insurance policy should not be limited to the question of permission. In my view, a person without a driver's license cannot as a matter of law have a reasonable belief that he is entitled to operate a motor vehicle.

IN RE APPLICATION FOR VARIANCE

[95 N.C. App. 182 (1989)]

Furthermore, if the question to be submitted to the jury is the subjective reasonable belief of the driver that he was entitled to operate the vehicle, that person, defendant Slater, has admitted that he did not have such a belief.

For these reasons, I vote to affirm.

IN RE: APPLICATION FOR VARIANCE BY J. H. CARTER BUILDER COMPANY
INC.

DAVID F. KIRBY, STEPHEN EASTMAN, WILLIAM D. STEVENSON, JR., BARBARA D. MARTIN, PETITIONERS v. BOARD OF ADJUSTMENT OF THE CITY OF RALEIGH AND J. H. CARTER BUILDER, INC., RESPONDENTS

No. 8810SC1185

(Filed 15 August 1989)

Municipal Corporations § 30.6— application for variance denied— no proper basis for rehearing

Respondent Board of Adjustment violated its own procedural rules when it agreed some six weeks after denying petitioner's application for a zoning variance to rehear the application since the Board of Adjustment rules then applicable stated that an application for rehearing "shall be denied by the Board if in its judgment there had been no substantial change in the facts, evidence or conditions in the case"; the chairman explained that he had reviewed the minutes of the meeting in which the petition had been denied and he would like to change his vote; and it was clear that there was no substantial change in the facts, evidence, or conditions in this case.

APPEAL by J. H. Carter Builder, Inc. from *Bailey, Judge*. Order entered 28 July 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1989.

On 14 March 1986 appellant Carter purchased two subdivided lots, numbered 61 and 62, on White Oak Road in Raleigh. A house stood on lot 61, lot 62 was undeveloped. A condition of the sale was that Carter be able to recombine the two lots, so that lot 62 would be buildable. The existing house extended beyond the original property line a few feet. The purpose of the recombination

IN RE APPLICATION FOR VARIANCE

[95 N.C. App. 182 (1989)]

was to insure proper setbacks for any new construction. This was to be accomplished by moving the dividing line into lot 62.

On 21 February 1986 a recombination map was approved by the Subdivision Section of the City Planning Department. On 1 June 1987 the city granted Carter a building permit for lot 62. Adjacent property owners and concerned neighbors, appellees in this case, thereafter notified the city that the recombined lot might be too small for building in the applicable zoning district. On 8 June 1987 the subdivision administrator notified Carter, through his surveyor, that the recombination map was wrongly approved because it had been discovered that lot 62 contained only .228 acre (9,931.68 sq. ft.) when a minimum lot size of .25 acre (10,890 sq. ft.) is required in the applicable zoning district, R-4. On 12 June 1987 the building permit was rescinded. Carter already had sold lot 61, and the current owner (appellee Eastman) is unwilling to sell Carter any additional square footage.

On 20 July 1987 Carter applied for a variance from the required lot size. On 3 August 1987, the Board of Adjustment heard evidence on Carter's application and a motion was made to grant the variance. The vote was three in favor, two against. Because N.C.G.S. § 160A-388(e) requires a four-fifths vote to grant a variance, the motion failed. The next day, Carter requested that the board rehear the matter. At its meeting on 14 September 1987 the board agreed to rehear the matter. Upon rehearing the vote in favor of the variance was four to one, thus the variance was granted. Pursuant to N.C.G.S. § 160A-388(e) appellees petitioned for writ of certiorari to the Superior Court, Wake County. The petition was granted. In its order dated 28 July 1988 the Superior Court reversed the Board of Adjustment and vacated the variance. Carter appeals from that order.

Seay, Rouse, Harvey & Titchener, by George H. Harvey; and Hunter, Wharton & Lynch, by John V. Hunter III, for appellant J. H. Carter Builder, Inc.

Manning, Fulton & Skinner, by John B. McMillan and John I. Mabe, Jr., for appellee.

ARNOLD, Judge.

Carter excepts to the trial court's conclusion of law that "[t]he action of the Raleigh Board of Adjustment in granting a variance

IN THE COURT OF APPEALS
IN RE APPLICATION FOR VARIANCE

[95 N.C. App. 182 (1989)]

in the matter under review before this Court was contrary to law." We affirm the trial court.

N.C.G.S. § 160A-381 enables cities to regulate and restrict land use:

For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence These regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

N.C.G.S. § 160A-388(e) governs the procedure of Boards of Adjustments when granting variances. In pertinent part it states:

The concurring vote of four-fifths of the members of the board [of adjustment] shall be necessary . . . 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.

Pursuant to N.C.G.S. § 160A-381, the Raleigh ordinance creates a board of adjustment at Code Section 10-2094. That section provides that:

(e) The board of adjustment may adopt its own other rules or procedure. Such rules shall be consistent with the laws of North Carolina and the ordinances and the policies of the council.

In 1987, when Carter's variance application was heard, the following rule had been adopted by the Raleigh Board of Adjustment:

V. Appeals and Applications

* * * *

C. 4. *Rehearings*. An application for a rehearing may be made in the same manner as provided for an original hearing. Evidence in support of the application shall initially be limited to that which is necessary to enable

IN RE APPLICATION FOR VARIANCE

[95 N.C. App. 182 (1989)]

the Board to determine whether there has been a substantial change in the facts, evidence or conditions in the case. *A rehearing shall be denied by the Board if in its judgment there has been no substantial change in the facts, evidence or conditions in the case.* (Emphasis added.)

In *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974), our Supreme Court held that when a board of aldermen passes upon an application for a special use permit, it "may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance." *Id.* at 467, 202 S.E.2d at 135. The Court explained:

The procedural rules of an administrative agency "are binding upon the agency which enacts them as well as upon the public. . . . To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights."

Id. at 467-68, 202 S.E.2d at 135 (citation omitted). This rule, which demands that a board of adjustment consistently follow its procedural rules, is equally applicable to a case involving a variance.

At the Board of Adjustment meeting held 3 August 1987, the board heard evidence concerning Carter's application for a variance. A motion was made to approve the variance. As N.C.G.S. § 160A-388(e) requires a four-fifths vote to grant a variance, the vote, three in favor, two opposed, was insufficient to carry the motion. On 4 August 1987, Carter requested that the board reconsider its vote because, Carter states in his request: "at least one of the negative votes was based on the incorrect assumption that the Board had no authority, on a variance request, to change the area requirements of the zoning ordinance."

At the 14 September 1987 meeting of the Board of Adjustment, the board entertained Carter's request to reconsider the vote taken at the 3 August 1987 meeting. The chairman of the board explained that since the meeting he had reviewed the minutes and information and he would like to change his vote. No new evidence was heard. A vote was taken and the variance application was approved four in favor, one against.

IN RE APPLICATION FOR VARIANCE

[95 N.C. App. 182 (1989)]

The Board of Adjustment rules then applicable and cited above stated that an application for rehearing "shall be denied by the Board if in its judgment there has been no substantial change in the facts, evidence or conditions in the case." After considerable review of the record in this case we conclude that the board violated its own procedural rules when it agreed to rehear Carter's application for a variance. It is clear that there was no change in the "facts, evidence or conditions in the case." N.C.G.S. § 160A-388(e) provides that Carter's route to appeal was review by the superior court "by proceedings in the nature of certiorari."

Carter's reliance on *Fisher v. Town of Boscawen*, 121 N.H. 438, 431 A.2d 131 (1981), which interprets a distinguishable statutory scheme is misplaced. Similarly, given our interpretation of *Refining Co.*, Carter's reliance on *Bennett v. City of Clemson*, 293 S.C. 64, 358 S.E.2d 707 (1987), is to no avail. In *Bennett*, the South Carolina court found that no statute or municipal ordinance precluded a zoning board from reconsidering and reversing a matter it had previously decided. *Id.* at 66, 358 S.E.2d at 708. The Board of Adjustment rules here make it clear when a case may be reheard by the Board of Adjustment. As the *Bennett* court pointed out:

In cases permitting an agency to reconsider its decision, courts have emphasized that an agency's power to reconsider or rehear a case is not an arbitrary one, and such power should be exercised only when there is justification and good cause; i.e., newly discovered evidence, fraud, surprise, mistake, inadvertence or change in conditions.

Id. at 66-67, 358 S.E.2d at 708-09. This rationale ably explains the reasoning behind the Board of Adjustment rehearing rule which was ignored in this case.

Given the holding above it is unnecessary to reach appellant's additional assignments of error. The order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE v. HARRINGTON

[95 N.C. App. 187 (1989)]

STATE OF NORTH CAROLINA v. JOHNNY HARRINGTON

No. 8820SC1054

(Filed 15 August 1989)

Assault and Battery § 16— assault with deadly weapon with intent to kill inflicting serious injury—instruction on lesser offense required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was entitled to an instruction on the lesser included offense of assault with a deadly weapon inflicting serious injury where he testified that he was trying to frighten the victim so she would move back and he could get in his car and leave, and defendant's statement was bolstered by his earlier testimony that he fired a warning shot just prior to firing the shot which wounded the victim.

APPEAL by defendant from *Fellers, Judge*. Judgment entered 6 May 1988 in Superior Court, ANSON County. Heard in the Court of Appeals 10 May 1989.

This is a criminal case in which the defendant was indicted and convicted of assault with a deadly weapon with intent to kill inflicting serious injury. From a judgment imposing a sentence of ten years imprisonment, the defendant appeals.

The State's evidence tended to show that on 18 July 1986 Susie Little, her eleven year old son Shawn, and a friend, Ms. Ledbetter, drove to Ms. Little's home. Ms. Little went into the house.

Ms. Little testified that she lived with defendant some time ago, that the defendant was her son Shawn's father, that when she went in her house, she found the defendant there and they had an argument, and that the defendant threatened to kill her and shortly thereafter shot her.

Ms. Ledbetter testified that upon arriving Shawn got out of his mother's car and went into the house. Shortly after Ms. Little went into her house, defendant came out carrying a shotgun and ran around to the side of the house where he stopped and looked in through a glass door. Ms. Ledbetter also testified that Ms. Little and the defendant met at the corner of the front porch each holding

STATE v. HARRINGTON

[95 N.C. App. 187 (1989)]

a gun pointed at the other, and that the defendant then shot Ms. Little. Ms. Ledbetter took Ms. Little to the hospital after the defendant refused to take her.

Shawn Little testified he saw the defendant and his mother arguing. Shawn testified at different times that he saw defendant get his gun from his car, saw his mother get her rifle and then heard a gunshot.

The defendant testified that when Ms. Little walked into the house, he was in the kitchen reading a note indicating that Cindy Little, Ms. Little's daughter, had sprayed defendant's car with oven cleaner. The defendant asked Ms. Little about the note. Ms. Little cursed him, accused him of being sexually promiscuous, and asked him, "[w]here's my rifle at?" The defendant responded, "You know where it's at better than I do." When Ms. Little began looking for her rifle, the defendant got his 410 gauge shotgun from a nearby closet. The defendant testified that as he left the house through the back door, Ms. Little fired a shot over his head. The defendant ran outside the house, fired a "warning shot" in the air, and looked in through a sliding glass door. The defendant further testified that he wanted to get to his car and leave, but he felt it would not be safe to try. The defendant heard Ms. Ledbetter tell Ms. Little where he was. Ms. Little stuck the barrel of her rifle around the corner of the house. The defendant tried to force her rifle away with a chair but after a brief struggle, he threw the chair down and fired his shotgun in an attempt to scare her. Ms. Little was wounded in the upper left shoulder.

Attorney General Thornburg, by Assistant Attorney General Donald W. Laton, for the State.

Assistant Appellate Defender Teresa A. McHugh for defendant-appellant.

EAGLES, Judge.

Defendant contends that he was entitled to an instruction on the lesser included offense of assault with a deadly weapon inflicting serious injury, and that because Ms. Little's statement to the police did not corroborate her testimony, it should not have been allowed into evidence. Though we disagree with the defendant's contention that Ms. Little's statement was improperly admitted, we agree that the trial court should have instructed on the lesser

STATE v. HARRINGTON

[95 N.C. App. 187 (1989)]

included offense. Accordingly, we reverse and remand for a new trial.

I.

The trial court is not required to instruct on the issue of a defendant's guilt of a lesser offense of the crime charged in every case. *State v. Davis*, 33 N.C. App. 262, 265, 234 S.E.2d 762, 764 (1977). However, "[w]hen any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986); *State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970). "The presence of such evidence is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954).

Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge.

State v. Thacker, 281 N.C. 447, 456, 189 S.E.2d 145, 151 (1972).

The "crime condemned by G.S. 14-32(b) [assault with a deadly weapon inflicting serious injury] is a lesser degree of the offense defined by G.S. 14-32(a) [assault with a deadly weapon with intent to kill inflicting serious injury] . . ." *Thacker*, 281 N.C. at 456, 189 S.E.2d at 150-151, and the only distinction is the presence of intent to kill in the greater offense. The critical issue to be resolved, then, is whether there was *any* evidence from which the jury may have concluded that the defendant did not intend to kill Ms. Little. We hold that there was.

Intent to kill is a mental attitude which must normally be proven by circumstantial evidence. *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956). Intent to kill "may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances." *State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946). However, that inference is not required, and whether it is drawn in a particular case is a question for the jury.

STATE v. HARRINGTON

[95 N.C. App. 187 (1989)]

The instant case is analogous to *State v. Whitaker, supra*. In *Whitaker* the defendant was charged with kidnapping. The Supreme Court held that defendant was entitled to an instruction on the lesser included offense of false imprisonment.

The evidence here does not so unerringly point to a purpose to rape the victim as to preclude the jury from reasonably finding defendant guilty of the lesser included offense of false imprisonment. Left to its own devices after having been instructed fully on all pertinent law in the case, the jury reasonably could have inferred from defendant's statement and acts that he did not intend to attempt to rape his victim, but intended only to commit some sexual offense short of attempted rape. . . . The question of the defendant's purpose in abducting the victim, being a question of his state of mind, should have been for the jury to decide, as the evidence did not point unerringly to a conclusion that defendant did or did not intend to attempt to rape the victim.

Whitaker, 316 N.C. at 521, 342 S.E.2d at 518. Here, the defendant stated, "I was trying to frighten her so she would move back so I could get in my car and leave." Indeed, defendant's statement is bolstered by his earlier testimony that he fired a warning shot while at the rear of the house just prior to his shot which wounded Ms. Little.

The State contends that *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) controls here. We disagree. In *Johnson*, a first degree murder by poison case, the Supreme Court noted that "the only evidence to negate these elements was the defendant's denial that he had committed the offense. The trial court did not err by refusing to instruct the jury on second degree murder." *Johnson*, 317 N.C. at 205, 344 S.E.2d at 782. However, the court also stated "a specific intent to kill is equally irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and we hold that an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods." *Johnson*, 317 N.C. at 203, 344 S.E.2d at 781. Here the intent to kill is an element of the principal offense charged and its presence is challenged by defendant's conduct leading up to the shooting as well as by his denial of an intent to kill.

"[T]he factual issue which separates the greater offense from the lesser, i.e., intent, is not susceptible to clear cut resolution."

BLANCHFIELD v. SODEN

[95 N.C. App. 191 (1989)]

State v. Banks, 295 N.C. 399, 416, 245 S.E.2d 743, 754 (1978). On this record, we hold that the trial court should have instructed the jury on the lesser included offense.

II.

Our disposition of defendant's first assignment of error makes it unnecessary for us to reach his second assignment of error. However, because the issue may arise again in a retrial, we address it in our discretion. Defendant argues that the trial court's admission of Ms. Little's statement to the police was erroneous because it was not in fact corroborative. We disagree.

Defendant argues that there were conflicts and discrepancies between Ms. Little's statement to the police and her testimony. However, conflicts and discrepancies between earlier statements and in-court testimony go to Ms. Little's credibility and to the weight, if any, the jury should give her testimony. *State v. King*, 258 N.C. 532, 128 S.E.2d 888, 889 (1963); *State v. Ramey*, 318 N.C. 457, 467, 349 S.E.2d 566, 573 (1986).

For the reasons stated the judgment of the trial court is reversed and the case is remanded for a

New trial.

Judges PARKER and ORR concur.

FRANCIS J. BLANCHFIELD, JR. AND SANDRA GOARD BLANCHFIELD v.
KEVIN J. SODEN AND HOPE SODEN

No. 8826SC1247

(Filed 15 August 1989)

**Vendor and Purchaser § 6— misrepresentation that roof was new—
purchasers' reliance on sellers' misrepresentations not unrea-
sonable as a matter of law**

Where plaintiffs sued defendants claiming that defendants misrepresented that the house plaintiffs purchased from defendants had a new roof when in fact it did not, the evidence did not show as a matter of law that plaintiffs were unreason-

BLANCHFIELD v. SODEN

[95 N.C. App. 191 (1989)]

able in relying on defendants' representations that the house had a new roof even though plaintiffs knew the roof was cracked and that it leaked, since defendant husband personally told plaintiffs that the roof was new after they specifically asked about its condition; the listing prepared by defendants' agent with information supplied by the husband listed the house as having a new roof; despite the fact that the husband knew the listing was wrong, the representation was not corrected or qualified in any way; later on, defendants were silent even though plaintiffs' letter which was transmitted with the final contract put them on notice that plaintiffs thought that they were getting a new roof; and while plaintiffs knew the roof leaked, their failure to inspect it further was not unreasonable as a matter of law because defendant husband informed them that the roof would be repaired, and they had no reason to doubt his word.

APPEAL by defendants from Judgment of *Judge James U. Downs* entered 15 June 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 16 May 1989.

Smith Helms Mulliss & Moore, by Robert H. Pryor and H. Landis Wade, Jr., for plaintiff appellees.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell, by Robert D. McDonnell, for defendant appellants.

COZORT, Judge.

Plaintiffs sued defendants claiming that defendants misrepresented that the house plaintiffs purchased from defendants had a new roof, when in fact the roof was not new. The jury found for plaintiffs. Defendants argue that the trial court erred in denying their directed verdict and j.n.o.v. motions, because the evidence shows as a matter of law that plaintiffs were unreasonable in their reliance. We find no error. The facts follow.

Defendants owned a house and 15.43 acres of land in Charlotte. Defendants decided to sell the home in 1983 and enlisted Bissell-Hayes Realtors to sell the property.

In July 1984, plaintiffs received the Bissell-Hayes listing information on defendants' home. Defendant Kevin Soden was the primary source of the listing information. Typed on the listing

BLANCHFIELD v. SODEN

[95 N.C. App. 191 (1989)]

were the words "new roof" in a section titled "Outstanding Features, other remarks."

Plaintiffs' evidence tended to show that, during their first visit to the home, plaintiff Francis Blanchfield asked defendant Kevin Soden about the roof. Mr. Blanchfield testified that Mr. Soden told him "that's a new roof" as he gestured toward the ceiling. However, defendants' evidence tended to show that Mr. Soden informed Mr. Blanchfield that only the roof over the room in which they were standing was new.

A contract was formed on 13 September 1985 for the purchase of the house and 15.43 acres for \$372,000, with the closing to occur on 20 September 1985.

In July 1985, plaintiffs hired an inspector to inspect the house. Plaintiff Francis Blanchfield received the inspection report and discussed it with his inspector. Mr. Blanchfield testified that he knew there were cracks in the roof. He testified as follows:

It was a new roof as far as I understood. And there was some problem with a seam to be resealed and in our description, I just thought it was one of those little witches [*sic*] that goes with something new and that it was just to repair a new roof that needed to be done.

Plaintiffs' evidence tended to show that they discussed the inspection report with defendant Kevin Soden, but he did not disclose that the house had an old roof.

The parties also discussed the cracks in the roof. Defendant Kevin Soden had a roofer repair the cracks before plaintiffs closed on the house. The roofer informed Mr. Soden that the roof needed to be replaced, but he did not inform plaintiffs of the roofer's recommendation. Also in the contract of sale, which was in the form of a letter from plaintiff Francis Blanchfield to defendant Kevin Soden, plaintiff referred to the "new roof" as being one of the outstanding features of the house.

After closing, plaintiffs discovered that the roof leaked. Plaintiffs filed suit, and the jury returned a verdict for \$6,632.96. The jury also awarded plaintiffs \$219.00 in damages for defendants' conversion of a food processor and a basketball goal which were supposed to go with the property.

BLANCHFIELD v. SODEN

[95 N.C. App. 191 (1989)]

The issue on appeal is whether as a matter of law plaintiffs were unreasonable in relying on defendants' representations that the house had a new roof even though plaintiffs knew the roof was cracked and that it leaked.

Under the standard of review for the denial of defendants' directed verdict motion at the close of all the evidence and of defendants' j.n.o.v. motion, we consider the evidence in the light most favorable to plaintiffs and resolve all conflicts in the evidence in plaintiffs' favor. *Coppley v. Carter*, 10 N.C. App. 512, 514, 179 S.E.2d 118, 120 (1971).

To prove fraud plaintiffs had to prove six elements: (1) that defendants made a representation of a material past or existing fact, (2) that the representation was false, (3) that defendants knew the representation was false or made it recklessly without regard to its truth or falsity, (4) that the representation was made with the intention that it would be relied upon, (5) that plaintiffs did rely on it and that their reliance was reasonable, and (6) that plaintiffs suffered damages because of their reliance. See *Johnson v. Owens*, 263 N.C. 754, 756, 140 S.E.2d 311, 313 (1965); *Roberson v. Williams*, 240 N.C. 696, 701, 83 S.E.2d 811, 814 (1954). Defendants do not seriously challenge plaintiffs' evidence on each element of plaintiffs' cause of action except with regard to the reasonableness of plaintiffs' reliance. The substance of defendants' argument is that plaintiffs were unreasonable in relying on any representations that the house had a new roof. Defendants argue that plaintiffs had the opportunity to inspect, did inspect, and were fully informed by their own inspector that the roof was cracked and that it leaked. According to defendants, that knowledge of the roof's problems and the opportunity to discover that the roof was not new rendered any reliance by plaintiffs on statements that the roof was new unreasonable as a matter of law. We disagree.

Viewing the evidence in the light most favorable to plaintiffs, we find that plaintiffs' reliance was not unreasonable as a matter of law because they had notice that the roof leaked. Defendant Kevin Soden personally told plaintiffs that the roof was new after they specifically asked about its condition. The listing prepared by Mr. Soden's agent with information supplied by him listed the house as having a new roof. Despite the fact that Mr. Soden knew the listing was wrong, neither of these representations was corrected or qualified in any way. Later on, Mr. Soden was silent

BLANCHFIELD v. SODEN

[95 N.C. App. 191 (1989)]

even though plaintiff's letter which was transmitted with the final contract put him on notice that plaintiffs thought that they were getting a new roof, because the letter recited a new roof as one of the home's outstanding features.

While plaintiffs knew that the roof leaked, their failure to inspect it further was not unreasonable as a matter of law. Mr. Soden assured plaintiffs that the roof would be *repaired*. He failed to inform plaintiffs, however, that the roof repairman had recommended that the roof be *replaced*. Since he had previously told plaintiffs that the roof was new and that the leak would be repaired, plaintiffs had no reason to doubt Mr. Soden's word. Whether plaintiff's testimony was credible—that he thought the leaks were due to a bad seal or “a glitch” in the “new” roof—was an issue for the jury. *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971).

In considering the issue of reasonable reliance, our Supreme Court has noted:

Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine. This case presents that difficulty. In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, “You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.” Courts should be very loath to deny an actually defrauded plaintiff relief on this ground. When the circumstances are such that a plaintiff seeking relief from alleged fraud must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him. In such a case the doctrine is the specific remedy for a complainant who is, so to speak, malingering. A plaintiff who, aware, has made a bad bargain should not be allowed to disown it; no more should a fraudulent defendant be permitted to wriggle out on the theory that his deceit inspired confidence in a credulous plaintiff.

Johnson, 263 N.C. at 758, 140 S.E.2d at 314. The reasonableness of plaintiffs' conduct in light of these circumstances was appropriately

RICHARDSON v. HIATT

[95 N.C. App. 196 (1989)]

for the jury and not the trial court to decide. *See Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987).

We have reviewed defendants' assignments of error concerning the lack of evidence to support plaintiffs' damages for the cost of repairing the roof and for conversion of the food processor and the basketball goal. We find the evidence sufficient.

In the trial below we find

No error.

Judges JOHNSON and GREENE concur.

RONALD RICHARDSON v. WILLIAM S. HIATT, COMMISSIONER, NORTH
CAROLINA DIVISION OF MOTOR VEHICLES

No. 887SC1096

(Filed 15 August 1989)

1. Automobiles and Other Vehicles § 126.3— driving while impaired— taking of blood sample— nurse present in emergency room— willful refusal to be tested— no question as to presence of qualified person to draw blood

The trial court erred in concluding that respondent failed to show that a physician, registered nurse, or other qualified person was present to withdraw petitioner's blood at the time the sample was requested and that petitioner therefore did not willfully refuse to be tested, since petitioner must state with a reasonable degree of specificity the basis upon which the contention rests that a refusal to be tested was not willful because the means of chemical analysis were invalid; there was no record in the trial below of proper allegations by petitioner; two officers in this case testified that a nurse was present in a hospital emergency room to withdraw petitioner's blood; and there was no evidence to support the trial court's finding to the contrary.

RICHARDSON v. HIATT

[95 N.C. App. 196 (1989)]

2. Automobiles and Other Vehicles § 125— driving while impaired—reasonable grounds for arrest

An officer had reasonable grounds to arrest petitioner for impaired driving, and his driver's license was properly revoked for refusal to submit to a chemical analysis of his blood, where petitioner had been involved in a one vehicle accident in which his car went off the road into a ditch at a time when driving conditions were excellent; petitioner told the officer that he had fallen asleep at the wheel; and the officer detected the strong odor of alcohol about petitioner.

APPEAL by respondent from Judgment of *Judge Napoleon Barefoot* entered 11 August 1988 in NASH County Superior Court. Heard in the Court of Appeals 19 April 1989.

Ralph G. Willey, III, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for respondent appellant.

COZORT, Judge.

Petitioner's driver's license was revoked by the respondent, Division of Motor Vehicles (DMV), for willfully refusing to submit to chemical analysis of his blood to determine its alcohol concentration. A DMV hearing officer affirmed the revocation. Petitioner filed for a hearing *de novo* in Superior Court under N.C. Gen. Stat. § 20-16.2(e). The trial court ordered that petitioner's driving privileges be fully restored because DMV failed to prove that a physician, registered nurse or other qualified person was available to withdraw blood at the time the charging officer requested petitioner to submit to a blood test. William Hiatt, Commissioner of DMV, appeals the trial court's judgment. We reverse. Petitioner cross appeals contending that the charging officer did not have reasonable grounds to believe that petitioner committed an implied consent offense when the officer requested that petitioner submit to a blood test. On petitioner's cross appeal we affirm. The facts follow.

Petitioner was involved in a one-car accident when his vehicle went off the road and into an adjacent ditch on 27 August 1987, on a clear day at approximately 3:00 p.m. Officer Lynn Lewis, Jr., of the Rocky Mount Police Department, was dispatched to the accident scene.

RICHARDSON v. HIATT

[95 N.C. App. 196 (1989)]

Upon arriving, Officer Lewis asked a group of five or six people gathered at the scene whether any of them was the driver of the car. Petitioner responded that he was the driver. He then produced, at the officer's request, his license and registration.

Petitioner, complaining of a head injury, was transported by ambulance to a local hospital shortly after speaking with Officer Lewis. The officer detected a strong odor of alcohol from petitioner and formed an opinion that he was under the influence of alcohol.

While Officer Lewis was en route to the hospital, he called Officer William Hoehlein, also of the Rocky Mount Police Department, to perform a chemical analysis of petitioner. Officer Hoehlein is a certified chemical analyst authorized to administer a breathalyzer test. But at the time in question he was not authorized to withdraw blood for chemical analysis.

At the hospital, Officer Hoehlein fully advised petitioner of his rights concerning chemical analysis. The officer testified that petitioner was very coherent and indicated that he understood his rights.

In the hospital's emergency room and with Officer Hoehlein in attendance, Officer Lewis requested that petitioner allow a nurse who was standing nearby to withdraw a blood sample to determine the amount of alcohol in his blood. Officer Hoehlein testified that the nurse was present in the room and "actually had the needle in hand, so to speak." Petitioner responded that he was not going to allow anyone to withdraw his blood. Officer Hoehlein then told petitioner that he would be cited as a voluntary refusal if he did not give the nurse a blood sample. Petitioner responded that he did not care.

[1] Petitioner's driver's license was revoked for willfully refusing to submit to chemical analysis, pursuant to N.C. Gen. Stat. § 20-16.2. The revocation was affirmed by a DMV hearing officer. Upon a hearing *de novo* the trial court reversed the revocation order, concluding that petitioner did not willfully refuse to be tested because respondent failed to show that a physician, registered nurse or other qualified person was present to withdraw petitioner's blood at the time the sample was requested.

N.C. Gen. Stat. § 20-139.1(c) provides that "[w]hen a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may

RICHARDSON v. HIATT

[95 N.C. App. 196 (1989)]

withdraw the blood sample." N.C. Gen. Stat. § 20-139.1(c) (1988). This Court has held that the State has the burden of proving compliance with this section. *State v. Bailey*, 76 N.C. App. 610, 613, 334 S.E.2d 266, 269 (1985).

Sections 20-16.2(e) and 20-25 provide petitioner the right for a hearing *de novo* in Superior Court to determine whether he willfully refused to submit to chemical analysis upon request of the charging officer. See N.C. Gen. Stat. § 16-2(d)(5), (e) (Cum. Supp. 1988); N.C. Gen. Stat. § 20-25 (1988).

The petitioner has the right to challenge in his petition whether the person who stood ready to withdraw the blood sample was qualified under N.C. Gen. Stat. § 20-139.1(c). See, e.g., *Bailey*, 76 N.C. App. at 613, 334 S.E.2d at 268-69. But such a challenge must be raised in the petition to give the State ample notice and opportunity to respond. It is essential that the State be given notice so that the trial court can fairly examine the testimony offered by both sides and thoroughly examine the facts of the case as the statute requires. See N.C. Gen. Stat. § 20-25 (1988); *In re Austin*, 5 N.C. App. 575, 580, 169 S.E.2d 20, 23 (1969). Since the hearing in superior court is *de novo*, the trial court does not have the benefit of the evidence offered before the hearing officer and instead must rely upon the parties—particularly the petitioner—to guide him as to the salient issues. Therefore, petitioner must state with a reasonable degree of specificity the basis upon which the contention rests that a refusal to be tested was not willful because the means of chemical analysis were invalid. There is no record below of proper allegations by the petitioner.

Moreover, in *State v. Watts*, 72 N.C. App. 661, 664, 325 S.E.2d 505, 507, *disc. rev. denied*, 313 N.C. 611, 332 S.E.2d 83 (1985), this Court held that testimony from the charging officer that the blood sample was drawn by a blood technician at a hospital was sufficient evidence that the blood was drawn by a qualified person under § 20-139.1(c). In this case both Officers Lewis and Hoehlein testified that a nurse was present to withdraw petitioner's blood. Officer Hoehlein further testified that she was "authorized to do that." There was no evidence to the contrary. Thus the only evidence before the trial court was that a nurse was present to withdraw the blood. There was no evidence to support the trial court's finding to the contrary. We find *Watts* controlling, and we must reverse

RICHARDSON v. HIATT

[95 N.C. App. 196 (1989)]

the trial court's judgment that the State failed to carry its burden of proof to show compliance with § 20-139.1(c).

[2] In his cross appeal, petitioner contends that the trial court erred in refusing to reverse the revocation on the grounds that the charging officer did not have probable cause to arrest petitioner for an implied consent offense. He argues that the State failed to show evidence tending to support a reasonable basis to arrest him for impaired driving beyond the testimony of Officer Lewis that he detected from petitioner the strong odor of alcohol. We disagree.

Probable cause to arrest exists when the officer has reasonable grounds to believe that 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). In this case there was additional evidence, beyond the strong odor of alcohol, that gave Officer Lewis reasonable grounds to believe petitioner had been driving while impaired. First, petitioner had been involved in a one-vehicle accident in which his car went off the road into a ditch. The accident occurred when driving conditions were excellent. It occurred on a clear day in the middle of the afternoon. Second, Officer Lewis testified that petitioner told him that he had fallen asleep at the wheel. The evidence surrounding the accident and petitioner's reason for its occurrence, coupled with the strong odor of alcohol detected from him, gave Officer Lewis reasonable grounds to arrest petitioner for impaired driving. See *Church v. Powell*, 40 N.C. App. 254, 257, 252 S.E.2d 229, 231 (1979).

In DMV's appeal we reverse the trial court's order rescinding DMV's revocation on the grounds that the State failed to prove compliance with § 20-139.1(c). In petitioner's cross appeal we affirm the trial court's judgment denying his motion to rescind the revocation order for lack of probable cause. The cause is remanded to Nash County Superior Court for entry of an order affirming the revocation of petitioner's driver's license.

Reversed in part, affirmed in part, and remanded.

Judges PHILLIPS and PARKER concur.

EWAYS v. GOVERNOR'S ISLAND

[95 N.C. App. 201 (1989)]

JOSEPH M. EWAYS, PLAINTIFF v. GOVERNOR'S ISLAND, A NORTH CAROLINA LIMITED PARTNERSHIP AND ALLEN DUKES-JONES ISLAND, PARTNERSHIP, DEFENDANTS v. J. L. TODD AUCTION CO., INTERVENOR DEFENDANT

No. 883SC1252

(Filed 15 August 1989)

Courts § 2.1— issues before federal Bankruptcy Court— subject matter jurisdiction not conveyed on state court by federal court

The trial court properly dismissed plaintiff's suit for lack of subject matter jurisdiction where defendant filed an action against plaintiff for the amount of deficiency between plaintiff's bid and the subsequent sale price of real property; the Bankruptcy Court entered judgment against plaintiff for a certain sum; plaintiff appealed to the U. S. District Court; that court decided to abstain temporarily from ruling on plaintiff's appeal from the Bankruptcy Court to allow the parties 90 days to file proceedings in state court to resolve issues concerning the quality of title offered by defendants; plaintiff thereafter filed this action alleging that the title offered by defendants was not good and marketable title as the parties' contract required, given the restrictions on it announced at the auction where plaintiff had made the highest bid; and pursuant to *Gilliam v. Sanders*, 198 N.C. 635, the federal court could not confer subject matter jurisdiction upon the state court where the highest court of this State had ruled that no such state jurisdiction existed.

APPEAL by plaintiff from Order of *Judge J. Herbert Small* entered 28 June 1988 in PAMLICO County Superior Court. Heard in the Court of Appeals 16 May 1989.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for plaintiff appellant.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by John R. Wallace; Adams, McCullough & Beard, by Lisa M. Nieman; and Ward and Smith, P.A., by Michael P. Flanagan, for defendant appellees.

EWAYS v. GOVERNOR'S ISLAND

[95 N.C. App. 201 (1989)]

COZORT, Judge.

Plaintiff sued defendants seeking to recover money he was ordered to deposit by the United States Bankruptcy Court to secure his performance on a bid he made to purchase property owned by the defendant Governor's Island. The trial court dismissed plaintiff's suit for lack of subject matter jurisdiction. Plaintiff appeals. We affirm.

Defendant Governor's Island, a North Carolina limited partnership, and defendant Allen Dukes-Jones Island partnership owned an interest in an island located in Pamlico County. In 1983 both defendants filed petitions under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court ordered defendant Governor's Island to market and sell the property. The defendant then applied to the Bankruptcy Court for permission to sell the property by public sale. The sale was subject to the approval of the Bankruptcy Court.

Intervenor defendant J. L. Todd Auction Company was chosen by defendant to conduct the public sale. The brochures prepared by J. L. Todd Auction Company provided that the sale was subject to announcements made by the auctioneer on the day of the sale. The auctioneer announced prior to bidding that the property was being sold subject to oil and natural gas rights held by third parties. It was also announced that defendants could not sell land located under navigable waters and that a fifteen-acre tract was being excluded from the sale. Plaintiff claims that he did not hear and was unaware of the announced restrictions. The public auction took place in January 1984. Plaintiff's bid of \$1,960,000 for the entire island was the high bid. The Bankruptcy Court thereafter confirmed the sale to plaintiff upon application of defendant Governor's Island. Plaintiff made a security deposit of \$184,000 with J. L. Todd Auction Company.

After the sale was confirmed by the Bankruptcy Court, plaintiff notified defendants that he was unable to arrange financing to complete his purchase because of the restrictions on the title which had been announced at the auction, about which plaintiff claimed he was unaware when he made his bid. The closing did not occur as scheduled, and defendant Governor's Island filed an application with the Bankruptcy Court to order plaintiff's security deposit forfeited. The court concluded that plaintiff breached his obligation to purchase the property but decided to allow plaintiff ad-

EWAYS v. GOVERNOR'S ISLAND

[95 N.C. App. 201 (1989)]

ditional time to close the sale. Plaintiff failed to complete the purchase.

The property was eventually sold at public auction for \$1,100,000. Defendant Governor's Island then filed an action against plaintiff for \$860,000, plus costs, the amount of deficiency between plaintiff's bid of \$1,960,000 and subsequent sale price of \$1,100,000. The Bankruptcy Court entered judgment against plaintiff for \$294,000. Plaintiff appealed to the United States District Court, Eastern District of North Carolina.

The United States District Court decided to temporarily abstain from ruling on plaintiff's appeal from the Bankruptcy Court. The parties were allowed ninety days to file proceedings in state court to resolve issues concerning the quality of title offered by defendants. Plaintiff thereafter filed this action alleging that the title offered by defendants was not "good and marketable" title as the parties' contract required, given the restrictions on it announced at auction. The trial court dismissed plaintiff's suit for lack of subject matter jurisdiction.

Based on our Supreme Court's holding in *Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930), we hold that a federal court cannot confer subject matter jurisdiction upon a state court where the highest court of this State has ruled that no such state court jurisdiction exists. In *Gilliam*, plaintiff, the appointed trustee of the bankrupt, filed suit in state court against defendant for failing to comply with his bid for real and personal property offered at public sale by the trustee pursuant to an order of the United States District Court. *Id.* at 635, 152 S.E. at 888. The trial court in *Gilliam* dismissed plaintiff's suit and our Supreme Court affirmed. *Id.* at 638, 152 S.E. at 890. The court reasoned as follows:

"In a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be given in the pending action, it must be done by a motion in the cause and not by an independent action. The latter is allowed only when the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid multiplicity of suits, avoid delay and save costs. *Hudson v. Coble*, 97 N.C. 260, *Pettillo, ex parte*, 80

EWAYS v. GOVERNOR'S ISLAND

[95 N.C. App. 201 (1989)]

N.C. 50; *Mason v. Mills*, 63 N.C. 564, and numerous cases cited in them.”

Id. at 637, 152 S.E. at 889-90 (quoting *Marsh v. Nimocks*, 122 N.C. 478, 29 S.E. 840 (1898)).

The policy expressed in *Gilliam* is that of keeping all proceedings related to the bankrupt's property within the equity jurisdiction of the District Court to avoid multiplicitous suits, costs, and needless delay. In the opinion of the District Court, that policy is not in keeping with modern notions of abstention and comity. Since Congress has provided that federal courts may abstain from ruling on important issues of state law, and since no such abstention laws existed when *Gilliam* was decided, plaintiff contends that the federal abstention statutes “override any precedential argument stemming from *Gilliam*.” We disagree.

The policy of avoiding multiple suits, along with the accompanying costs and delay, rings more true today than it did in 1930 when *Gilliam* was decided. Today the state and federal courts are faced with an avalanche of litigation. *Cf. Gordon v. Green*, 602 F.2d 743, 745 n.6 (5th Cir. 1979) (where the court noted in passing on a particularly bad case of unnecessary litigiousness, which we hasten to add is *not* present here, that such cases “only hasten the speed at which our country's trees are being transformed into sheets of legal jargon”). Yet we recognize that plaintiff's complaint may raise important state law issues, and that to advance sound principles of federalism and comity we should resolve questions of such magnitude. On balance we find that *Gilliam* expresses sound policy. The federal courts are not unaccustomed to deciding questions involving state law, *e.g.*, diversity cases, and unquestionably have the expertise to evaluate how the resolution of those issues relates to the overall bankruptcy case. But, more importantly, we are bound by *Gilliam* because it is indistinguishable from the present case. Therefore, the order dismissing plaintiff's complaint for lack of subject matter jurisdiction was correct.

Plaintiff also appealed the trial court's denial of his motion for summary judgment. Our affirmance of the trial court's dismissal of plaintiff's action precludes the necessity for considering this argument.

The order of dismissal is

ALLEN v. WEYERHAEUSER, INC.

[95 N.C. App. 205 (1989)]

Affirmed.

Judges JOHNSON and GREENE concur.

LARRY ALLEN v. WEYERHAEUSER, INC., A/K/A WEYERHAEUSER COMPANY

No. 883SC1202

(Filed 15 August 1989)

Contracts § 26.1; Master and Servant § 8— safety program of employer—integration with written employment contract—termination for failure to comply with safety program

The trial court properly directed verdict for defendant in plaintiff's action for wrongful termination of his contract to haul defendant's timber where the parties' written contract did not fully integrate their agreement; though the contract did not mention defendant's "Lights On For Safety" program, plaintiff was informed of and agreed to comply with the safety program before he signed the contract; plaintiff's initial compliance with that program subsequent to signing the agreement was additional evidence that the parties did not intend the writing to be fully integrated; evidence that plaintiff verbally agreed to comply and did comply with defendant's safety program did not contradict the express language of the contract; and plaintiff's evidence established as a matter of law that he anticipatorily breached the contract where plaintiff told his supervisor that he would no longer operate his truck with his headlights turned on and that the supervisor should go ahead and "do him a favor" by firing him.

APPEAL by plaintiff from Judgment of *Judge I. Beverly Lake, Jr.*, entered 28 June 1988 in CRAVEN County Superior Court. Heard in the Court of Appeals 11 May 1989.

Barker, Dunn & Mills, by James C. Mills, for plaintiff appellant.

Ward and Smith, P.A., by John A. J. Ward, for defendant appellee.

ALLEN v. WEYERHAEUSER, INC.

[95 N.C. App. 205 (1989)]

COZORT, Judge.

Plaintiff was under contract to drive a truck to haul defendant's timber. He claims that defendant wrongfully terminated his contract. The trial court granted defendant a directed verdict at the close of plaintiff's evidence. Plaintiff appeals. We affirm.

Plaintiff hauled timber for defendant pursuant to a contract signed in March 1985. Plaintiff previously had for several years been an employee for defendant as a truck driver. In 1983, he began working for defendant as an independent contractor.

The provision of the contract relevant to this dispute provided:

1. SCOPE OF WORK

* * * *

(d) Contractor agrees to comply with all operational safety and conservation rules and regulations promulgated by Weyerhaeuser and in effect at the various loading and delivery places, while upon or about such places. Weyerhaeuser shall inform Contractor of any such rules and regulations and amendments thereto.

Plaintiff's witness, Billy Corey, was defendant's supervisor in charge of contract trucking. Mr. Corey, a long-time friend and former co-worker of plaintiff's, was responsible for informing contractors of defendant's safety regulations and for insuring that the drivers complied with those regulations. Mr. Corey informed plaintiff, before plaintiff signed the contract in March 1985, that he would have to burn his headlights while he was on the road. Defendant required all of its contract truckers to operate trucks with headlights on as part of defendant's "Lights On For Safety" program.

Initially, plaintiff complied with the headlight requirement. There were occasions, however, when Mr. Corey would have to remind plaintiff to turn on his headlights. Plaintiff's noncompliance became more frequent, even though Mr. Corey sat down with him on several occasions and explained that he had to comply with company policy. Finally, in May 1985, plaintiff told Mr. Corey that "he won't [*sic*] going to run with his lights on; that he was tired of it anyway and if . . . [Corey] would fire him it would do him a favor."

ALLEN v. WEYERHAEUSER, INC.

[95 N.C. App. 205 (1989)]

On 17 May 1985, Mr. Corey sent plaintiff a letter giving him notice that defendant was terminating plaintiff's hauling contract. Mr. Corey wrote that plaintiff had been requested to turn on his headlights on 6 May by the company dispatcher and on 15 May by Mr. Corey, but had refused.

Plaintiff sued claiming that defendant wrongfully terminated his contract. The trial court granted defendant a directed verdict at the close of plaintiff's evidence.

The standard of review for the granting of defendant's directed verdict motion involves the question whether, when viewing the evidence in the light most favorable to plaintiff, no reasonable juror could find for plaintiff. *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 606 (1985).

Plaintiff argues that the contract required him to comply only with those safety rules that were in effect "at the various *loading* and *delivery* places." (Emphasis added.) He contends that nothing in the written contract gave defendant the right to force his compliance with the "Lights On For Safety" program when he was on the open road and not at a "loading or delivery place."

The issues are whether the writing fully integrated the parties' agreement, and, if it did not, whether parol evidence was inconsistent with the written contract. The parol evidence rule is defined as follows:

It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. 2 Stansbury's N.C. Evidence § 253 (Brandis Rev. 1973). This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. *The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol. Id.*, § 252.

Craig v. Kessing, 297 N.C. 32, 34-35, 253 S.E.2d 264, 265-66 (1979) (emphasis added).

ALLEN v. WEYERHAEUSER, INC.

[95 N.C. App. 205 (1989)]

The contract in question contains no integration or merger clause. Plaintiff offered no evidence that the parties intended the writing to be the full, exclusive expression of their agreement. Mr. Corey's testimony tends to suggest that plaintiff was informed of and agreed to comply with the "Lights On For Safety" program before plaintiff signed the contract. Plaintiff's initial compliance with that program subsequent to signing the agreement is additional evidence that the parties did not intend the writing to be fully integrated, and we find that it was not integrated.

The test to determine whether evidence of the parties' oral agreement is admissible is as follows: "If oral evidence does not contradict written it is admissible; otherwise, it is not admissible." *Craig v. Calloway*, 68 N.C. App. 143, 147, 314 S.E.2d 823, 826 (1984) (quoting *Mozingo v. Bank*, 31 N.C. App. 157, 162, 229 S.E.2d 57, 61 (1976), *cert. denied*, 291 N.C. 711, 232 S.E.2d 204 (1977).

We find the evidence that plaintiff verbally agreed to comply and did comply with defendant's "Lights On For Safety" program does not contradict the express language of the contract. First, the relevant language does not *strictly* limit plaintiff's compliance with safety regulations to loading and delivery places. "(d) Contractor agrees to comply with all operational safety and conservation rules and regulations promulgated by Weyerhaeuser and in effect at various loading and delivery places, while *upon or about* such places." (Emphasis added.) Second, the contract does not limit the type of regulations with which plaintiff must comply only to those involving loading and delivery. It says plaintiff must comply "with *all* operational safety . . . rules and regulations." (Emphasis added.) Thus, the contract does not reflect an overall restrictive intent regarding plaintiff's safety compliance duty even though loading and delivery areas are specifically pointed out.

Plaintiff's assent to defendant's request, for which there is unequivocal evidence, represents a supplemental or additional promise. We find nothing inconsistent between the written and the oral promises. Here the evidence was that plaintiff knew about the headlight safety program before signing the contract and was reminded numerous times after its execution. Moreover, a strict construction of the language, as plaintiff would have us apply, runs contrary to sound public policy. Efforts to improve highway safety should be encouraged.

CHARLOTTE TRUCK DRIVER TRAINING SCHOOL v. N.C. DMV

[95 N.C. App. 209 (1989)]

Finally, plaintiff's evidence established as a matter of law that he anticipatorily breached the contract.

When the promisor to an executory agreement for the performance of an act in the future renounces its duty under the agreement and declares its intention not to perform it, the promisee may treat the renunciation as a breach and sue at once for damages. *Pappas v. Crist*, 223 N.C. 265, 25 S.E.2d 850 (1943). In order to maintain a claim for anticipatory breach, the words or conduct evidencing the renunciation or breach must be a "positive, distinct, unequivocal, and absolute refusal to perform the contract" when the time fixed for it in the contract arrives. *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917); 4 Corbin, *Contracts* § 973 (1951).

Messer v. Laurel Hill Associates, 93 N.C. App. 439, ---, 378 S.E.2d 220, 223 (1989). Plaintiff told his supervisor, Mr. Corey, that he would no longer operate his truck with his headlights turned on and that Mr. Corey should go ahead and "do him a favor" by firing him. We find that this conduct was unequivocal evidence of anticipatory repudiation.

We find that the trial court's grant of directed verdict should be Affirmed.

Judges JOHNSON and GREENE concur.

CHARLOTTE TRUCK DRIVER TRAINING SCHOOL, INC. v. NORTH CAROLINA
DIVISION OF MOTOR VEHICLES

No. 8826SC1069

(Filed 15 August 1989)

Administrative Law § 6— DMV order canceling truck driver school license — jurisdiction of superior court to review — rights of petitioner determined by agency proceeding — contested case

The superior court had jurisdiction pursuant to N.C.G.S. § 150B-43 to review respondent's order canceling petitioner's truck driver school license even though petitioner waived its right to an evidentiary hearing, since the rights of petitioner

CHARLOTTE TRUCK DRIVER TRAINING SCHOOL v. N.C. DMV

[95 N.C. App. 209 (1989)]

were determined by an in-person interview and an investigation by a hearing officer of respondent; the interview and investigation constituted "an agency proceeding"; this was therefore a "contested case" subject to judicial review; the waiver of an evidentiary hearing was in regard to the determination of whether an alleged violation of respondent's rules actually occurred; and the parties did not consent to waive judicial review of any agency decision.

APPEAL by petitioner from *Snepp (Frank W., Jr.)*, Judge. Order entered 18 July 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 April 1989.

Reginald L. Yates for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jane P. Gray, for respondent-appellee.

GREENE, Judge.

Petitioner, Charlotte Truck Driver Training School, Inc., appeals from an order entered by the Mecklenburg County Superior Court in which petitioner's petition for judicial review was dismissed on the ground that the court lacked jurisdiction under N.C.G.S. Sec. 150B-43 (1987).

Petitioner was issued a commercial truck driver's training school license by the North Carolina Division of Motor Vehicles (hereinafter "the respondent"). Respondent is an agency of the State of North Carolina charged with responsibility of licensing and promulgating rules and regulations which govern the operation of truck driver training schools in North Carolina. N.C.G.S. Sec. 20-320 *et seq.* Allegations were made that petitioner had violated certain rules and regulations promulgated by the respondent and petitioner was notified by letter on 18 December 1986 that its license to operate a commercial truck driver training school was cancelled. Petitioner requested an administrative hearing and the hearing was held on 25 and 26 February 1987. On 1 April 1987, a consent order was entered into between petitioner and respondent which provided that petitioner's license was suspended for three years but that the suspension was stayed on certain conditions. According to the terms of the consent order, in the event of an alleged violation, such alleged violation would be referred to a hearing officer for determination of whether such violation actually occurred and the

CHARLOTTE TRUCK DRIVER TRAINING SCHOOL v. N.C. DMV

[95 N.C. App. 209 (1989)]

terms of the consent order had been violated. The consent order also provided that in the event of such subsequent allegation of a violation, an investigation could be made by the hearing officer but no evidentiary hearing would be required.

Subsequent allegations were made that petitioner had violated the terms of the consent order in that petitioner allegedly allowed an unlicensed instructor to instruct students and the petitioner violated the guidelines for commercial truck driver school advertising. Petitioner was notified of the allegations and a meeting was held on 23 September 1987 at respondent's offices in Raleigh. On 30 October 1987, an order was entered finding as a fact that petitioner had violated the terms of the consent order of 1 April 1987 and revoking petitioner's license until 31 March 1990.

On 1 December 1987, petitioner filed a petition for judicial review in Mecklenburg County Superior Court and obtained a temporary restraining order restraining respondent from revoking petitioner's license. On 8 December 1987, a preliminary injunction was issued. At the hearing on petitioner's petition for judicial review on 7 July 1988, the court found that since petitioner had waived its right to an evidentiary hearing in the event the consent order had been violated, the court lacked jurisdiction under N.C.G.S. Sec. 150B-43 to review the order of 30 October 1987. Petitioner's petition for judicial review was therefore dismissed.

The issue presented for review is whether the superior court has jurisdiction pursuant to N.C.G.S. Sec. 150B-43 to review the order cancelling petitioner's truck driver school license even though petitioner waived its right to an evidentiary hearing.

Relevant provisions of North Carolina General Statute 150B-43 provide that:

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

N.C.G.S. Sec. 150B-43 (1987). This statute has been interpreted as imposing five requirements in order to have standing for judicial review:

CHARLOTTE TRUCK DRIVER TRAINING SCHOOL v. N.C. DMV

[95 N.C. App. 209 (1989)]

- (1) the petitioner must be an aggrieved party;
- (2) there must be a final agency decision;
- (3) the decision must result from a *contested case*;
- (4) the petitioner must have exhausted all administrative remedies; and
- (5) there must be no other adequate procedure for judicial review.

In re Wheeler, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987) (emphasis added). The respondent implicitly concedes in brief that petitioner meets all the five requirements with the exception of No. 3 which requires that "the decision must result from a *contested case*." *Id.* (emphasis added).

North Carolina General Statute 150B-2(2) defines "contested case" as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C.G.S. Sec. 150B-2(2) (1987). "Person" as used in the statute includes corporations such as the petitioner. N.C.G.S. Sec. 150B-2(7) (1987). Our Supreme Court has interpreted the term "contested case" as having two elements: "(1) an agency proceeding, (2) that determines the rights of a party or parties." *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E.2d 843, 850 (1979). The rights of the petitioner were determined by the in-person interview of 23 September 1987 and by the investigation conducted by the hearing officer as petitioner's license was revoked as a result thereof. Therefore, the pivotal question in determining whether this is a "contested case," is whether the in-person interview and investigation constitute "an agency proceeding." *Id.* As the in-person interview and the investigation were conducted by a hearing officer of the North Carolina Division of Motor Vehicles, a State agency, we conclude that they constitute "an agency proceeding." See *State of Tenn. v. Environmental Management Comm'n*, 78 N.C. App. 763, 767, 338 S.E.2d 781, 783 (1986) (it is irrelevant what the proceeding is called as long as it is conducted by an agency). We therefore determine this is a contested case.

Furthermore, the waiver of an evidentiary hearing found in the consent order is in regard to the determination of whether an alleged violation actually occurred. The parties did not consent to waive judicial review of any agency decision. Although absent

STATE v. MANLEY

[95 N.C. App. 213 (1989)]

an evidentiary hearing the superior court would be unable to review the evidence, the court would be able to review the findings and conclusions of the hearing officer in accordance with N.C.G.S. Sec. 150B-51(b) to see if "the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
-
- (6) Arbitrary or capricious.

N.C.G.S. Sec. 150B-51(b) (1987).

Accordingly, we reverse the 30 October 1987 order of the hearing officer and remand to the Mecklenburg County Superior Court for judicial review pursuant to N.C.G.S. Sec. 150B-51(b).

Reversed and remanded.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. SCOTT RUSSELL MANLEY

No. 888SC946

(Filed 15 August 1989)

Criminal Law § 26.5; Rape and Allied Offenses § 2— first degree sexual offense—taking indecent liberties—different elements of offenses—no double jeopardy

Defendant could properly be convicted of first degree sexual offense and of taking indecent liberties with a child without subjecting him to double jeopardy, since the two offenses had differing age requirements, and the two offenses did not have the same elements in that the crime of indecent liberties could involve a "lewd or lascivious act" which was not necessarily a

STATE v. MANLEY

[95 N.C. App. 213 (1989)]

"sexual act," as required by the first degree sexual offense statute. N.C.G.S. § 14-27.4(a)(1) and § 14-202.1(a)(2).

APPEAL by defendant from *Allsbrook (Richard B.)*, Judge. Judgment entered 31 March 1988 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 April 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Howard E. Hill, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant-appellant.

GREENE, Judge.

This appeal arises from defendant's convictions of first-degree rape, first-degree sexual offense, and taking indecent liberties with a child. On appeal, defendant argues the trial court should have arrested either the sex offense or indecent liberties count and that its failure to do so resulted in defendant's conviction of two crimes with the same elements which contravenes his constitutional protection against double jeopardy.

In *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987), our Supreme Court stated:

Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense absent clear legislative intent to the contrary Where . . . a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the other does not By definition, all the essential elements of the lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes.

(Emphasis in original.) (Citations omitted.) The pertinent definition of first-degree sexual offense is "a sexual act . . . with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim" N.C.G.S. Sec. 14-27.4(a)(1) (1986). A person is guilty

STATE v. MANLEY

[95 N.C. App. 213 (1989)]

of taking indecent liberties with children if, being sixteen years of age or more and at least five years older than the child in question, he or she "either (1) [w]illfully 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) [w]illfully 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." N.C.G.S. Sec. 14-202.1(a)(1), (2) (1986).

Defendant notes that our Supreme Court has stated that, "conviction of taking indecent liberties also requires that the offense committed 'for the purpose of arousing or gratifying sexual desire' which is not required for conviction of first-degree sexual offense." *State v. Swann*, 322 N.C. 666, 678, 370 S.E.2d 533, 540 (1988). Defendant consequently argues that: (1) the *only* element distinguishing first-degree sex offense from indecent liberties is the latter's requirement under Section 14-202.1 that the illegal act must be performed "with the purpose of arousing and gratifying sexual desire"; (2) the trial judge instructed the jury that it could convict defendant of indecent liberties if it found defendant committed *either* "a lewd and lascivious act" *or* an act performed "for the purpose of arousing and gratifying sexual desire"; (3) the jury therefore may have convicted defendant of indecent liberties only because it found he committed a "lewd and lascivious act" — which defendant argues is not the element distinguishing first-degree sex offense from indecent liberties; and (4) therefore, the ambiguity in the jury's verdict creates the possibility the jury convicted defendant of two crimes having the same elements. Given the ambiguity of the verdict as well as an alleged lack of clear legislative intent that defendant be punished for both offenses, defendant argues the ambiguity should be resolved in his favor and one of the offenses should be arrested to protect his right against double jeopardy. *Cf. Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed.2d 306, 309 (1933) (when same act violates two statutes, test is whether each requires proof of additional fact the other does not).

We reject defendant's analysis. In *Swann*, our Supreme Court stated that:

In *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), we held that in single prosecutions for more than one crime . . . *Blockburger* has no application. We held in *Gardner* that

STATE v. MANLEY

[95 N.C. App. 213 (1989)]

it is a matter of legislative intent as to whether a defendant may receive multiple punishment if he is convicted of two crimes in one prosecution. Although the elements of two crimes may be identical, we said in *Gardner*, multiple sentences may be imposed if that is the intent of the Legislature. *In determining the intent of the Legislature, the fact that each crime for which a defendant is convicted in one trial requires proof of an element the other does not demonstrate the Legislature's intent that the defendant may be punished for both crimes.*

322 N.C. at 677, 370 S.E.2d at 539 (emphasis added). Under *Swann*, the dispositive issue for defendant's appeal is whether "each crime for which [the] defendant is convicted in one trial requires proof of an element the other does not . . ." *Id.* As defendant correctly notes, the test for determining whether there are distinctive elements between two crimes requires analyzing the legislative definitions of the crimes, even though under certain factual circumstances the offenses would not be identical. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

However, defendant mistakenly asserts that only the "sexual desire" prong of the definition of indecent liberties under Section 14-202.1(a)(1) distinguishes indecent liberties from first-degree sex offense. First, defendant's selective citation of *Swann* overlooks the Court's recognition the two offenses also have differing age requirements:

Conviction of first-degree sexual offense requires the victim be under the age of 13, whereas conviction of indecent liberties requires only that the victim be under the age of 16. Conviction of taking indecent liberties requires the defendant be at least 16 years old and five years older than the victim, whereas first-degree sexual offense only requires that he be at least 12 years old and four years older than the victim.

Swann, 322 N.C. at 678, 370 S.E.2d at 539-40.

Furthermore, since the test is a "definitional" test, there is no logical reason to exclude the "lewd or lascivious act" prong of the definition of indecent liberties under Section 14-202.1(a)(2). A "lewd or lascivious act" constituting an indecent liberty need not include the "sexual act" required for first-degree sex offense. See *Etheridge*, 319 N.C. at 51, 352 S.E.2d at 683 (indecent liberties is not lesser included offense of second-degree sex offense which

RALEIGH PLACE ASSOC. v. CITY OF RALEIGH

[95 N.C. App. 217 (1989)]

also requires "sexual act"); *Weaver*, 306 N.C. at 636, 295 S.E.2d at 379 (indecent liberties requires sexual purpose or lascivious act and is therefore not lesser included offense of first-degree rape). The word "lewd" is defined broadly as "sexually unchaste or licentious, dissolute, lascivious" or "suggestive of or tending to moral looseness" or "inciting to sensual desire or imagination." *Webster's Third New International Dictionary* at 1301 (1968). Section 14-27.1(4) more narrowly defines a "sexual act" as meaning "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . ." N.C.G.S. Sec. 14-27.1(4) (1986).

Therefore, since a "lewd or lascivious act" is not necessarily a "sexual act," the crime of indecent liberties under Section 14-202.1(a)(2) does not have the same elements as the crime of first-degree sexual offense under Section 14-27.4(a)(1). Accordingly, we conclude that the definitional elements of first-degree sex offense and indecent liberties are different. We therefore hold defendant's conviction of first-degree sex offense and indecent liberties did not contravene his constitutional protection against double jeopardy.

No error.

Judges ARNOLD and LEWIS concur.

RALEIGH PLACE ASSOCIATES v. CITY OF RALEIGH, BOARD OF
ADJUSTMENT

No. 8810SC1349

(Filed 15 August 1989)

Municipal Corporations § 39.13— sign across bank drive-through lanes—prohibited roof sign

Respondent board of adjustment properly found that a sign erected by petitioner was a prohibited roof sign and not a permitted canopy sign where the sign was located on the top of a structure which extended approximately 25 feet from the wall of petitioner's building across two driveway lanes used by bank patrons who used drive-through teller windows.

RALEIGH PLACE ASSOC. v. CITY OF RALEIGH

[95 N.C. App. 217 (1989)]

APPEAL of respondent from *Ellis, Craig B., Judge*. Judgment entered 31 August 1988. Heard in the Court of Appeals 8 June 1989.

Respondent, the Board of Adjustment of the City of Raleigh, appeals from a certiorari decision which declared that petitioner Raleigh Place Associates' sign was not prohibited by the Raleigh City Code.

Smith Helms Mulliss & Moore, by David C. Keesler, for petitioner-appellee.

Associate City Attorney Elizabeth C. Murphy for respondent-appellant.

JOHNSON, Judge.

Petitioner Raleigh Place Associates submitted building plans for a proposed office building, to be located at 316 West Edenton Street in Raleigh, to the City of Raleigh for zoning approval. These plans included drawings depicting a sign which was to be located on a structure which would cover the drive-through teller windows of Southern National Bank, a tenant in the proposed office building. The City approved these plans. The City requires that every individual sign be approved in a separate review process, but petitioner did not obtain such approval for the sign in question.

The office building at 316 West Edenton Street was completed in August, 1986. Petitioner then erected the sign in question. The sign is approximately 42 inches high and 171 inches long, and it displays in 14-inch block lettering the words "Southern National Bank." The sign is located on the top of a structure which extends approximately 25 feet from the wall of the building and covers two driveway lanes which are used by patrons who use the drive-through teller windows.

On 10 September 1986, petitioner received notification from City of Raleigh Zoning Inspector Scott Mills that the sign in question violated sec. 10-2065.5(9) of the Raleigh City Code. This section of the Code prohibits any newly erected roof sign which is not authorized by the city council. On 15 September 1986, petitioner filed an application with the Raleigh Board of Adjustment seeking either a reversal of the zoning inspector's decision or, in the alternative, a variance allowing the sign in question to remain. On 13 October 1986, the Board upheld the zoning inspector's decision and denied petitioner's request for a variance.

RALEIGH PLACE ASSOC. v. CITY OF RALEIGH

[95 N.C. App. 217 (1989)]

On 21 November 1986, petitioner filed a petition for review by the superior court of Wake County requesting that the court issue its writ of certiorari to review the Board's decision. This petition was granted on 12 May 1987. The court filed a certiorari decision on 1 September 1988 which reversed the Board's decision. The court found that the sign in question was not a roof sign, which is prohibited by the Code, but was instead a canopy sign, which is permitted by the Code.

Respondent's first contention on appeal is that the Board properly found that the sign in question is a prohibited roof sign and not a permitted canopy sign. We agree.

The sign in question is prohibited by the Raleigh City Code if it is attached to a roof, but the sign is permitted if it is attached to a canopy. Any newly erected roof sign which is not authorized by the city council is prohibited, Raleigh City Code sec. 10-2065.5(9), and there is no evidence that petitioner sought or received authorization from the city council to erect the sign in question. The Code defines a "roof sign" as "[a]ny sign . . . attached to and extending from the roof of a structure or building." *Id.* sec. 10-2002. The Code does allow marquee signs, however. *Id.* sec. 10-2065.2(a). The Code also states that a sign erected on a canopy is considered to be a marquee sign. *Id.* sec. 10-2002. The Code does not provide any definitions of the words "roof" or "canopy."

The sign in question is not attached to a canopy. The words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired a technical meaning or unless a definite meaning is apparent or indicated by the context of the words. *State v. Lee*, 277 N.C. 242, 176 S.E.2d 772 (1970). The *Lee* rule, like other rules of statutory construction, is applicable to the construction of municipal ordinances. *Cogdell v. Taylor*, 264 N.C. 424, 142 S.E.2d 36 (1965). The ordinary meanings of the word "canopy" are set forth in Webster's Third New International Dictionary, which in part defines a canopy as "a covering usu[ally] for shelter or protection." Webster's Third New International Dictionary 328 (1968). *Webster's* includes with this definition an exhaustive list of sub-definitions. *Id.* This list of sub-definitions includes "a . . . cover providing shelter and decoration (as over a door or window)" and "an awning or marquee often stretching from doorway to curb." *Id.* The structure in question is not located over a traditional type of window or door, and it doesn't ex-

LAMB v. GROCE

[95 N.C. App. 220 (1989)]

tend from the doorway to the curb, so it cannot be classified as a canopy according to what we believe to be the ordinary and common understanding of the word "canopy."

We find that the sign in question is attached to a roof. *Webster's* defines a roof as "the outside cover of a building or structure." *Id.*, p. 1971. This broad definition clearly encompasses the cover of the structure to which the sign in question is attached.

Respondent's second contention on appeal is that the superior court erred in reversing the Board's decision that the sign in question is a roof sign. We agree. The decisions of a municipal board of adjustment are final, "subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority." *Lee v. Board of Adjustment*, 226 N.C. 107, 109, 37 S.E.2d 128, 131 (1946). Our discussion of respondent's first contention on appeal demonstrates that the Board's decision did not constitute an error of law, and the Board's decision was also not arbitrary, oppressive, or attended with manifest abuse of authority. The superior court therefore erred in reversing the Board's decision.

Reversed.

Judges COZORT and GREENE concur.

DAN LAMB, GILBERT MILLER, AND WIFE, MAE MILLER v. CHELSIE GROCE,
PAUL GROCE, AND RANDY GROCE

No. 8823DC1378

(Filed 15 August 1989)

**Attorneys at Law § 6— withdrawal from case—withdrawal for
nonpayment—sufficient notice—denial of continuance discre-
tionary**

The trial court did not err in allowing defendants' attorney to withdraw where defendants had two weeks notice that the attorney would not represent them at trial if he was not paid; furthermore, it was within the trial court's discretion to grant or deny defendants' motion for continuance made when their attorney was allowed to withdraw on the day the case was called for trial.

LAMB v. GROCE

[95 N.C. App. 220 (1989)]

APPEAL by defendants from *Helms (Michael E.)*, Judge. Judgment entered 22 July 1988 in District Court, WILKES County. Heard in the Court of Appeals 9 June 1989.

Plaintiffs filed this action on 30 July 1987 seeking double damages from defendants for trespass and unlawful cutting of timber pursuant to G.S. 1-539.1. Plaintiffs and defendants then obtained professional surveys of the property in question, but defendants' survey was not to their satisfaction. The matter was continued at least three times in order for defendants to obtain another survey. On 6 May 1988, Judge Edgar B. Gregory entered an order requiring the parties to submit plats to the court on or before 30 June 1988 and to be ready for trial at the July 1988 session of Wilkes County District Court.

On 20 July 1988, the matter came on for hearing before Judge Helms. Defendants' counsel, Mike Correll, made another motion to continue based on the lack of a survey, and the court denied the motion. Correll then moved to withdraw as attorney of record for defendants. He based his motion on defendants' failure to pay him, and he stated that he had given two weeks' notice to defendants that he could not represent them if not paid. The court granted the motion and Correll was allowed to withdraw. Defendants' subsequent motion for a continuance was denied.

Following the presentation of evidence, the jury found for plaintiffs and the court entered a judgment awarding them \$4,000.00 pursuant to G.S. 1-539.1. Defendants appeal.

Max F. Ferree for plaintiff-appellees.

Robert P. Laney for defendant-appellants.

ORR, Judge.

Defendants assign as error the trial court's granting of Correll's motion to withdraw and its refusal to allow a continuance so that defendants could obtain substitute counsel.

An attorney may withdraw from an action after making an appearance if there is (1) justifiable cause, (2) reasonable notice to his clients, and (3) permission of the court. *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965); *Williams and Michael v. Kenamer*, 71 N.C. App. 215, 321 S.E.2d 514 (1984). Generally, clients' failure to pay or secure payment of proper fees upon reasonable

LAMB v. GROCE

[95 N.C. App. 220 (1989)]

demand is justifiable cause for an attorney's withdrawal. *Smith, supra; Gosnell v. Hilliard*, 205 N.C. 297, 171 S.E. 52 (1933). Prior notice which is specific and reasonable is also required. *Williams and Michael, supra*. In this case, defendants had two weeks notice that Correll could not represent them at trial without payment. We therefore hold the requirements for withdrawal were fully met and the trial court did not err in allowing defendants' attorney to withdraw.

As for the trial court's refusal to grant a continuance, the general rule is that "an attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle v. Shankle*, 289 N.C. 473, 484, 223 S.E.2d 380, 387 (1976). Such a decision is instead within the trial court's discretion. *Id.* This rule presupposes that the attorney has given sufficient prior notice of his intent to withdraw. *Williams and Michael, supra*. If not, the trial court must either grant a reasonable continuance or deny the attorney's motion to withdraw. *Id.* In this case, sufficient notice of Correll's intent to withdraw was given; therefore, the trial court had discretion to grant or deny a motion for a continuance. We hold the trial court did not abuse its discretion in this case. Defendants' arguments are without merit.

For these reasons, in the District Court we find no error.

No error.

Judges JOHNSON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 15 AUGUST 1989

BESAW v. SHARP No. 8821DC1303	Forsyth (88CVD184)	Appeal Dismissed
BOVENDER v. EQUITABLE LIFE ASSURANCE SOCIETY No. 8818SC1158	Guilford (87CVS1815)	Affirmed
BRITT JACKS & ASSOC. v. WEATHERFORD No. 8826SC1322	Mecklenburg (87CVS6874)	Affirmed
BROWN v. SMITH TRANSMISSIONS No. 8810IC760	Ind. Comm. (I-1663)	Affirmed
BRYANT v. BRYANT No. 8924DC106	Mitchell (85CVD188)	Vacated & Remanded
CRUSE v. HILL No. 888SC996	Wayne (86CVS629)	New Trial
FISHER v. HOMECRAFT CORP. No. 8926SC16	Mecklenburg (86CVS9838)	Affirmed
GENSINGER v. WESTON No. 8810SC951	Wake (86CVS2397)	Affirmed
GODWIN ASSOCIATES v. McGEE No. 8826SC1270	Mecklenburg (88CVS7220)	Vacated in part; affirmed in part & remanded
HAWKE NEWSPAPER v. SEAHAWKE NEWSPAPER No. 895SC11	New Hanover (87CVS3000)	Affirmed
HITCHCOCK v. CULLERTON No. 8818SC1350	Guilford (83CVS5043)	Affirmed
HOLLAND v. NCNB No. 8822SC907	Iredell (87CVS1593)	Affirmed
IN RE BULLOCK No. 8914DC96	Durham (88J102)	No Error
IN RE HARRIS v. ELECTRICITIES No. 8810SC1249	Wake (88CVS2844)	Affirmed

IN RE HUGHES No. 8922DC424	Alexander (88J9)	Vacated & Remanded
INDUSTRIAL TECHNICAL SERVICE v. AMERICAN COMMUNICATION TERMINALS No. 8813DC1417	Brunswick (85CVD746)	Affirmed
LEINHARDT v. NEUSE SHORES No. 883SC1352	Pamlico (87CVS39)	Affirmed
MATHIS v. T & S HARDWOODS No. 8830DC1279	Jackson (87CVD305)	No Error
PEOPLES v. PIEDMONT FEDERAL SAVINGS & LOAN ASSN. No. 8821SC1357	Forsyth (87CVS2994)	Affirmed
ROACH v. LUPOLI No. 8810IC938	Ind. Comm. (044961)	Affirmed
STATE v. ALSTON No. 897SC164	Nash (88CRS3719) (88CRS8512)	No Error
STATE v. BULLARD No. 8920SC24	Moore (85CRS1508)	No Error
STATE v. CRAWLEY No. 895SC152	New Hanover (88CRS8620)	No Error
STATE v. DAVENPORT No. 8912SC1	Cumberland (88CRS3023)	No Error
STATE v. DOWNING No. 892SC13	Washington (88CRS171)	No Error
STATE v. DUNLAP No. 8926SC213	Mecklenburg (88CRS54538)	No Error
STATE v. GARY No. 8918SC51	Guilford (88CRS35943)	No Error
STATE v. GATES No. 8821SC1193	Forsyth (87CRS23459)	New Trial
STATE v. HICKMAN No. 893SC43	Pitt (87CRS21475)	No Error
STATE v. PETERSON No. 8926SC21	Mecklenburg (88CRS16845) (88CRS16846) (88CRS16847) (88CRS16849) (88CRS16851)	No Error

STATE v. QUICK No. 8920SC250	Moore (88CRS3165)	No Error
STATE v. REID No. 8926SC81	Mecklenburg (88CRS41590)	No Error
STATE v. SCHUITMAKER No. 8818SC1400	Guilford (88CRS21569)	Appeal Dismissed
STATE v. STEPHENS No. 8818SC965	Guilford (87CRS42330) (87CRS42331)	New Trial
STATE v. THOMPkins No. 8912SC94	Cumberland (87CRS32688)	No Error
STATE v. WADDELL No. 8819SC1368	Randolph (87CRS8153) (87CRS8154)	No Error
STATE v. WHITE No. 8926SC148	Mecklenburg (88CRS042030)	No Error
STATE v. WILLIAMS No. 8910SC67	Wake (88CRS4642) (88CRS4643)	No Error
TAYLOR v. TAYLOR No. 8824DC1130	Madison (86CVD90)	Vacated & Remanded
WEISS v. JOHNSTON No. 8818SC353	Guilford (86CVS3940)	No Error
WILLIAMS v. JEFFERSON No. 8918DC223	Guilford (87CVD5164)	Affirmed

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, PLAINTIFF v. THE STROH BREWERY COMPANY, DEFENDANT

No. 8821SC899

(Filed 5 September 1989)

1. Master and Servant § 10.2— retaliatory discharge— OSHANC complaint— summary judgment for defendant

Defendant was entitled to summary judgment as a matter of law in an action in which the Commissioner of Labor alleged that defendant discharged an employee, Nettles, in retaliation for filing a complaint about an unsafe working condition with the Occupational Health and Safety Division of the N.C. Department of Labor. The undisputed facts would permit the court to conclude as a matter of law that Nettles would have been discharged notwithstanding the OSHANC complaint. N.C.G.S. § 95-130(8), N.C.G.S. § 1A-1, Rule 56(c).

2. Master and Servant § 10.2— retaliatory discharge— acceptance of multiplant grievance committee decision— bar to action

An action by the Commissioner of Labor alleging retaliatory discharge for reporting an unsafe working condition to the occupational safety and health division was not barred pursuant to N.C.G.S. § 95-36.8 by the employee's acceptance of a multiplant grievance committee determination because the multiplant grievance procedure was not arbitration as contemplated by the statute. However, the limited scope of the benefits sought (back pay for the period of the employee's suspension) makes this an action for private rather than public benefits and the Commissioner's action is therefore barred; the purpose of the antiretaliation statute is to avoid the chilling effect on employees' willingness to file complaints when those who do are disciplined or discharged under pretext, and that chilling effect can be neutralized effectively by a collective bargaining agreement grievance procedure. Summary judgment for defendant on that ground was therefore proper.

3. Judgments § 37; Master and Servant § 10.2— action for retaliatory discharge— ESC determination of dismissal for misconduct— no collateral estoppel

Summary judgment on the basis of collateral estoppel was not proper where the Commissioner of Labor brought

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

an action for the retaliatory discharge of an employee for filing a complaint with the occupational safety and health division of the North Carolina Department of Labor; the employee had filed a claim for unemployment compensation which had been rejected based on a determination of misconduct in failing to follow posted safety procedures; and the record shows that no evidence was presented on the issue of discriminatory treatment, that neither the ESC nor the superior court determined whether defendant had discriminated against the employee, and there was no indication that the appeals referee had even considered the question of retaliatory discharge.

APPEAL by plaintiff from *Rousseau (Julius A.)*, Judge. Judgment entered 28 March 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 March 1989.

This action was brought by the Commissioner of Labor pursuant to the Occupational Safety and Health Act of North Carolina (OSHANC), G.S. 95-126 *et seq.*, and arises from Edward Nettles' discharge as an employee of defendant The Stroh Brewery Company. Plaintiff contends that Nettles was discharged in retaliation for filing a complaint with the Occupational Safety and Health Division of the North Carolina Department of Labor (OSHD) about an unsafe working condition at defendant's Winston-Salem brewery.

In April 1983, Nettles, an electrician, complained to defendant's assistant manager for engineering, Harold Mann, concerning a safety hazard at an electrical control panel near a Dubru washer in the plant. These complaints were discussed with both the plant superintendent, Richard Graves, and the plant manager, Gray Wooten. Not being satisfied with the company's response, on 9 May 1983 Nettles filed a complaint with OSHD regarding the electrical control panel. On 26 May 1983 an OSHD inspector arrived at the brewery and inspected the electrical control panel. Subsequent to the inspection OSHD issued defendant a citation with a penalty relating to the electrical panel.

In November 1983 Nettles was transferred from the packaging plant to the brewhouse. On 19 January 1984, while working the third shift, Nettles failed in two separate situations to follow proper safety procedures in violation of defendant's safety policy. For these violations Nettles was placed on indefinite suspension on 20 January 1984. On 26 January 1984 a second level meeting was held to

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

inquire further into the 19 January incident. At this meeting, which was conducted by Don Steele, manager of industrial relations, Graves, Mann, Nettles and three union representatives were present. After this meeting Steele met with plant manager Wooten to discuss the meeting and conferred by telephone with corporate headquarters in Detroit. Steele then recommended that Nettles be terminated. The final decision was made by Wooten. Nettles was terminated 26 January 1984. On 1 February 1984 Nettles filed a complaint with OSHD alleging retaliatory discrimination.

Between the time Nettles filed his complaint with the North Carolina Department of Labor and the time this action was filed on 13 January 1987, Nettles' termination had been reduced to six months suspension without pay through the collective bargaining agreement grievance process. Plaintiff's complaint asked the court to award back pay and lost benefits to Nettles and to enjoin defendant from discriminating against workers making safety complaints in violation of G.S. 95-130(8). In the court below summary judgment was entered for defendant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Rodney S. Maddox and Associate Attorney General Robert J. Blum, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Mark N. Poovey, for defendant-appellee.

PARKER, Judge.

On appeal plaintiff argues that the trial court erred in granting summary judgment on any one of the three grounds asserted by defendant in that (i) plaintiff forecast evidence showing a genuine issue of material fact as to defendant's motive in discharging Nettles, (ii) Nettles' acceptance of an arbitration award did not preclude the plaintiff from bringing this action, and (iii) plaintiff is not estopped by the Employment Security Commission's findings in Nettles' proceeding for unemployment benefits. We address separately each of plaintiff's contentions.

I.

[1] General Statute 95-130 sets forth the rights and duties of employees under the Occupational Safety and Health Act of North Carolina. The statute states, in pertinent part, the following:

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

No employee shall be discharged or discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this Article or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Article.

G.S. 95-130(8).

The Occupational Safety and Health Act of North Carolina, G.S. 95-126 *et seq.*, is closely patterned after the Federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 *et seq.*, and G.S. 95-130(8) is virtually identical to the federal act's provision prohibiting retaliatory discharge. *See* 29 U.S.C. § 660(c). The primary purpose of both the Federal and State Occupational Safety and Health Acts is to assure safe and healthful working conditions for workers. *See Marshall v. Intermountain Elec. Co., Inc.*, 614 F.2d 260, 262 (10th Cir. 1980). The primary purpose of both the federal and state provisions prohibiting retaliatory discrimination is to ensure that employees are not discouraged from reporting violations of the Act. *See id.*; *Donovan v. R.D. Andersen Const. Co., Inc.*, 552 F. Supp. 249, 251, 66 A.L.R. Fed. 644, 647 (D. Kan. 1982); *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2, 3 (M.D. Pa. 1977). North Carolina has received approval from the federal government to administer its own occupational safety and health program. *See* 29 U.S.C. § 667; 29 C.F.R. §§ 1952.150-1952.155. Realizing the significant similarities between OSHANC and the federal act, this Court has, in the past, looked for guidance to federal court decisions interpreting OSHA. *See Brooks, Comr. of Labor v. Butler*, 70 N.C. App. 681, 321 S.E.2d 440 (1984), *disc. rev. denied and appeal dismissed*, 313 N.C. 327, 329 S.E.2d 385 (1985). Since this is the first action brought by the Commissioner to enforce G.S. 95-130(8), we look to federal cases interpreting the analogous federal statute.

Summary judgment is appropriate only where the evidence presented to the court shows both a lack of genuine issue of material fact and movant's entitlement to judgment as a matter of law. *Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976); G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment the court must closely scrutinize the movant's materials while it regards with indulgence the non-movant's materials. *Hillman v.*

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

United States Liability Ins. Co., 59 N.C. App. 145, 148, 296 S.E.2d 302, 304-305 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). In order to survive a motion for summary judgment, the Commissioner need only forecast evidence showing that he can make a *prima facie* case of retaliatory discrimination at trial. See *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). Moreover, the non-movant need only present evidence sufficient to rebut the movant's showing of either an affirmative defense or nonexistence of an essential element of the claim. *Id.*

As a general rule summary judgment in favor of the party bearing the burden of proof is rarely proper. *Blackwell v. Massey*, 69 N.C. App. 240, 243, 316 S.E.2d 350, 352 (1984). See also *Valdese General Hospital, Inc. v. Burns*, 79 N.C. App. 163, 164-65, 339 S.E.2d 23, 25 (1986); *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 578, 329 S.E.2d 417, 418 (1985). Additionally, defendant has a particularly difficult burden in establishing his right to summary judgment in a case in which plaintiff's claim is dependent upon proof that defendant acted with a particular state of mind. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218, *disc. rev. denied*, 322 N.C. 111, 367 S.E.2d 910 (1988); *Valdese General Hospital, Inc. v. Burns*, 79 N.C. App. at 165, 339 S.E.2d at 25; *Edwards v. Bank*, 39 N.C. App. 261, 269, 250 S.E.2d 651, 657 (1979).

For the court to hold that defendant has violated the statutory prohibition against retaliatory discrimination, the court must find (i) that the employee/complainant engaged in protected activity, (ii) that the protected activity was a substantial causative factor in the employee's termination, and (iii) that the employer has not shown by a preponderance of the evidence that it would have treated the employee/complainant in the same manner in the absence of protected activity. See *Marshall v. Commonwealth Aquarium*, 469 F. Supp. 690 (D. Mass.), *aff'd*, 611 F.2d 1 (1st Cir. 1979) (applying 29 U.S.C. § 660(c)). At trial once the plaintiff has shown that the employee's activities were protected and were a substantial factor in the employer's decision, the burden shifts to defendant to show that the same decision would have been made if the employee had not engaged in the protected activity. *Marshall v. Commonwealth Aquarium*, 469 F. Supp. at 692. See also *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471, 482-84 (1977) (shifting burden to defendant where protected activity implicated first amendment right to freedom of speech),

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

quoted in *Marshall v. Commonwealth Aquarium*, 469 F. Supp. at 692. *Accord NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (burden shifts to employer in context of retaliatory discharge for union activities under 29 U.S.C. § 158(a)(3)). *But see, Dunlop v. Bechtel Power Corp.*, 1978 O.S.H. Dec. (CCH) ¶ 22,711 (M.D. La. 1977).

In the present case there is no question, and defendant has not contested the fact, that Nettles' 23 April 1983 complaint to his employer and Nettles' filing of the OSHANC claim on 9 May 1983 were protected activities within the scope of the legislation. G.S. 95-130; 29 U.S.C. § 660. *See also, e.g., Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121 (W.D. Mo. 1985) (OSHA complaint); *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417 (E.D.N.Y. 1984), *aff'd*, 760 F.2d 253 (2d Cir. 1985) (complaint to union); *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869 (D.R.I. 1982) (OSHA complaint); *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548 (D. Conn. 1982) (OSHA complaint); *Donovan v. R.D. Andersen Const. Co., Inc.*, 552 F. Supp. 249 (D. Kan. 1982) (conversation with reporter); *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. 642 (D.S.C. 1982) (OSHA complaint); *Marshall v. Power City Electric, Inc.*, 1979 O.S.H. Dec. (CCH) ¶ 23,947 (E.D. Wash. 1979) (oral complaint to employer); *Marshall v. Commonwealth Aquarium*, 469 F. Supp. at 690 (OSHA complaint); *Marshall v. P & Z Company, Inc.*, 1978 O.S.H. Dec. (CCH) ¶ 22,579 (D.D.C. 1978) (complaint to employer and outside agencies); *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. at 2 (complaint to employer); *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976) (complaint about working conditions made to legal services attorney).

The question then is whether, on the undisputed facts in the record, defendant has demonstrated as a matter of law that Nettles would have been discharged even if he had not filed the complaint concerning the electrical panel with the Commissioner of Labor. During his shift on 18-19 January 1984, Nettles disregarded company safety policy thereby creating two potentially life-threatening situations. The first incident occurred when Nettles, who had been working on a motor on the #15 fermenting tank in the brewhouse, was called to a higher priority job assignment. At this time Nettles merely disconnected the wires from the motor and laid them on top of the fermenting tank. Company safety procedure required Nettles either to place a lock to secure the disconnection or to

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

remove the fuses. The second incident occurred in the "Murphy Products" area of the plant, where employees frequently use water in proximity to the motors. Nettles temporarily hooked up a motor using only electrical tape, rather than securing the conduit with a locknut so that the conduit would be watertight.

Initially, we recognize that there is a dispute in the evidence as to whether plant manager Wooten knew about Nettles' OSHANC complaint when he made the decision to terminate Nettles. Although Wooten denied that he knew that Nettles had filed the complaint, reports prepared during the investigation of Nettles' 19 January 1984 safety violations contain a statement concerning Nettles' OSHANC complaint. Since Wooten was apprised of the information contained in these reports by Steele, the inference could be drawn that Wooten knew that Nettles had filed the OSHANC complaint in May 1983. Therefore, for purposes of summary judgment we must accept as true that Wooten knew that Nettles filed the OSHANC complaint. Similarly, based on the affidavits in the record, we must accept as true that other employees, with their supervisor's knowledge, had violated defendant's safety rules concerning lock-out and hold tag procedures and were not disciplined.

Even accepting these facts as true, the record, in our view, still discloses that defendant has met its burden of showing that Nettles would have been discharged in the absence of his protected activity. The undisputed facts show that on the morning of 19 January 1984, Mann received a call from Buddy Amburn, an employee on first shift, who advised that a safety hazard had been created by the way the flexible conduit had been connected to the junction box on a motor that had been replaced on the third shift in the "Murphy Products" area. Nothing in the record in any way suggests that Amburn had been told to check or report on Nettles' work. From all that appears of record, Amburn's call to Mann was an unsolicited report of unworkmanlike work that had created an unsafe condition. The record also reflects that the first report of the failure to lock-out on the #15 fermenting tank was made by an employee, Wayne Myers, to Ted Holcomb, an electrical supervisor, who reported the incident to Mann. Although the record does suggest some friction between Holcomb and Nettles, the tension was in no way connected with Nettles' filing the OSHANC complaint. The record is devoid of any suggestion that these reports to Mann on 19 January 1984 were instigated by Mann or any other supervisor or were the product of any concerted effort to

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

“get” Nettles in retaliation for filing an OSHANC complaint in May 1983.

The fact is undisputed that prior to filing the OSHANC complaint, Nettles had requested that he be transferred out of the brewhouse because he was not confident in his ability to handle the job. Although plaintiff implies that Nettles was transferred from the packaging division back to the brewhouse in retaliation for filing the OSHANC complaint, the undisputed evidence in the record is that Nettles requested that he be transferred back to the brewhouse so that he could obtain weekend overtime.

The record also discloses that Steele made the recommendation that Nettles be terminated after this recommendation was cleared with corporate headquarters. On deposition Steel testified:

Q Why did you recommend that Mr. Nettles be terminated?

A Essentially for two reasons: Number one, the gravity of his actions, the fact that he had, in fact, created not one, but two situations that were literally life threatening. And the second part was during all of the discussions that Harold and I had with Mr. Nettles, he never once admitted that he had done anything wrong, that his actions were totally proper and he would probably do it again the same way, and we couldn't live with that.

Q Was Mr. Nettles — is it your understanding that Mr. Nettles was terminated solely for not following the lock-out procedure?

A No, that's not my understanding.

Q What is your understanding in that regard?

A He was terminated for not following the lock-out procedure on the No. 15 fermenting tank, but his job performance and the way that he left the Murphy Products motor was also a very serious safety function.

Q Did that Murphy Product situation involve the lockout procedure?

A It was an issue during the time he was working, but it's when he walked away without telling me about it was the sin.

Then on redirect examination by the Commissioner's counsel, Steele testified:

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

Q If, in your opinion, Mr. Nettles had quote, "admitted doing something wrong," would it have changed your determination or your recommendation that he be discharged?

A I don't know that it would have changed it from discharge, no, but his lack of admitting that he had done anything wrong sealed it.

At the 26 January 1984 meeting to review Nettles' indefinite suspension, at which company representatives and three union representatives were present, the following exchange took place between Steele and Nettles:

Nettles: I want to say I made that motor safe for me to work on. I put the wires up under the cat walk where nobody would mess with them.

Steele: But don't you see Ed, someone did mess with them. The mechanics handled the wires and put them in the motor.

Nettles: That's not their job.

Steele: And because it's not their job they should die?

Nettles: If you go f_____ around in a panel you should die.

Steele: This meeting is over if no one has anything else to say. If you think of anything, let me know.

Further, in his report the OSHD investigating officer, after opining that Nettles would not have been discharged in the absence of the protected activity, then stated: "Nevertheless, this investigation failed to produce any real evidence (time, place, etc.) like Nettles' case wherein an employee failed to follow the lock-out procedure placing himself or others in danger who was not punished after discovery by management." The investigator's report also indicates that, "Nettles' method of safeproofing against accidental electrical shock or electrocution was irresponsible and unacceptable with regard to electrical codes and federal/state safety regulations."

Finally, the record reflects that Nettles was only an average electrician, requiring more assistance than most even after the normal training period. Nettles had also had at least one other disciplinary action, the nature of which is not disclosed in the record.

The test adopted in federal OSHA retaliatory discharge cases was enunciated in *Mt. Healthy City Board of Ed. v. Doyle*, 429

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, a case involving first amendment protected activity. Justice Rehnquist, delivering the opinion of the Court, stated:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86, 97 S.Ct. at 575, 50 L.Ed.2d at 482-83. This analysis, in our view, makes clear that the Supreme Court did not intend an employee who engages in protected activity to be immune from discipline or discharge arising out of unprotected activity or work performance. In an action under OSHANC the Commissioner stands in the employee's stead.

Evaluated in light of this analysis, the undisputed facts in the case at bar would permit the court to conclude as a matter of law that Nettles would have been discharged notwithstanding the OSHANC complaint. The following factors support this conclusion: (i) the absence of any evidence of insidious intent on the part of the first-shift employees who reported the incidents on 19 January 1984, (ii) the lack of any connection whatever between these employees' reporting the incidents and Nettles' OSHANC complaint eight months earlier, (iii) the time lapse between the OSHANC complaint and the incidents precipitating Nettles' ter-

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

mination, (iv) the inability of the investigator, even after Nettles had returned to work, to find any evidence of a similar incident of equal seriousness where the employee had not been disciplined, (v) Nettles' refusal to acknowledge that the manner in which he had handled the job was not acceptable, (vi) Nettles' obvious hostile attitude toward his fellow employees who were endangered by his ineptitude or carelessness, and (vii) Nettles' average work performance in terms of his need for assistance and inability to handle the job.

These factors distinguish the case at bar from the cases relied on by plaintiff. For example in *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869 (D.R.I. 1982), the complainants were issued pink slips which were dated two days prior to the date the employer claimed the complainants voluntarily quit. These slips stated the reason for termination as lack of work, but the employer had told the complainants when they reported for work that they were through and had hired replacements who reported for work that same day. The termination occurred just two days after complainants filed their complaints with OSHA.

In *Stafford Construction Company v. Stephen Smith, et al.*, 1983 O.S.H. Dec. (CCH) ¶ 26,514 (F.M.S.H.R.C. 1983), a decision pursuant to the Federal Mine Safety and Health Act, the evidence showed not only concerted effort to identify the complainants, but a direct correlation between the employee's protected activity and discharge. Witnesses testified that the president of the company issued a directive that when the individuals who complained to the Mine Safety and Health Administration were identified, they were to be terminated immediately. Moreover, the evidence demonstrated that defendant's reasons for terminating one of the complainants, reduction in force, could not be substantiated by employment records which showed that the employment levels remained constant. The other claimant was discharged ostensibly for damaging a motorgrader. This action was inconsistent with treatment of other employees who were discharged only for gross negligence. Other testimony showed the management's animus in that the company president had referred to the employee as "the SOB who is causing us a lot of trouble."

In *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. 642 (D.S.C. 1982), the employees were fired less than a month after the complaint was filed with the State Department of Labor. They

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

were fired for returning late from lunch. At the time, the company had no written rules concerning tardiness and absenteeism, and another employee who had been tardy numerous times, both before and after the complainants were terminated, was not disciplined. Even under new strict rules promulgated after the terminations, complainants would have received only a warning. The evidence also showed that the discharged employees were highly qualified and competent machinists whose work performance was excellent.

Similarly, in *Marshall v. P & Z Company, Inc.*, 1978 O.S.H. Dec. (CCH) ¶ 22,579 (D.D.C. 1978), the defendant's defense that the complainants' discharges were due to an accident was held to be a pretext. An almost identical accident occurred several weeks thereafter, but none of that crew was discharged. Moreover, there was also evidence that the superintendent had referred to complainants as troublemakers.

The direct causal connection between the protected activity and termination present in each of these cases is not evident in the case presently before the Court. This Court is not unmindful that circumstantial evidence is often the only evidence available to show retaliation against protected activity. *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. at 651; *Marshall v. Chapel Electrical Co.*, 1980 O.S.H. Dec. (CCH) ¶ 24,157 (S.D. Ohio 1980). Nevertheless, the causal connection must be something more than speculation; otherwise, the complaining employee is clothed with immunity for future misconduct and is "better off" for having filed the complaint rather than merely being no "worse off." *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. at 285-86, 97 S.Ct. at 575, 50 L.Ed.2d at 483.

The seriousness of Nettles' safety violations and his manifest disregard for the safety of his fellow workers demonstrated during the suspension interview are, in our view, significant considerations in determining that defendant as a matter of law has met its burden of showing that it would have discharged Nettles even in the absence of his complaint to OSHD. Accordingly, we hold that on the undisputed facts in the record, defendant is entitled to summary judgment as a matter of law.

II.

[2] We turn now to examine what effect, if any, Nettles' acceptance of the determination made by the multiplant grievance

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

committee has on plaintiff's action. After Nettles was terminated on 26 January 1984, he filed a grievance in accordance with the collective bargaining contract. A hearing on this grievance was denied by Don Steele. After denial of his grievance, Nettles' only recourse was appeal to a multiplant grievance committee. The multiplant grievance committee heard Nettles' complaint in February 1984 and reduced the termination to a six-month suspension without pay. Under the terms of this decision Nettles returned to work at the Winston-Salem Stroh plant in July 1984.

Plaintiff contends that defendant is not entitled to summary judgment on the grounds that this action is barred by Nettles' accepting the six-month suspension in lieu of permanent discharge. Plaintiff argues that since this is a suit brought by the Commissioner of Labor to enforce a public right, the right of all employees to a safe and healthful working environment, the Commissioner should not be barred from bringing suit to enforce OSHANC's prohibition against retaliatory discharge merely because the employee pursued remedies available to him under a collective bargaining agreement.

The majority of federal courts addressing the issue have held that prior arbitration awards do not preclude the Secretary of Labor from bringing suit pursuant to 29 U.S.C. § 660(c)(1). See, e.g., *Marshall v. N.L. Industries, Inc.*, 618 F.2d 1220 (7th Cir. 1980) and *Brenan v. Alan Wood Steel Co.*, 1975-76 O.S.H. Dec. (CCH) ¶ 20,136 (E.D. Pa. 1975). Relying primarily on *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), these courts have reasoned that the Secretary is asserting a statutory right independent of the arbitration process, that occupational safety and health legislation was intended to have a broad social, public policy impact that can only be satisfied in the judicial forum and that the enforcement of 29 U.S.C. § 660(c) is to benefit the public, not just individual employees. *Marshall v. N.L. Industries, Inc.*, 618 F.2d at 1222-23. The scope of relief available in arbitration does not satisfy these goals. *Id.* at 1223.

Some federal courts, however, have declined to accept the idea that the antidiscrimination enforcement provision contained in 29 U.S.C. § 660(c) has broad public interest impact in all cases. See *Marshall v. General Motors Corp.*, 1978 O.S.H. Dec. (CCH) ¶ 22,532 (N.D. Ohio 1977). See also *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. at 1420.

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

In *Alexander v. Gardner-Denver*, *supra*, the Court held that arbitration under the antidiscrimination provision in a collective bargaining agreement would not preclude plaintiff's statutory right of action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 415 U.S. at 59-60, 94 S.Ct. at 1025, 39 L.Ed.2d at 164-65. Plaintiff's action in *Alexander*, however, was not pursuant to the retaliatory discharge provision of Title VII, 42 U.S.C. § 2000e-3(a), but rather was for racial discrimination, the very conduct the Civil Rights Act of 1964 was enacted to eliminate. While 29 U.S.C. § 660(c) and G.S. 95-130(8) are statutory actions apart from any collective bargaining agreement, they are retaliatory discharge provisions, not the enforcement provisions directed at the substantive ill to be corrected by OSHA and OSHANC, namely, unsafe or unhealthy conditions in the workplace. This distinction, in our view, makes the underlying public policy argument against the preclusive effect of arbitration espoused in *Alexander* less persuasive in the antiretaliation context. Moreover, the Secretary of Labor's regulations applicable to 29 U.S.C. § 660(c), 29 C.F.R. § 1977.18(a)(3), adopting a policy of deferring to an arbitration award where possible, supports the position that enforcement under the federal statute is more individual than public in nature. Furthermore, some federal courts even after *Alexander v. Gardner-Denver* recognized that the acceptance of an arbitration award and settlement with the employer would preclude a claimant from proceeding against the employer for further benefits. In *EEOC v. McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975), the Court stated:

Gardner-Denver did not hold that a grievant may accept an award of an arbitrator and settle with his employer, and thereafter sue his employer for additional benefits.

Id. at 1010.

In this State, G.S. 95-36.8 provides that arbitration awards pursuant to a collective bargaining agreement provision for arbitration to settle controversies shall be final and binding upon the parties to the proceeding. Relying on *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 354 S.E.2d 357 (1987), wherein an action for wrongful termination by an employee following arbitration was barred by the statute, defendant argues that plaintiff is barred in the present case. Plaintiff argues that this statute has no applicability to this proceeding because the Commissioner was not

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

a party to the multiplant grievance procedure and because the multiplant grievance procedure was not final and binding arbitration. We agree with plaintiff that the multiplant grievance procedure was not arbitration contemplated by G.S. 95-36.8. Thus, the statute does not bar the Commissioner's action.

The question remains, however, whether Nettles' acceptance of the multiplant grievance committee decision rendered pursuant to the collective bargaining agreement bars this action. In our view, it does.

The limited scope of the benefits sought, namely back pay for the period during Nettles' suspension, makes this action one for private rather than public benefits. See *Marshall v. General Motors, supra*. No industry or company-wide relief from a pervasive discriminatory practice is being sought in this litigation; nor is any unsafe condition subjecting other employees to potential harm to be eliminated. Hence, the public policy supporting early resolution of controversies in the workplace to promote industrial peace outweighs any public interest reason for not according the multiplant grievance decision preclusive effect. The fact that the multiplant grievance proceeding was not arbitration does not alter the result. Under the collective bargaining agreement, the multiplant proceeding, held in Tampa, Florida, was an interim step in the grievance process. The committee consisted of six people, three from the company and three from the union. If this committee deadlocked, then the grievance went to full arbitration, but if the multiplant committee was able to render a decision, that decision was final and binding. As we noted earlier, the purpose of the antiretaliation statute is to avoid the chilling effect on employees' willingness to file complaints when those who do are disciplined or discharged under pretext. In our view, this chilling effect can be neutralized effectively by a collective bargaining agreement grievance procedure. Whether in a grievance proceeding or a judicial forum, the employer is at risk of having to reduce the penalty or reinstate the employee with or without back pay. Therefore, when the scope of the relief sought by the Commissioner is for private, individual benefit, we see no reason for the action not to be barred by the employee's acceptance of an award in the collective bargaining grievance process. Accordingly, we hold that summary judgment on this ground was proper.

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

III.

[3] We now address plaintiff's contention that the trial court erred in granting summary judgment for defendant on the grounds that plaintiff was collaterally estopped by virtue of Nettles' claim before the North Carolina Employment Security Commission (ESC), which found that he was dismissed for misconduct. Plaintiff argues, first, that retaliatory discharge was never considered by the ESC and, second, that the Commissioner should not be precluded from maintaining this action even if Nettles would be collaterally estopped by the Commission's findings.

After his discharge, Nettles filed a claim for unemployment compensation on 10 February 1984, stating only that he had been discharged for failing to follow company lock-out procedures. The claims adjudicator determined that since Nettles had been discharged for failing to follow posted safety procedures he had been terminated for "misconduct" and was not eligible for unemployment benefits. On 1 March 1984 Nettles appealed the decision of the claims adjudicator, raising the issue that the company was aware of his OSHANC complaint at the time he was terminated. Nettles' testimony at this hearing before the appeals referee was directed to the lock-out procedure and the events which immediately preceded his termination. Based on this testimony and a written statement from Don Steele, the referee concluded that the claimant's violation of the lock-out procedure evinced a willful disregard of the employer's best interests, that claimant was discharged from his job for misconduct, and that claimant was, therefore, disqualified from receiving unemployment benefits. Nettles appealed the decision of the referee to the full Commission. In his letter of appeal Nettles once again referred to his suspicion that his discharge was connected to his OSHANC complaint. Before the Commission reviewed the determination, it informed Nettles that he could request a hearing for oral argument on points of law but that no evidence would be taken. On 11 May 1984 the full Commission affirmed and adopted the decision rendered by the appeals referee. Finally, Nettles appealed the decision of the full Commission to Superior Court, Davie County. Nettles appeared *pro se* until the appeal to Superior Court. After a hearing, the Court held that the evidence contained in the record of proceedings before the ESC supported the ESC determination.

The transcripts and documents related to all of these proceedings have been made part of the record on appeal in this

BROOKS v. STROH BREWERY CO.

[95 N.C. App. 226 (1989)]

Court. Having reviewed the transcripts and other documents connected with Nettles' ESC case, we are of the opinion that the ESC determination does not collaterally estop the Commissioner from bringing this suit against defendant for retaliatory discrimination.

Collateral estoppel is a doctrine whereby "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552-557 (1986). The North Carolina Supreme Court has set forth five prerequisites to the defensive use of collateral estoppel:

- (i) the prior suit resulted in judgment on the merits;
- (ii) identical issues are involved;
- (iii) the issue was actually litigated;
- (iv) the issue was actually determined;
- (v) the determination was necessary to the resulting judgment.

Id. at 429, 349 S.E.2d at 557. In the present case, although the issue of discriminatory treatment was raised in Nettles' letters of appeal to the appeals referee and the full Commission, the record shows that no evidence was presented on this issue and neither the ESC nor the Superior Court determined whether defendant had discriminated against Nettles. In fact there is no indication that the appeals referee even considered the question of retaliatory discharge.

In *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417 (E.D.N.Y. 1984), *aff'd*, 760 F.2d 253 (2d Cir. 1985), an employee was discharged after he filed complaints with his union about fumes from a faulty gas heater. The employee filed a claim for State Unemployment Insurance benefits. The administrative law judge ruled that the employee was ineligible because he walked off the job. Subsequent to the adjudication of unemployment benefits, the United States Secretary of Labor brought an action against the employer for retaliatory discrimination in violation of 29 U.S.C. § 660(c). The employer moved for summary judgment on the basis that the Secretary was collaterally estopped from claiming retaliatory discharge where the State Unemployment Insurance Agency had determined that the employee was discharged for walking off the

SMITH v. PASS

[95 N.C. App. 243 (1989)]

job. In denying the employer's motion for summary judgment, the court held that although by virtue of the agency's determination the Secretary would be collaterally estopped to deny that the employee was discharged for walking off the job, the agency's determination did not bar the Secretary's action for retaliatory discrimination because the agency determination was not dispositive of that question. *Id.* at 1421-22. Specifically, the court held that the agency's determination was unclear as to whether the discharge would have taken place in the absence of a discriminatory motive. *Id.* at 1422. *See also University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986).

On the record before this Court on this appeal, summary judgment on the basis of collateral estoppel would not be proper.

Any one of the grounds asserted by defendant would be determinative of the summary judgment, and we have ruled that defendant would be entitled to summary judgment on two of those grounds. Accordingly, the judgment of the trial court is

Affirmed.

Judges BECTON and ORR concur.

MARJORIE SMITH v. AMOS PASS, FIRST PIEDMONT CORPORATION AND DENNIS WADE MARSHALL

No. 8817SC1262

(Filed 5 September 1989)

1. Evidence § 19.2— evidence of similar accident

In an action to recover for injuries received by a passenger when the car in which she was riding struck a garbage truck stopped partly on the paved road facing oncoming traffic, the trial court did not err in admitting evidence that another garbage truck placed in the same location at the same time the next day was also struck by an oncoming vehicle.

SMITH v. PASS

[95 N.C. App. 243 (1989)]

2. Automobiles and Other Vehicles § 45.2— collision with garbage truck—prior procedures for garbage collection—relevancy

In an action to recover for injuries received by a passenger when the car in which she was riding struck a garbage truck stopped partly on the paved road facing oncoming traffic while a customer's garbage was being collected, testimony that the customer's garbage had previously been picked up by driving the truck into her driveway but that such practice ceased after the customer requested that her driveway not be used was relevant to the issue of whether defendant garbage truck driver violated statutes pertaining to parking on the highway, N.C.G.S. § 20-161(a) and (b), and whether he acted negligently. N.C.G.S. § 8C-1, Rule 401.

3. Evidence §§ 19.1, 47— exclusion of testimony by meteorologist—visibility conditions—effect of sun's glare on drivers

The trial court did not err by excluding a meteorologist's testimony concerning visibility conditions on the date of an accident and two years later on the ground that there was an insufficient showing of similarity of conditions on the two dates. Nor did the trial court err in excluding the meteorologist's opinion testimony about the effect of the sun's glare on drivers since the witness's credentials as a meteorologist made him no more qualified than any other driver to offer such an opinion. N.C.G.S. § 8C-1, Rule 702.

4. Evidence § 15.1— sun's effect at accident scene—admissibility of testimony

The trial court did not err in admitting testimony by the investigating officer and a medical technician concerning the effect of the sun on visibility at an accident scene where both witnesses arrived at the scene within an hour after the accident and approached the scene from the same direction as the automobile in which plaintiff was riding.

5. Evidence § 50.2— cause of injury—expert testimony

The trial court properly admitted opinion testimony by an orthopedic surgeon who diagnosed a fracture of plaintiff's thoracic vertebrae a month after plaintiff was involved in a collision that the fracture was caused by the collision.

SMITH v. PASS

[95 N.C. App. 243 (1989)]

6. Damages § 13.1— admissibility of medical bills

Plaintiff's medical bills from an orthopedic surgeon for the diagnosis and treatment of plaintiff's thoracic fracture were admissible where there was evidence that the fracture was caused by the accident in question.

7. Damages § 16.1— cause of injuries—evidence sufficient without expert testimony

A driver's evidence of the cause of his injuries was sufficient for the jury without the presentation of expert medical testimony where he testified that when the collision occurred, he was hit on the forehead, chest and stomach and sustained a deep gash in his leg, and that he was hospitalized for six days and received stitches and a cast on his leg as a result of these injuries.

8. Damages § 16.3— lost profits—sufficient evidence

A van owner's evidence was sufficient to support an instruction on lost earnings where he testified that his sole source of income was his van pool business; he was unable to operate the van and had no customers for three and a half months after the van collided with defendants' garbage truck; and although the volume of his business fluctuated from week to week, he testified about his past average weekly income from the business.

9. Automobiles and Other Vehicles § 90.15— instructions—driver's duty of care

There was no error in the trial court's instruction that "the conduct of each driver is to be evaluated in the light of the factors and circumstances with which he is confronted at the time and his duty is to exercise the ordinary care required of a driver confronted with those circumstances."

10. Automobiles and Other Vehicles § 50.3— garbage truck—improper parking on road—jury question

Whether a garbage truck was stopped at a customer's residence partly on the traveled portion of a road facing oncoming traffic for a necessary purpose so that it was not "parked" in violation of N.C.G.S. § 20-161(a) and (b) was a question for the jury where there was conflicting evidence as to whether alternative means were available for garbage to be collected at the residence.

SMITH v. PASS

[95 N.C. App. 243 (1989)]

11. Automobiles and Other Vehicles § 53.2— failure to drive on right side of road—truck stopped on left side with engine running

The evidence presented a jury question as to whether a garbage truck driver violated the statute requiring vehicles to be driven on the right side of the road, N.C.G.S. § 20-146, where there was evidence that the truck was stopped partly on the left shoulder of the road facing oncoming traffic with its engine running.

12. Automobiles and Other Vehicles § 50.3— garbage truck stopped partly in highway—collision with oncoming vehicle—common law negligence

Plaintiff's evidence was sufficient for the jury on the issue of defendant garbage truck driver's common law negligence where it tended to show that defendant stopped his truck at a customer's house partially in the traveled portion of the highway facing oncoming traffic; defendant had picked up garbage on that stretch of road many times in the past during the same time of day and was aware of the layout of the road and that the sun was up and facing oncoming traffic; alternative methods of picking up garbage at the customer's house were available and had been used in the recent past; and the garbage truck was struck head-on by the right front portion of a van in which plaintiff was a passenger.

13. Automobiles and Other Vehicles § 88— driving with sun in face—not contributory negligence as matter of law

A van driver was not contributorily negligent as a matter of law in striking a garbage truck stopped partially in the van's lane of travel where the van driver testified that his vision was obscured by the sun and that, although he pulled down the van's visor and slowed his vehicle, he did not see the garbage truck until moments before his van hit the truck.

14. Appeal and Error § 48— evidentiary rulings—effect of jury finding of no negligence

The driver of a van in which plaintiff was a passenger was not prejudiced by the trial court's evidentiary rulings in plaintiff's action to recover for injuries received in a collision with a garbage truck where the jury found that the van driver was not negligent.

SMITH v. PASS

[95 N.C. App. 243 (1989)]

APPEAL by defendants, First Piedmont Corporation (Piedmont) and Dennis Wade Marshall (Marshall) and cross appeal by defendant, Amos Pass (Pass) from *John (Joseph R.), Judge*. Judgment and Order entered 12 April 1988 in Superior Court, CASWELL County. Heard in the Court of Appeals 17 May 1989.

Ramsey, Cioffi & Abell, by Andrew P. Cioffi and James E. Ramsey, for plaintiff-appellee.

Henson Henson Bayliss & Teague, by Perry C. Henson and Gary K. Sue, for defendant-appellants, First Piedmont Corporation and Dennis Marshall.

Adams Kleemeier Hagan Hannah & Fouts, by Joseph W. Moss and Trudy A. Ennis, for defendant-appellee, Amos Pass.

LEWIS, Judge.

This is a negligence action. The record reveals the following sequence of events. On 30 December 1985 at approximately 8:35 a.m. defendant Dennis Marshall (Marshall), while within the scope of his employment, was operating Piedmont's garbage truck on Rural Road 1554 in Caswell County. He was traveling in a westerly direction. In order to pick up the garbage at customer Annie Swann's (Swann) house, Marshall pulled the truck off onto the opposite shoulder of the paved road in front of the Swann's driveway so that it was facing oncoming eastbound traffic. Marshall and his co-worker exited the vehicle, loaded the garbage and were preparing to drive off when a passenger van driven by Pass and occupied by plaintiff, Marjorie Smith (Smith) and nine other passengers collided head-on with the right front portion of Piedmont's truck. Plaintiff and Pass allegedly suffered physical injury and Pass' van was damaged.

Plaintiff sued Pass for negligence alleging, among other things, failure to properly control the van, failure to maintain a proper lookout, excessive speed and reckless driving. Plaintiff also sued Marshall and Piedmont alleging common law negligence and negligence *per se* for violations of G.S. 20-161(a) and (b); and 20-146 of the North Carolina Motor Vehicle Code. Pass and Piedmont/Marshall filed cross-claims against each other alleging negligence, contributory negligence, indemnification and contribution.

The case was tried before a jury which found Piedmont, through its employee Marshall, negligent and awarded \$32,500 to plaintiff

SMITH v. PASS

[95 N.C. App. 243 (1989)]

Smith and \$15,000 to Pass. Pass was found not negligent and not contributorily negligent. On 12 April 1985 the trial court entered an order denying Piedmont/Marshall's motions for directed verdict, judgment notwithstanding the verdict and a new trial. Piedmont/Marshall appeal the entry of judgment and the court's order denying their motions. Pass cross appeals under App. R. 10(d).

I. Piedmont/Marshall Appeal

Piedmont/Marshall bring forth numerous assignments of error which can be divided into three basic categories. The first category involves the trial court's alleged erroneous admission or omission of various evidence and testimony. The second involves the trial court's instructions to the jury. The third deals with the lower court's denial of their post-trial motions.

a. *Evidence*

[1] Piedmont/Marshall allege that the trial court committed prejudicial error in admitting evidence concerning a subsequent accident occurring on 31 December 1985 on this same Rural Road 1554 and involving one of Piedmont's garbage trucks and another vehicle. Specifically, they contend that the facts surrounding the 31 December accident were too dissimilar to the facts of the 30 December accident to permit their admission and alternatively that G.S. 8C-1, Rule 407, which disallows evidence of subsequent remedial action, prohibits their admission.

Our court has held that, "[w]hen substantial identity of circumstances and reasonable proximity in time is shown, evidence of similar occurrences or conditions may, in negligence actions, be admitted as relevant to the issue of negligence." *Murrow v. Daniels*, 85 N.C. App. 401, 405, 355 S.E.2d 204, 208 (1987), *rev'd on other grounds*, 321 N.C. 494, 364 S.E.2d 392 (1988), *quoting* Brandis N.C. Evidence Section 89 (1982).

The evidence here reveals that on 31 December 1985, officers and employees of Piedmont, in an attempt to assess the safety and reasonableness of Marshall's actions on 30 December, placed another garbage truck of similar size and weight in the same location as the truck driven by Marshall the day before, at the same time of day. At approximately 9:00 a.m. a car driven in an easterly direction by George Moore collided with the right front portion of Piedmont's truck. The officer, who investigated both accidents, testified that the road and weather conditions as well as the location

SMITH v. PASS

[95 N.C. App. 243 (1989)]

of the truck were nearly identical. Although testimony also revealed that there were some slight differences in the exact size and position of the truck and the time of the accident, we are of the opinion that the similarities in time and circumstances far outweigh the differences. The trial judge properly allowed evidence of the 31 December accident to be admitted.

Further, we note that Piedmont/Marshall's argument as to 8C-1, Rule 407 is without merit. For the purpose of showing negligence, Rule 407 excludes evidence of measures taken after an event which would have made the event less likely to occur. There is no evidence that the actions taken by Piedmont on 31 December 1985 were remedial in nature. Testimony of Piedmont's own president, Ben Davenport (Davenport) reveals that the purpose of their actions was to assess whether Marshall's activities on 30 December were safe and proper. Thus, 8C-1, Rule 407 is not applicable to this situation.

[2] Piedmont/Marshall next argues that the trial court erred in admitting testimony pertaining to other means and procedures used to pick up garbage at Swann's residence. They contend that such evidence is irrelevant and thus inadmissible under our rules of evidence. Alternatively they contend that even if relevant, the evidence's probative value is substantially outweighed by its prejudicial effect.

Marshall was allowed to testify at trial that until approximately one year prior to the 30 December accident, Swann's garbage was picked up by driving the truck up into her driveway but that such practice ceased after Swann requested the truck no longer use her driveway. Marshall stated that after he became aware of Swann's request he never used her driveway to pick up her garbage. Swann confirmed that she asked Piedmont not to use her drive but also testified that as recently as one to two weeks before the 30 December accident Piedmont employees used her driveway to pick up her garbage.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. However, 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,

SMITH v. PASS

[95 N.C. App. 243 (1989)]

waste of time, or needless presentation of cumulative evidence." G.S. 8C-1, Rule 403. Whether to exclude evidence under Rule 403 is a determination within the sound discretion of the trial court and our Court will not disturb its ruling absent a showing that such ruling was so arbitrary that it could not have resulted from a reasoned decision. *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Plaintiff alleged in her complaint that Piedmont/Marshall violated G.S. 20-161(a) and (b) which prohibits parking a vehicle on the travelled portion of a highway. Conversely, Piedmont/Marshall argued that the garbage truck was not "parked" under the meaning of the statute but had only stopped momentarily to pick up Swann's garbage and that Swann's instructions coupled with the physical limitations of the surrounding landscape made it necessary for Marshall to stop as he did.

In construing G.S. 20-161(a) our courts have defined "parking" to be more than a temporary or momentary stop for a necessary purpose. *Adams v. Mills*, 312 N.C. 181, 322 S.E.2d 164 (1984). In determining whether a violation of G.S. 20-161(a) has occurred, the trier of fact must consider whether the stop, even if temporary, was for a necessary purpose and "under such conditions that it [was] impossible to avoid leaving such vehicle in such a position.'" *Melton v. Crotts*, 257 N.C. 121, 129, 125 S.E.2d 396, 402 (1962), quoting *Capital Motor Lines v. Gillette*, 235 Ala. 157, 177 So. 881 (1935).

We find that evidence of the alternative method for collecting Swann's garbage prior to the accident as well as testimony revealing Marshall's rationale for stopping as he did on 30 December is relevant not only to the issue of whether Piedmont/Marshall violated G.S. 20-161(a) and (b) but also to the issue of Marshall's alleged negligent conduct and is thus admissible under G.S. 8C-1, Rule 401. Further, we find that defendant failed to show that the judge abused his discretion in allowing the evidence to be admitted or that the effect of its admission was so prejudicial that it outweighed its probative value so as to warrant exclusion under G.S. 8C-1, Rule 403.

[3] Piedmont/Marshall's next contention is that the court erred in excluding certain testimony of expert meteorologist William Haggard (Haggard) concerning weather conditions, sun location, visibility and steps drivers could take to eliminate the glare of the early

SMITH v. PASS

[95 N.C. App. 243 (1989)]

morning sun. The record reveals that at the conclusion of *voir dire* examination, the trial judge allowed Dr. Haggard to testify as to his observations as a meteorologist of the 30 December 1985 weather records as well as to the various atmospheric and climate conditions as they existed on 30 December 1985 and 1987, and as to his findings with regard to the location of the sun in terms of degrees, horizon and movement from east to west. The only testimony the judge excluded was Haggard's opinion testimony regarding visibility and glare finding that there had not been a sufficient show of similarity of conditions on 30 December 1985 and on 30 December 1987.

G.S. 8C-1, Rule 702 permits a witness qualified as an expert to offer opinion testimony about his or her area of expertise if the trier of fact determines such testimony would be helpful to the jury. The judge is given wide latitude of discretion when making a determination about the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). A determination of whether the opinion evidence is sufficiently reliable and relevant is also within the judge's discretion. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), *cert. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986).

We have reviewed the record and find that the trial court did not abuse its discretion in excluding Haggard's testimony regarding visibility conditions in 1985 and 1987. Visibility, unlike the mathematical calculations of the angle and location of the sun to which Haggard was allowed to testify, calls for a more subjective judgment involving personalized observations of certain physical conditions. The court also did not abuse its discretion in excluding Haggard's testimony about the effect of the sun's glare on drivers. Expert witness testimony is admissible if an expert, given his expertise, is better qualified than the jury to form an opinion. *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 335 S.E.2d 759 (1985). The effect of the sun's glare on drivers is an effect to which any driver heading into the direction of the sun can attest. In this situation, Haggard's expert credentials as a meteorologist made him no more qualified than any other driver to offer an opinion. Defendant's argument is without merit.

[4] Piedmont/Marshall's next contention is that the court erred in admitting the testimony of Trooper Williamson (Williamson), the officer at the scene of the accident, and Stephen Russell (Russell),

SMITH v. PASS

[95 N.C. App. 243 (1989)]

a medical technician also at the scene, concerning the condition of the sun and effects on visibility on 30 December 1985. Specifically, defendants argue that there was no showing of identity of circumstances or proximity of time between the accident and their arrival at the scene. We do not agree.

Whether to admit such evidence is again within the sound discretion of the trial judge. *Jones, supra*. Here, the evidence showed that both Russell and Williamson arrived within an hour of the accident and approached the scene from the same direction as Pass. While it cannot be disputed that the exact position of the sun would have shifted somewhat, we do not think the time frame so great or circumstances so changed that admission of these witnesses' testimony amounted to an abuse of discretion. This assignment of error is overruled.

Piedmont/Marshall next assign as error the trial court's admission of the medical testimony and medical bills of Dr. William Bruch (Bruch). They contend that there was no competent medical testimony establishing a causal connection between the accident and a fracture of plaintiff's thoracic vertebrae diagnosed by Bruch approximately one month after the accident and further that Bruch did not actually "treat" plaintiff for any injuries incurred as a result of the 30 December collision. We do not agree.

[5] Expert opinion testimony was received from Bruch who saw plaintiff in his professional capacity after the 30 December accident. G.S. 8C-1, Rule 702 allows a witness qualified as an expert to testify in the form of an opinion. A medical expert is competent to testify as to the cause of suffering alleged by plaintiff. *Spivey v. Newman*, 232 N.C. 281, 59 S.E.2d 844 (1950). In this case, Bruch, qualified as an expert in the field of orthopedic surgery, testified that in his opinion, based on his evaluation of plaintiff's medical condition, x-rays, bone scan and plaintiff's medical history, the thoracic fracture, originally undiagnosed by doctors immediately after the accident, was caused by the collision in question. Piedmont/Marshall's argument is without merit.

Additionally the court did not err in admitting Bruch's testimony regarding his treatment of plaintiff nor in admitting plaintiff's medical bills from Bruch. Black's Law Dictionary (5th ed. 1979) defines "treatment" as "[a] broad term covering all the steps taken to effect a cure of an injury . . . including examination and diagnosis as well as application of remedies." Evidence at trial showed that

SMITH v. PASS

[95 N.C. App. 243 (1989)]

plaintiff first visited Bruch on 28 January 1986 complaining of thoracic or mid-back pain. Bruch took a medical history, conducted a physical examination, ordered x-rays and a bone scan, and on one occasion prescribed pain medication. Although there was also evidence that plaintiff sought Bruch's services on the advice of her attorney, we believe there was a sufficient showing that Bruch did in fact "treat" plaintiff and that his testimony was admissible.

[6] Likewise, we hold that Bruch's medical bills were properly admitted. Medicals bills are admissible where lay and medical testimony of causation is provided. *See Taylor v. Boger*, 289 N.C. 560, 223 S.E.2d 350 (1976). In this case, Bruch provided expert testimony that plaintiff's thoracic fracture was caused by the 30 December accident. Plaintiff also testified about experiencing back pain immediately after the collision and in the weeks following. This assignment of error is overruled.

Defendants allege the court erred in admitting the orthopedic summary portion of the hospital medical records regarding plaintiff's case because the summary constituted hearsay. The summary was not admitted for the truth of the matter asserted but to corroborate plaintiff's testimony and the jury was given a limiting instruction to that effect. Admission of the summary was proper in this case.

b. *Jury Instructions*

Piedmont/Marshall's next category of errors relates to the trial court's jury instructions. Specifically, they contend that the court erred in instructing on Smith's common law and statutory claims of negligence, on defendant Pass' loss of earnings and on the proximate cause of Pass' injuries because in each instance there was insufficient evidence to support such instructions. Additionally, they allege the judge erroneously instructed the jury on Pass' duty of care. We have reviewed all Piedmont/Marshall's contentions and find them without merit and further find that the judge's instructions are supported by applicable North Carolina law and the facts in this case.

A trial judge is required to explain the law and apply it to the evidence on the substantive issues of the action and must submit the issue with appropriate instructions if there is evidence, viewed in the light most favorable to plaintiff, to support a reasonable inference of each element of plaintiff's claims. *Adams, supra*. We

SMITH v. PASS

[95 N.C. App. 243 (1989)]

have reviewed the record in this case and find that Smith's complaint sufficiently alleged common law negligence as well as violations of G.S. 20-161(a) and (b) and G.S. 20-146 and she presented sufficient evidence at trial to create a reasonable inference of the elements of these claims. The judge properly instructed the jury on Smith's various causes of action.

[7] Pass in his countersuit also presented sufficient evidence of lost earnings and proximate cause. Pass testified that when the collision occurred he was hit on his forehead, chest and stomach and sustained a deep hole or gash in his leg. He was taken to the hospital where he was treated for these injuries and hospitalized for six days. He also received stitches and a cast on his leg. Pass offered no expert medical testimony. However, in this case, where Pass' injuries were obvious and apparently did not involve complicated diagnostic procedures or treatment, we hold that expert medical testimony as to the cause of his injuries was not necessarily required. "There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965).

[8] Additionally, Pass offered sufficient evidence as to his lost earnings. He testified that his sole source of income was his van pool business and that from the date of the accident until he resumed driving the van on 15 April 1985 he was unable to operate the van and had no customers. He also testified that the volume of his business fluctuated from week to week but provided testimony about his past average weekly income from the business. Evidence of loss of business is competent and admissible in determining damages for loss of time or impaired earning capacity. *Jernigan v. R.R. Co.*, 12 N.C. App. 241, 182 S.E.2d 847 (1971). "The fact that defendant did not testify from business records and accounts does not render his testimony too speculative. Plaintiff had full opportunity to cross-examine him with respect to all phases of the business." *Id.* at 244, 182 S.E.2d at 849, quoting *Smith v. Corsat*, 260 N.C. 92, 99, 131 S.E.2d 894, 899 (1963).

[9] Further, the judge's instruction with regard to a driver's duty of care comports with North Carolina law. The judge here instructed the jury "[t]he conduct of each driver is to be evaluated in the light of the factors and circumstances with which he is confronted at the time and his duty is to exercise the ordinary care required

SMITH v. PASS

[95 N.C. App. 243 (1989)]

of a driver confronted with those circumstances." This language is almost a verbatim recitation of our holding in *Allen v. Pullen*, 82 N.C. App. 61, 345 S.E.2d 469 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E.2d 738 (1987). In that case, our Court was confronted with the issue of whether the plaintiff-driver was contributorily negligent as a matter of law in failing to stop when her visibility was obscured by a cloud of dust. Writing for the panel, Judge Martin noted the several occasions the appellate courts had been confronted by the issue of a driver's contributory negligence when his or her vision became obscured and stated:

It is apparent from these varied decisions that there is no absolute universal rule which may be applied; the conduct of each motorist must be evaluated in the light of unique factors and circumstances which he or she is confronted. Only in the clearest cases should a failure to stop completely be held to be negligent as a matter of law.

Id. at 68, 345 S.E.2d at 474. We find no error in the judge's instruction.

c. *Directed Verdict/Judgment Notwithstanding the Verdict and A New Trial*

Piedmont/Marshall's final category of assigned errors involves the court's refusal to grant their motions for a directed verdict, judgment notwithstanding the verdict and new trial regarding Smith's action and Pass' cross-claim. Again we have reviewed Piedmont/Marshall's various contentions and find no error.

A motion for directed verdict pursuant to G.S. 1A-1, Rule 50(a) presents an identical question for trial and appellate courts—whether plaintiff's evidence, considered in the light most favorable to the non-movant and given every reasonable inference, is sufficient to submit to the jury. *Alston v. Herrick*, 76 N.C. App. 246, 332 S.E.2d 720 (1985), *aff'd*, 315 N.C. 386, 337 S.E.2d 851 (1986). Directed verdicts are seldom appropriate in negligence cases and the court should deny such a motion if it finds any evidence more than a scintilla to support plaintiff's prima facie case. *Clark v. More*, 65 N.C. App. 609, 309 S.E.2d 579 (1983). The above-cited test for determining the sufficiency of the evidence is equally applicable in considering a motion for judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50(b). *Henderson v. Traditional Log Homes*, 70 N.C. App. 303, 319 S.E.2d 290, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). Such a motion is cautiously

SMITH v. PASS

[95 N.C. App. 243 (1989)]

and sparingly granted. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972). Additionally, whether to grant a new trial is within the discretion of the trial judge and his ruling will not be disturbed absent a showing of an abuse of discretion. *Copley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

[10] In addition to her allegations of common law negligence, Smith alleged Piedmont/Marshall violated G.S. 20-161(a) and (b) which prohibit parking a vehicle on the travel portion of a rural highway and G.S. 20-146 which requires vehicles to be driven on the right side of the road. Piedmont/Marshall contends however that plaintiff failed to show that their truck was "parked" within the meaning of G.S. 20-161(a) and (b) or that the truck was being "driven" within the meaning of G.S. 20-146. We disagree with Piedmont/Marshall's contentions.

As stated previously our courts have construed "parking" under G.S. 20-161 so as to exclude temporary stops for a necessary purpose. *Adams, supra*. Whether a vehicle stopped on the travel portion of the road was for a necessary purpose is "ordinarily a question for the jury unless the facts are admitted." *Id.* at 190, 322 S.E.2d at 170, quoting *Melton v. Crofts*, 257 N.C. 121, 130, 125 S.E.2d 396, 402 (1962). In this case there was conflicting evidence about the necessity of stopping the garbage truck on the shoulder and travel portion of the road facing oncoming traffic or whether alternative means were available for Marshall and his assistant to collect garbage at the Swann residence. Here, the court properly submitted this issue to the jury.

[11] The trial judge also properly submitted the issue of whether Piedmont/Marshall violated G.S. 20-146. Piedmont/Marshall contend that the garbage truck was stopped in the opposite lane of traffic and therefore not being driven within the meaning of the statute. However, the Supreme Court in *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343 (1984) stated:

Although Chapter 20 of the General Statutes contain no definition of 'drive' or 'operate,' 'driver' and 'operator' are defined. In N.C.G.S. 20-4.01(7) 'driver' is defined as the 'operator of a vehicle.' 'Operator' is defined as 'a person in actual physical control of a vehicle which is in motion or which has the engine running.' N.C.G.S. 20-401(25) . . . [W]e are satisfied that the legislature intended the two words to be synonymous.

SMITH v. PASS

[95 N.C. App. 243 (1989)]

Id. at 436, 323 S.E.2d at 347. In this case there was evidence that while the garbage truck was stopped, the engine was left running. Piedmont/Marshall's argument is without merit.

[12] We further find that there was sufficient evidence for the plaintiff's claims of common law negligence to go to the jury. Considered in the light most favorable to plaintiff, the evidence revealed: 1) Marshall parked or stopped his vehicle partially in the travel portion of the highway facing oncoming traffic; 2) Marshall had picked up garbage on that stretch of road many times in the past during that same time of day and was aware of the layout of the road and that the sun was up and facing oncoming traffic, and 3) alternative methods of picking up garbage at the Swann residence were available and allegedly had been used in the recent past. Based on the foregoing and the evidence presented at trial we hold that the trial judge did not err in denying Piedmont/Marshall's motions for directed verdict and judgment notwithstanding the verdict as to plaintiff's claims nor did he abuse his discretion in denying their motion for a new trial.

[13] Similarly, the trial court correctly denied Piedmont/Marshall's motions as to Pass' counterclaim based on contributory negligence. A directed verdict on the ground of contributory negligence is proper only where the defense is so clearly established that no other reasonable inference can be drawn. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978). Here Pass presented evidence that as he proceeded up Rural Road 1554 his vision was obscured by the sun and that although he pulled down the van's sun visor and slowed his vehicle he did not see the garbage truck until moments before his van hit the truck. Our court in *Clark v. More*, *supra*, a case in which the plaintiff's car struck defendant's truck abandoned in the plaintiff's lane of traffic, affirmed the trial court's denial of the defendant's directed verdict motion and stated:

While contributory negligence on the part of plaintiff could be inferred in that he continued driving with the blinding sun in his face, that is not the only reasonable inference to be drawn from the evidence. The jury could, and apparently did, infer that plaintiff was exercising the ordinary care required of a reasonably prudent person who finds himself driving with blinding sunlight in his face.

Id. at 611, 309 S.E.2d at 581. This assignment of error is overruled.

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

II. Pass' Cross-Appeal

[14] Finally we address Pass' cross-appeal. Pass excepts and assigns error to the trial court's admission and omission of various testimony offered at trial. An appellant must not only show error but that the alleged error was prejudicial and amounted to a denial of a substantial right. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967). Given the fact that the jury ultimately found Pass not to be negligent in this case, we find that the court's various evidentiary rulings did not prejudice Pass and that he received a fair trial free from prejudicial error.

Affirmed.

Judges BECTON and PHILLIPS concur.

ANIMAL PROTECTION SOCIETY OF DURHAM, INC., DURHAM COUNCIL OF THE BLIND, INC., I.R.F., INC., AND JERRY W. McLAURIN, PLAINTIFF-APPELLANTS v. THE STATE OF NORTH CAROLINA, LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE 14TH PROSECUTORIAL DISTRICT, AND ROLAND W. LEARY, SHERIFF OF DURHAM COUNTY, DEFENDANT-APPELLEES

No. 8814SC962

(Filed 5 September 1989)

1. Rules of Civil Procedure § 56.3— summary judgment for defendants based on plaintiffs' affidavits

Summary judgment was properly entered in favor of defendants where the pleadings and affidavits submitted by plaintiffs established that defendants were entitled to judgment as a matter of law.

2. Gambling § 4— charitable sales promotion—free bingo upon purchase of items—bingo statutes applicable

Even if a corporate charitable solicitor's sale of combs and candies to patrons who were then permitted to participate in "free" bingo games fit within the G.S. Ch. 131C definition of a "charitable sales promotion," the element of bingo in the fundraising scheme brought all activity connected with the

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

operation of that game within the ambit of the bingo statutes, G.S. Ch. 14, Art. 37, Part 2.

3. Gambling § 4— consideration for bingo— applicability of gambling and bingo statutes

While consideration must exist for bingo to be a violation of the gambling statutes, any activity which meets the definition of bingo in N.C.G.S. § 14-309.6 comes within the purview of the bingo statutes whether or not consideration is paid to play the game.

4. Gambling § 4— bingo statutes— licensure and proceeds violations— penalties against charitable solicitors and charities

The penalty provisions of the bingo statutes may be enforced against a corporate charitable solicitor and two charities where the record establishes that bingo games conducted by the charitable solicitor for the charities violate provisions of the bingo statutes regarding licensure and use of game proceeds.

5. Gambling § 4— “free” bingo upon purchase of items— violation of gambling statutes

Consideration was required for participation in “free” bingo games offered by a charitable solicitor to patrons who purchased combs and candies at inflated prices so that the bingo games constituted gambling in violation of N.C.G.S. § 14-292 where the patrons understood their purchases to be the basis for the opportunity to play bingo. The fact that some patrons may have obtained bingo cards without first buying combs or candy did not transform the bingo games into games without consideration where patrons who obtained the cards without making a purchase received fewer cards than those who bought the items, and the other patrons thus had to pay to obtain a greater number of cards.

6. Appeal and Error § 3— constitutional issue— reply brief— issue not before appellate court

Although an argument that the bingo statutes abridge commercial speech in violation of the First Amendment was presented in the trial court, that issue was not properly presented to the appellate court where it was raised only in appellants’ reply brief and not in their initial brief.

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

APPEAL by plaintiffs from *Wiley F. Bowen, Judge*. Judgment entered 18 June 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 April 1989.

David S. Crump for plaintiff-appellants.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Christopher P. Brewer and Associate Attorney General David F. Hoke, for defendant-appellees.

BECTON, Judge.

At issue in this action for declaratory and injunctive relief is the applicability of North Carolina's "bingo statutes," N.C. Gen. Stat. Secs. 14-309.5 through 14-309.14, to the "charitable sales promotion" conducted by or on behalf of the plaintiffs. The plaintiffs are two charities, a corporate charitable solicitor, and the individual president of the corporate solicitor. The defendants are the State of North Carolina and various officials charged with enforcing the bingo statutes. Plaintiffs appeal from summary judgment granted in favor of the defendants. We affirm.

I

The corporate plaintiff, I.R.F., Inc., is a North Carolina corporation owned by its president, the individual plaintiff, Jerry W. McLaurin. I.R.F. is licensed as a "professional solicitor" under the Charitable Solicitation Licensure Act, N.C. Gen. Stat. Sec. 131C-1 *et seq.* (1986 & Supp. 1988). The charitable plaintiffs, the Animal Protection Society of Durham, Inc., and the Durham Council of the Blind, Inc., are also licensed to solicit charitable contributions under the Charitable Solicitation Act. Although the charities were at one time licensed to conduct bingo games under N.C. Gen. Stat. Sec. 14-309.7, neither I.R.F. nor the charities are currently licensed under that statute.

In November 1987, I.R.F. contracted with the two charities to operate a "charitable sales promotion" on their behalf. A "charitable sales promotion" is defined in Chapter 131C as "an advertising campaign sponsored by a for-profit entity which offers for sale a tangible item . . . upon the representation that all or a portion of the purchase price will be donated to a person established for a charitable purpose." Sec. 131C-3(2) (1986). As "an inducement to make purchases and donations," I.R.F. offered "free bingo games" to persons participating in the charitable sales promotions.

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

I.R.F.'s charitable sales promotions were conducted at a place of business called "The Oasis" in Durham County. (It is not clear from the record what business—other than charitable sales promotion—The Oasis conducted.) To accomplish the sales promotion, I.R.F. advertised the sale of plastic hair combs (retail value 19 cents) and peppermint candies (retail value 1 cent), which it then sold for \$5.00 and \$1.00 respectively, to patrons of The Oasis. I.R.F. advertisements stated that "[t]he difference between the purchase price and the actual retail value of purchased merchandise offered in this sales promotion, [sic] is a charitable donation, and may be tax deductible [sic]." Upon purchasing combs or candy, the patron was given "free" bingo game cards. The greater the patron's "donation," the more "free" game cards the patron received. Patrons were then allowed to participate in the "free bingo games," at which substantial cash prizes were awarded.

I.R.F. emphasizes on appeal that there was no charge for participating in a bingo game, and that anyone who wished to play without making a donation could do so simply by requesting the cards. I.R.F. advertisements displayed at The Oasis declared:

THE BINGO GAMES offered in this sales promotion are offered "Absolutely FREE" as an advertising promotion for the purchase of merchandise offered in this sales event. You may obtain absolutely "FREE" Bingo Cards for future events by sending your request . . . to . . . [I.R.F.]

However, persons who requested bingo cards without first buying combs or candies received fewer cards than patrons who purchased the items.

The promotion apparently was successful, both for the charities and for the professional solicitor, although the charities received a substantially smaller share of the revenues than did I.R.F. The record shows that, for the months of January and February 1988, the gross receipts from the sale of combs and candies was \$663,250.00. The charities each received less than 9% of that amount, \$59,658.00. In contrast, the "solicitor's fee" for the same two month period was \$132,649.00, or 20% of the gross revenues. The remaining \$411,285.00 went to cover I.R.F.'s "advertising and promotion expense" incurred in conducting the charitable sales promotion. The charities did not object to this distribution of revenues. In fact, their contracts with I.R.F. explicitly provided:

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

Professional Solicitor makes no representations to Charity with regard to the character of income derived by the Charity from the charitable sales promotion. . . . DUE TO THE COST OF GOODS, COST OF ADVERTISING, OVERHEAD AND OTHER COST FACTORS ASSOCIATED WITH A CHARITABLE SALES PROMOTION, THERE IS A POSSIBILITY THAT CHARITY MAY RECEIVE LESS THAN FIFTY PERCENT (50%) OF THE GROSS RECEIPTS OF THE SOLICITATION.

. . .

In February 1988, defendant District Attorney Stephens informed the plaintiffs that their activities constituted an illegal bingo game in violation of this State's bingo statutes.

The plaintiffs brought the present suit seeking declaratory and injunctive relief, specifically praying for: (1) a declaration that their charitable sales promotion was not illegal gambling within the meaning of Part 1 of Article 37 of Chapter 14 of the General Statutes, N.C. Gen. Stat. Secs. 14-289 *et seq.* (entitled "Lotteries and Gaming"); (2) a declaration that the charitable sales promotion was not governed by Part 2 of Article 37 of Chapter 14, N.C. Gen. Stat. Secs. 14-309.5 *et seq.* (entitled "Bingo and Raffles"); and (3) an injunction restraining the defendants from enforcing Chapter 14, Article 37 against them. In the alternative, the plaintiffs sought a declaration that Section 14-309.5 is unconstitutionally vague and violates the plaintiffs' First Amendment rights.

Defendants moved for summary judgment. Plaintiffs also moved for summary judgment. The trial judge granted the motion in favor of the defendants, and the plaintiffs appealed. The central question arising from the plaintiffs' several contentions on appeal is whether their activities constituted illegal bingo.

II

[1] Plaintiffs first contend that they were entitled to summary judgment because defendants failed to submit any affidavits or other evidence showing that plaintiffs operated an illegal bingo game. However, Rule 56(b) provides that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought, may, at any time, move *with or without supporting affidavits* for a summary judgment. . . ." N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56(b) (1983) (emphasis added). Summary judgment may be granted if the pleadings, depositions, interrogatories, and admissions on file, together with *any* affidavits, show that there is no genuine is-

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

sue as to any material fact and that *any* party is entitled to judgment as a matter of law. R. Civ. P. 56(c). It makes no difference if the only evidence outside the pleadings came from the plaintiffs, since, as we explain below, the pleadings and the affidavits submitted by the plaintiffs established that defendants were entitled to judgment as a matter of law.

III

[2] "Bingo" is defined in Article 37 of Chapter 14 as "a specific *game of chance* played with individual cards having numbered squares ranging from one to 75, in which *prizes are awarded* on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers. . . ." N.C. Gen. Stat. Sec. 14-309.6 (1986) (emphasis added). Plaintiffs admit that they operated this game, but they argue that they did so only in connection with their promotion of the sale of combs and candies. Plaintiffs contend that since their activities constituted a charitable sales promotion, Chapter 131C governed their conduct rather than Article 37 of Chapter 14. We disagree.

When faced with two statutes applicable to a particular situation, one of which is general and the other of which is specific, the statute which addresses the situation in detail governs over the statute which addresses it in general and comprehensive terms, unless it appears that the legislature intended that the general statute control. *See, e.g., Food Stores v. Bd. of Alcoholic Beverage Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966). Chapter 131C is concerned only with establishing basic standards for charitable fundraising; it does not address fundraising through bingo. *See* Sec. 131C-2 (1986). The bingo statutes in Part 2 of Chapter 14, Article 37, on the other hand, cover, in exhaustive detail, the operation of bingo games to benefit charities. We conclude, then, that the element of bingo in I.R.F.'s fundraising scheme brought all activity connected to the operation of that game within the ambit of the bingo statutes, even if I.R.F.'s sale of combs and candies fit within Chapter 131C's definition of "charitable sales promotion."

IV

Plaintiffs contend the trial judge erred in granting summary judgment for the defendants because a genuine issue of material fact remained for trial, namely, whether consideration was required

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

to participate in the "free" bingo games operated by I.R.F. Plaintiffs insist that their activities were not "gambling" prohibited by Part 1 of Chapter 14, Article 37, because no consideration was required to play. In turn, because Part 1 is inapplicable to their conduct, plaintiffs argue, Part 2 of Article 37 cannot apply either. Before we address plaintiffs' contentions, we provide a general overview of Article 37.

A

Part 1 of Chapter 14, Article 37, entitled "Lotteries and Gaming," prohibits lotteries, pyramid and chain schemes, and various forms of gambling. See N.C. Gen. Stat. Secs. 14-289 to 14-309.4 (1986 & Supp. 1988). Section 14-292, entitled "Gambling," provides, "*Except as provided in Part 2 of this Article, any person or organization that operates any game of chance . . . at which money . . . is bet . . . shall be guilty of a misdemeanor.*" Sec. 14-292 (1986) (emphasis added). Likewise, any person who *plays* in a game of chance at which money is bet is also guilty of a misdemeanor. *Id.* See also *State v. Stroupe*, 238 N.C. 34, 40, 76 S.E.2d 313, 317 (1953). Bingo is one form of gambling prohibited by the statute. See, e.g., *Durham Council of the Blind v. Edmisten*, 79 N.C. App. 156, 157, 339 S.E.2d 84, 86 (1986).

Part 2 of Chapter 14, Article 37, entitled "Bingo and Raffles," provides an exception to Section 14-292's prohibition against gambling. The "bingo statutes" in Part 2 permit charitable, civic, religious, and certain other tax exempt organizations to conduct bingo games and raffles, but only under strictly limited circumstances. See N.C. Gen. Stat. Secs. 14-309.5 to 14-309.14 (1986 & Supp. 1988). "Beach bingo"—at which prizes under \$10 are awarded—is excepted for the most part from the strictures of the bingo statutes. See Secs. 14-309.6(6), 14-309.14. See also Sec. 14-309.9 (limit on prizes does not apply to bingo games operated at a fair or exhibition conducted pursuant to Article 45 of Chapter 106); Sec. 14-309.6(2) (definition of "bingo" does not include "instant bingo," through which winners are determined by preselected designation on a card). Beach bingo is not at issue in this case; thus, our subsequent discussion does not apply to that game.

While one evident goal of the bingo statutes is to allow charities and other socially useful organizations to raise money through bingo in order to further the organizations' worthy aims, another manifest purpose is to prevent bingo games from being "operated by full

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

time professionals for profit." See *Durham Council of the Blind*, 79 N.C. App. at 159, 339 S.E.2d at 87; see also *State v. McCleary*, 65 N.C. App. 174, 183, 308 S.E.2d 883, 890 (1983), *aff'd*, 311 N.C. 397, 316 S.E.2d 870 (1984). Thus, no one other than the listed tax exempt organizations is permitted to conduct bingo games, and the games must be conducted in strict compliance with the requirements set out in Part 2. See Secs. 14-309.5; 14-309.7; 14-309.10; 14-309.12.

Some of these requirements are as follows: The exempt organization must be licensed to operate bingo games, and may not contract with any person to conduct the games in its behalf. See Secs. 14-309.5; 14-309.7(a), (c). The exempt organization is prohibited from paying anyone other than a member of the organization to conduct a game, and the rate of pay for that member's services is limited to one and one-half times the minimum wage. See Sec. 14-309.7(c). The exempt organization may not exceed the statutory maximums on the number or length of sessions of bingo which may be played in any week, see Sec. 14-309.8, or on the amount of money or value of other prizes that may be awarded. See Sec. 14-309.9. Bingo games may be held only in a building owned or leased by the exempt organization, and all equipment used in the games must be owned by the organization. See Sec. 14-309.7. Finally, the use of proceeds obtained from bingo is tightly controlled. Proceeds may be used by the exempt organization only (1) to pay expenses incurred in operating the games, (2) to compensate the member of the organization responsible for conducting the games, and (3) for charitable, religious, civic, or certain other purposes of the exempt organization which inure to the public benefit. See Sec. 14-309.11(a). An annual accounting must be made to the Department of Human Resources. Sec. 14-309.11(b).

Substantial penalties may be imposed for operating a bingo game in violation of any of the provisions in Part 2. Any bingo game conducted outside the terms of Part 2 is "gambling" within the meaning of N.C. Gen. Stat. Secs. 19-1 *et seq.* concerning offenses against public morals. See Sec. 14-309.12. Likewise, any licensed exempt organization which conducts a bingo game in violation of any provision of Part 2 will be guilty of a misdemeanor under Section 14-292, punishable by a fine or imprisonment pursuant to N.C. Gen. Stat. Sec. 14-3. See Sec. 14-309.5. The severest penalty is reserved for those who

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

- (i) . . . operate a bingo game without a license;
- (ii) . . . operate a bingo game while license is revoked or suspended;
- (iii) . . . willfully misuse or misapply any moneys received in connection with any bingo game; or
- (iv) . . . contract with or provide consulting services to any license[d exempt organization].

Id. These persons face conviction of a Class H felony, punishable by up to 10 years imprisonment, a fine, or both. *Id.*; N.C. Gen. Stat. Sec. 14-1.1 (1986). In addition to imposition of a fine or imprisonment, a person or organization convicted of a Class H felony for conducting an illegal bingo game may be ordered to forfeit to the State all money acquired through the bingo operation. *See* N.C. Gen. Stat. Sec. 14-2.3 (1986).

With this overview of Article 37 in mind, we now address plaintiffs' contentions.

B

[3] Plaintiffs challenge the applicability of Part 2 to their activities. Plaintiffs are correct when they assert that consideration must exist for a bingo game to be "gambling" in violation of Part 1. *See* Sec. 14-292. However, contrary to plaintiffs' reading of the statutes, violation of Part 1 is not a prerequisite to violation of Part 2, and payment of consideration to play bingo is not a condition precedent to violation of Part 2. *See* Sec. 14-309.6 (definition of bingo does not include consideration as one of its elements). We hold, therefore, that any activity which meets the Part 2 definition of bingo in Section 14-309.6 is within the purview of the bingo statutes, whether or not consideration is paid to play the game. *Accord Italian Home Community Fed'n v. Kelly*, 12 Misc.2d 33, 178 N.Y.S.2d 694 (1958) (even "free" bingo is illegal if it fails to conform to bingo legislation). We further hold that the penalties in Part 2 are fully enforceable against any person or organization conducting a bingo game in contravention of any of the requirements set out in that Part.

[4] The record before us establishes that the bingo game conducted by I.R.F. violated several provisions in Part 2, in particular, those provisions regarding licensure and use of bingo game proceeds. Thus, the defendants were entitled to summary judgment

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

as a matter of law with respect to plaintiffs' claims challenging the enforcement of Part 2 against them.

C

[5] Plaintiffs also challenge the applicability of Part 1 to their activities. Plaintiffs assert that a genuine issue of material fact remained as to whether consideration was required to participate in I.R.F.'s "free" bingo games, and therefore, as to whether I.R.F.'s activities constituted "gambling" in violation of Section 14-292 of Part 1. We disagree.

We find disingenuous plaintiffs' assertion that "no consideration [was] expected, accepted or required" to play. Plaintiffs' own evidence shows the contrary. Plaintiffs point to affidavits submitted by patrons of The Oasis to support their assertion that the only money paid was for the purchase of combs and candies, not to play bingo. However, the affidavits plainly show that the patrons came to The Oasis to play bingo, not because they wanted or needed combs and candy. The affidavits also show that patrons understood their purchases to be the basis for the opportunity to play bingo. Two affidavits state that persons working at The Oasis told patrons that they would receive free bingo cards "for" making a donation or buying the items. Typical of the affidavits in the record, one affiant states, ". . . for buying the candy and combs you get the bingo absolutely free. . . . I do not see why the Oasis Sales Promotion is illegal. It is the best place I have every [sic] been to play bingo. . . ." (Emphasis added.) Another says, "I don't see why it isn't legal for [the plaintiffs] to run *free bingo games to intise [sic] me to buy combs and candies* to support their charitable cause. . . ." (Emphasis added.)

Plaintiffs rely heavily on the fact that some patrons obtained bingo cards without first buying combs or candy. This alone did not transform the bingo games offered by plaintiffs into "free bingo" since patrons who obtained the cards without making a purchase received fewer cards than patrons who did buy the items; thus, it follows that the other patrons had to pay to obtain a greater number of bingo cards. "[A] game does not cease to be [gambling] because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances." *Commonwealth v. Wall*, 295 Mass. 70, 73, 3 N.E.2d 28, 30 (1936). *Accord State v. Mabry*, 245 Iowa 428, 60 N.W.2d 889 (1953); *McFadden v. Bain*, 162 Or. 250, 91 P.2d 292 (1939). See also *People v. Wil-*

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

liams, 202 Misc.2d 420, 113 N.Y.S.2d 167 (1952) ("free" bingo at which all patrons played without paying nonetheless involved consideration since some patrons paid for the use of chairs and table space).

We hold that no unresolved issue of fact regarding the existence of consideration remained for trial since the plaintiffs' own evidence showed that consideration was an element of the bingo game offered by I.R.F. Therefore, the game was "gambling" in violation of Section 14-292, and defendants were entitled to summary judgment as a matter of law.

D

Despite plaintiffs' assertions to the contrary, the situation before us is far different from an advertising promotion directed at increasing sales of a legitimate product or service offered in the free marketplace by a business regularly engaged in the sale of such goods or services. The evidence before us unequivocally shows that bingo, not combs and candies, was the product promoted. Likewise, the bingo cards were not distributed generally and indiscriminately to the public, *see, e.g., People v. Shira*, 62 Cal. App. 3d 442, 133 Cal. Rptr. 94 (1976), and were not "instant win" bingo cards, to which the bingo statutes do not apply. Sec. 14-309.6. Nor is this situation analogous to legitimate charitable sales promotions, such as "band candy" sold—often at inflated prices—to finance the purchase of high school band uniforms. There, the product itself and the prospect of donating to a worthy cause motivate the purchase. The extraneous element of bingo plainly distinguishes this transaction from other charitable sales promotions, even if altruism and the desire to own the combs or candy play a significant part in the patrons' decision to buy the items at 26 to 100 times their actual value.

Finally, we view as mere subterfuge I.R.F.'s decision to term its scheme a "charitable sales promotion" and "absolutely free bingo," rather than what it really was, a bingo game operated in violation of Parts 1 and 2 of Chapter 14, Article 37. It is the character of an activity which determines what it really is, not what the parties choose to call it. *See State v. DeBoy*, 117 N.C. 702, 704, 23 S.E. 167 (1895). What our Supreme Court said in 1915 about attempts to circumvent the gambling statutes is equally true today about the bingo games offered by I.R.F.:

ANIMAL PROTECTION SOCIETY v. STATE OF NORTH CAROLINA

[95 N.C. App. 258 (1989)]

. . . [N]o sooner is [the prohibited activity] defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter, of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. *It will look to the substance and not to the form of it*, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. *The court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited.* . . .

State v. Lipkin, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915) (emphasis added). No matter the name, the game here was bingo, and it was all the more objectionable because it was operated in part for profit, by an organization cloaked in the sympathetic robes of charitable giving.

V

[6] In their reply brief, the plaintiffs raise a constitutional argument based on the abridgment of commercial speech in violation of the First Amendment to the United States Constitution. We decline to address this contention. Although that argument was presented to the trial court, it was not among those issues argued in the plaintiff-appellants' initial brief which set the framework for the matters to be decided on appeal. Nor was it a matter raised in the defendant-appellees' brief, although the defendants did discuss in general terms prior North Carolina cases upholding the constitutionality of the bingo statutes. *See, e.g., Durham Highway Fire Protection Assoc. v. Baker*, 82 N.C. App. 583, 347 S.E.2d 86 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 744 (1987) (Sec. 14-309.8 did not violate right to free speech because plaintiffs were free to solicit contributions by means other than bingo). The reply brief was intended to be a vehicle for responding to matters raised in the appellees' brief; it was not intended to be—and may not serve as—a means for raising entirely new matters. *See R. App. P. 28(h)* (1988).

VI

It is the legislature's prerogative to establish the conditions under which bingo, lotteries, or other games of chance are to be per-

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

mitted. The plaintiffs' bingo games, being operated in violation of the requirements set out in Parts 1 and 2 of Chapter 14, Article 37 of the General Statutes, fall within that class of activities now prohibited by the legislature. Accordingly, the order granting summary judgment in favor of the defendants is

Affirmed.

Judges JOHNSON and ORR concur.

THOMPSON-ARTHUR PAVING COMPANY, A DIVISION OF APAC-CAROLINA, INC.,
PLAINTIFF v. LINCOLN BATTLEGROUND ASSOCIATES, LTD., LINCOLN
PROPERTY COMPANY NO. 1119, MACK POGUE, ROBERT M. DICKSON,
TIMOTHY B. BURNETTE, AND THE BLAIR MATTHEW POGUE LINCOLN
TRUST, DEFENDANTS

No. 8818SC1019

(Filed 5 September 1989)

1. Cancellation and Rescission of Instruments § 10.2— construction contract—extra work—settlement—rescission

The evidence was sufficient to support the jury's findings that a settlement agreement entered into by the parties to a construction dispute was subject to rescission because of mistake where plaintiff entered into settlement negotiations in order to resolve a dispute over \$29,376.05 it claimed for extra work; plaintiff was represented at a meeting by counsel and by the person who had been in charge of the project; the person who had been in charge of the project had been transferred to Atlanta; that person testified that he had forgotten about a \$22,000.00 retainage and, while he felt he had been negligent in not checking with the accounting department before signing the settlement agreement, he had come to the meeting prepared to discuss only the \$29,000.00 claimed for extra work; defendant's representative at the meeting testified that he was aware of the retained funds held by defendant and that it struck him as curious that plaintiff would settle all claims for \$20,000.00; no one mentioned the retainage at the meeting or in any of the correspondence that took place

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

prior to the meeting; and defendant had never asserted that plaintiff was not due the retained funds.

2. Contracts § 12.2— construction contract—payment in lump sum or on unit price basis—contract not plain and unambiguous

The trial court did not err in an action arising from a construction dispute by denying defendants' motions for a directed verdict and judgment notwithstanding the verdict where the evidence was subject to the interpretation that plaintiff intended to be paid on a unit price basis for work done or stone provided in excess of the amount estimated in the Proposal, whereas defendant intended payment on a lump sum basis, limited to a stated dollar amount. As the contract was not plain and unambiguous, the trial court did not err in refusing to rule as a matter of law that the contract was a lump sum contract.

3. Contracts § 26.2; Evidence § 32— construction dispute—type of invoices used—admissible

The trial court did not err in an action arising from a construction dispute by admitting testimony from plaintiff's witnesses that the invoices which were used were the type used with unit price contracts and were different from lump sum invoices. Evidence of conduct by the parties after executing the contract is not subject to the parol evidence rule and is admissible to show intent and meaning.

4. Quasi Contracts and Restitution § 2.1— construction dispute—implied in fact contract—evidence sufficient

Plaintiff was entitled to an instruction on the law of implied in fact contract and to recover the reasonable value of extra stone furnished in a construction project where plaintiff sought damages for breach of a written contract with defendants and alternatively for breach of defendants' promise to pay for extra stone rendered by plaintiff pursuant to defendants' request; defendants contend that plaintiff failed to prove any request and promise to pay for the extra stone; plaintiff's evidence tended to show that defendants' on site supervisor specifically ordered that stone be placed on the roadbeds out of sequence even though he was advised it would result in stone contamination and would ultimately require extra stone at \$9.00 per ton; construction traffic did contaminate the stone as predicted; and extra stone was placed on the site. Evidence

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

that plaintiff did not inform defendants specifically of the amount of extra stone being used prior to final invoicing, or that extra stone was in fact needed as discussed, went to the credibility of plaintiff's claim and did not defeat that claim as a matter of law.

5. Judgments § 55— interest—tender of payment—rescission

Plaintiff in a construction dispute was entitled to interest on the entire judgment of \$51,749.97 even though \$20,000.00 had been tendered by defendants because, according to the jury, plaintiff was entitled to rescind the settlement agreement pursuant to which the \$20,000.00 had been tendered. In refusing the check for \$20,000.00 tendered by defendants pursuant to an agreement entered into by mistake, plaintiff was deprived of the \$20,000.00 and is entitled to recover interest on that amount; to rule otherwise would be inconsistent with the jury's verdict.

APPEAL by plaintiff and defendants from Judgment of *Judge Melzer A. Morgan* entered 15 April 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 22 March 1989.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for plaintiff appellant-appellee.

John T. Weigel, Jr. for defendant appellants-appellees.

COZORT, Judge.

This appeal follows a jury verdict and entry of judgment in favor of plaintiff on plaintiff's claim for breach of contract. The jury found that a settlement agreement entered into by the parties was subject to rescission because of mistake. The jury then rejected both parties' express contract theories and awarded damages based on an implied in fact contract theory of recovery. We uphold judgment for plaintiff but remand for an additional award of interest.

The evidence at trial was as follows: On or about 5 November 1985, plaintiff submitted a Proposal and Contract Form to Lincoln Contractors, Inc. ("Lincoln"), agent for defendants, for curb, gutter, and paving work to be done by plaintiff for an apartment complex being constructed by defendants. The Proposal provided that the curb, gutter, and paving work needed for the job, in the quantities estimated in the Proposal, would cost \$232,221.72. Below the typewrit-

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

ten list of paving materials (including stone), curb, and gutter (and the cost for each per square yard or lineal foot), were the following clauses (also typewritten): "Extra Stone, if needed @ \$9.00 per ton," and "Job to be measured upon completion to determine final quantities and monies due." At the bottom of the Proposal was the following pre-printed language:

Unless a lump sum price is to be paid for the foregoing work and is clearly so stated it is understood and agreed that the quantities referred to above are estimates only and that payment shall be made at the stated unit prices on the actual quantities of work performed by the Company. Billings to be in accordance with paragraph 2 on reverse side.

Paragraph 2 provided that "Invoices shall be rendered monthly for all work performed under this agreement during any month"

After receiving plaintiff's Proposal, Lincoln prepared three Purchase Orders and Contracts for Construction Work, which divided the work to be done by plaintiff into three separate contracts: off-site curb, gutter, and paving; on-site curb and gutter; and on-site paving. Each of the Purchase Orders had the words "Lump Sum" typed in the "quantity" column, and "Total Contract Amount Not to Exceed" next to the dollar figure. Each Contract for Construction Work contained a provision that "deviations" from plans and specifications without written authority were at Thompson-Arthur's risk. Each contract further provided that 10% of each interim billing for work performed by plaintiff would be retained and that the amount retained would be paid to plaintiff thirty days after completion of the job.

Lincoln sent plaintiff three packets. Each packet contained, stapled together, one of Lincoln's Purchase Orders and Contracts and a copy of plaintiff's Proposal.

In December 1985, plaintiff's representatives met with Lincoln's job superintendents to discuss scheduling. According to testimony, the work normally would be scheduled to allow the curb and gutter to be installed first to provide confinement for the stone, which was the base for the asphalt. Lincoln, however, did not want to delay its access to the project during the winter months. Therefore, Lincoln's superintendent requested that the stone be put down immediately for use by construction traffic, despite

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

plaintiff's warning that, if the stone was laid down first and pushed into or off the roadbed, plaintiff would have to replace it. Plaintiff requested that Lincoln's instructions be put in writing, but Lincoln's superintendent said a letter was unnecessary because of the "extra stone at \$9.00 a ton" language in their contract. The superintendent also stated that he did not want copies of "stone tickets," or receipts from the quarry, but that they would "settle it up" when the job was finished.

The stone was laid down, as requested by Lincoln, prior to the installation of curb and gutter. No written authorization for extra stone was issued. During the project, plaintiff sent Lincoln monthly invoices from March through September. The invoices showed paving and curb and gutter work, expressed in square yards or lineal feet, which was completed during the billing period. According to defendants, prior to the final invoicing in September, the invoices did not specify that there were charges for extra stone. Nor did plaintiff advise Lincoln of the quantities of extra stone used. In September of 1986, after making on-site measurements, plaintiff submitted to defendants a billing for 3,101.58 tons of extra stone, an amount confirmed by stone tickets also sent to defendants. The total charge for the extra work was \$29,376.05.

Contending that they had a "lump sum" contract, Lincoln refused to pay for the extras. Plaintiff filed a Notice of Claim of Lien for \$29,376.05. At the time, Lincoln also held approximately \$22,000.00 in retained funds. The amount retained was not reflected in the Claim of Lien, and, during conversations about the amount in dispute for the extra work, neither party mentioned the retainage. In March of 1987 the parties met to discuss settling their dispute. At that meeting, counsel for defendants wrote "\$29,000.00" on a piece of paper and asked if that was approximately the amount in dispute. Plaintiff's lawyer, who was unaware of the retainage, said "yes." Counsel for defendants then asked how much plaintiff wanted in settlement. Having been informed by plaintiff that no other amounts were due, plaintiff's lawyer made an offer to settle for \$20,000.00, which defendant accepted. The parties thereafter entered into a Settlement Agreement releasing each party "of any and all claims" under their contract in consideration of the \$20,000.00. The following day, plaintiff discovered that the retainage had not been paid and informed Lincoln that it did not consider the \$20,000.00 settlement to include the retainage. Lincoln expressed its contrary view, whereupon plaintiff returned the check for \$20,000.00. Lincoln

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

refused to accept the check and returned it to plaintiff. The uncashed check was placed in evidence at trial.

The following issues were submitted to the jury and were answered as indicated: (The court's road map instructions are in capitals, as they were on the verdict sheet.)

Issue One (a)

1(a). At the meeting on March 6, 1987, was Thompson-Arthur's vice president, Steve Arthur, mistaken regarding the total amount Thompson-Arthur claimed due from Lincoln on the Lincoln Green II project?

ANSWER: Yes

IF YOU ANSWER ISSUE NUMBER ONE(A) "YES," CONSIDER ISSUE NUMBER ONE(B).

IF YOU ANSWER ISSUE NUMBER ONE(A) "NO," RETURN TO THE COURTROOM.

Issue One (b)

1(b). If so, did Lincoln's agents have reason to know of Thompson-Arthur's mistake?

ANSWER: Yes

IF YOU ANSWER ISSUE NUMBER ONE(B) "YES," CONSIDER ISSUE NUMBER ONE(C)

IF YOU ANSWER ISSUE NUMBER ONE(B) "NO," RETURN TO THE COURTROOM.

Issue One (c):

1(c). On March 6, 1987, did Thompson-Arthur, through vice president Steve Arthur assume the risk of a mistake by treating as sufficient Arthur's limited knowledge of the total amount claimed due on the Lincoln Green II project?

ANSWER: No

IF YOU ANSWER ISSUE NUMBER ONE(C) "YES," RETURN TO THE COURTROOM.

IF YOU ANSWER ISSUE NUMBER ONE(C) "NO," CONSIDER ISSUE NUMBER TWO.

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

Issue Two:

2. Did the parties intend that the language "lump sum" and the language "Unless a lump sum price is to be paid for the foregoing work and it is clearly so stated, it is understood and agreed that the quantities referred to above are estimates only and that payment shall be made at the stated unit prices on the actual quantities of work performed by the company" would mean that Lincoln was bound to pay Thompson-Arthur based upon final quantities of work done (unit price contracts)?

ANSWER: No

IF YOU ANSWER ISSUE NUMBER TWO "YES," SKIP ISSUES THREE, FOUR, FIVE AND SIX, AND CONSIDER ISSUE NUMBER SEVEN.

IF YOU ANSWER ISSUE NUMBER TWO "NO," CONSIDER ISSUE NUMBER THREE.

Issue Three:

3. Did the parties intend that the language "lump sum" and the language "Unless a lump sum price is to be paid for the foregoing work and it is clearly so stated, it is understood and agreed that the quantities referred to above are estimates only and that payment shall be made at the stated unit price on the actual quantities of work performed by the company" would mean that Lincoln was bound to pay Thompson-Arthur the lump sum of \$232,221.72 (lump sum contracts)?

ANSWER: No

IF YOU ANSWER ISSUE NUMBER THREE "YES," CONSIDER ISSUE NUMBER FOUR.

IF YOU ANSWER ISSUE NUMBER THREE "NO," SKIP ISSUES FOUR, FIVE, SIX AND SEVEN, AND CONSIDER ISSUE NUMBER EIGHT.

Issue Four:

4. Did Lincoln, through its job superintendent, waive the requirement of written change orders and request stone, in addition to the quantities mentioned on Lincoln's purchase orders?

ANSWER: _____

IF YOU ANSWER ISSUE NUMBER FOUR "YES," CONSIDER ISSUE NUMBER FIVE.

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

IF YOU ANSWER ISSUE NUMBER FOUR "NO," SKIP ISSUE NUMBER FIVE AND CONSIDER ISSUE NUMBER SIX.

Issue Five:

5. What amount, if any, is Thompson-Arthur entitled to recover of Lincoln for extra stone?

ANSWER: _____

NO MATTER HOW YOU ANSWER ISSUE NUMBER FIVE, CONSIDER ISSUE NUMBER SIX.

Issue Six:

6. What amount, if any, is Thompson-Arthur entitled to recover under the terms of lump sum contracts with Lincoln for retainage?

ANSWER: _____

IF YOU REACH THIS ISSUE, AFTER ANSWERING IT, YOU SHOULD RETURN TO THE COURTROOM.

Issue Seven:

7. What amount is Thompson-Arthur entitled to recover of Lincoln following final invoicing for retainage, extra stone, and work done under unit price contracts?

ANSWER: _____

IF YOU REACH THIS ISSUE, AFTER ANSWERING IT, YOU SHOULD RETURN TO THE COURTROOM.

Issue Eight:

8. What amount, if any, is Thompson-Arthur entitled to recover for any balance due on the reasonable value of extra stone?

ANSWER: \$29,376.05

IF YOU REACH THIS ISSUE, AFTER ANSWERING IT, YOU SHOULD RETURN TO THE COURTROOM.

Defendants' motions for judgment notwithstanding the verdict and for new trial were denied. The parties stipulated that, if the jury reached Issue Eight, it should not consider the retainage, and that the court would add \$22,373.92 to the jury award. Accordingly, the trial court entered judgment for plaintiff in the amount

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

of \$51,749.97. The court further ordered that defendants pay interest at the legal rate on \$31,749.97 from 1 November 1986. The \$20,000.00 amount tendered by defendants was excluded from the interest award.

On appeal, defendants assign error to the trial court's denial of their motion for judgment notwithstanding the verdict and alternative motion for a new trial. They argue that (1) the settlement agreement was a full and final settlement between the parties and was not subject to rescission because of plaintiff's unilateral mistake, and (2) the contract between the parties was a lump sum contract as a matter of law. Defendants also assign error to (3) the admission of testimony that the invoices sent by plaintiff to Lincoln were consistent with a unit price, versus lump sum, contract, and (4) the trial court's instruction to the jury regarding the measure of damages applicable for breach of an implied in fact contract. On cross appeal, plaintiff assigns error to the trial court's exclusion of \$20,000.00 from the amount upon which plaintiff received prejudgment interest. We initially address defendants' appeal, turning first to the issue of rescission of the settlement agreement.

[1] Ordinarily, for mistake of fact to justify the remedy of rescission, there must be mutual mistake of fact. *Howell v. Waters*, 82 N.C. App. 481, 487, 347 S.E.2d 65, 69 (1986), *disc. rev. denied*, 318 N.C. 694, 351 S.E.2d 747 (1987). Thus, "as a general rule relief will be denied where the party against whom it is sought was ignorant that the other party was acting under a mistake and the former's conduct in no way contributed thereto." *Id.* (quoting *Marriott Financial Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975)) (quoting 77 Am. Jur. 2d *Vendor and Purchaser* § 51) (emphasis omitted). In addition, a party who has assumed the risk of mistake (*e.g.*, "he is aware, at the time the contract is made that he has only a limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient") is not entitled to rescission. *Howell*, 82 N.C. App. at 488, 347 S.E.2d at 70 (quoting Restatement (Second) Contracts § 154 (1979)). Whether he has assumed the risk of mistake is a question of fact for the jury. *Id.* at 489, 347 S.E.2d at 70.

The evidence, viewed in the light most favorable to plaintiff, tends to show that plaintiff entered into settlement negotiations in order to resolve a dispute over \$29,376.05 it claimed for extra

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUNDS ASSOC.

[95 N.C. App. 270 (1989)]

work. Plaintiff was represented at the March 1987 meeting by counsel and by Ernest Arthur, who had been in charge of the Lincoln project but, by the time the project was being concluded, had been transferred to Atlanta. At trial, Mr. Arthur testified that he had forgotten about the retainage and felt that he had been negligent in not checking with the accounting department before signing the Agreement, but that he had come to the meeting prepared to discuss only the approximately \$29,000.00 claimed for extra work. Lincoln's representative at the meeting testified at trial that he was aware of the retained funds held by Lincoln and that it "struck me as curious" that plaintiff would settle all claims for \$20,000.00. No one mentioned the retainage at the meeting or in any of the correspondence that took place prior to the meeting. Lincoln had never asserted that plaintiff was not due the retained funds.

We believe the evidence supports the jury's findings. Plaintiff had a potential claim for approximately \$50,000.00 for the disputed extra work and the retained amount. Yet its first offer in settlement was for \$20,000.00, which was less than the undisputed amount held in retainage. "Where one of the parties, through mistake, names a consideration that is out of all proportion to the value of the subject of negotiation, and the other party, realizing that a mistake must have been committed, takes advantage of it and refuses to let the mistake be corrected when it is discovered, he cannot, under these conditions, claim an enforceable contract." 17 Am. Jur. 2d *Contracts* § 148. See also Restatement (Second) *Contracts* § 153 (1981).

Furthermore, the evidence supports the jury's finding that plaintiff did not assume the risk of mistake by treating as sufficient Mr. Arthur's limited knowledge of the total amount claimed due. This case is not analogous to a case where a party knows its knowledge is limited, assumes the risk of mistake because of that limited knowledge, and then seeks to rescind a contract because the facts were not as he had hoped. See *Dobbs, Remedies* § 11.2 (1973). The jury's findings being supported by the evidence, we hold plaintiff was properly allowed to rescind the Settlement Agreement because of mistake.

[2] Lincoln next argues that the parties' written agreement established a lump sum contract as a matter of law, and that the trial court's denial of its motions for directed verdict and judgment

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

notwithstanding the verdict was error. Lincoln concedes that there was a question of fact as to whether plaintiff's Proposal was a part of the parties' contract, but it argues that there was no inconsistency among those documents. We do not agree. The evidence is subject to the interpretation that plaintiff intended to be paid on a unit price basis for work done or stone provided in excess of the amount estimated in the Proposal, whereas Lincoln intended payment on a lump sum basis, limited to a stated dollar amount. As the contract was not plain and unambiguous, the trial court did not err in refusing to rule as a matter of law that the contract was a lump sum contract. A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law, but, if an agreement is ambiguous, interpretation of the contract is a question for the jury to resolve. *Cleland v. The Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983).

[3] We likewise overrule defendants' assignment of error to the trial court's admission of testimony from plaintiff's witness that the invoices which were used in plaintiff's monthly billings to Lincoln were the type of invoices it used with unit price contracts and were different from its lump sum invoices. "Evidence of conduct by the parties after executing the contract is not subject to the parol evidence rule, and is admissible to show intent and meaning." *Cordaro v. Singleton*, 31 N.C. App. 476, 479, 229 S.E.2d 707, 710 (1976).

In any event, the jury rejected both parties' respective interpretations of their written contract and, finding a contract implied in fact, awarded damages for the reasonable value of the extra stone. Defendants' remaining assignments of error challenge the sufficiency of the evidence to justify an instruction on an implied in fact contract theory of recovery and the measure of damages applicable to the case at bar.

[4] An implied in fact contract is an agreement between parties, but the terms of the agreement have not been fully expressed in words and, instead, are established by the parties' conduct. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 646, 312 S.E.2d 215, 218 (1984). In contrast, a contract implied in law is not based on some actual agreement between the parties, but is a contract implied by law to prevent the unjust enrichment of a party. *Id.* at 645, 312 S.E.2d at 217; *Wright v. Wright*, 305 N.C. 345, 289 S.E.2d 347 (1982). Damages under an implied in fact

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUND ASSOC.

[95 N.C. App. 270 (1989)]

contract are for the reasonable value of the services rendered by the plaintiff pursuant to the defendant's request and agreement to pay therefor. *Ellis Jones*, 66 N.C. App. at 646, 312 S.E.2d at 218. On the other hand, recovery under an implied in law contract theory, or recovery on quantum meruit, is for the reasonable value of materials and services accepted by and that benefit the defendant. *Id.* at 647, 312 S.E.2d at 218. In cases involving improvements to realty, the plaintiff's recovery on quantum meruit has been limited to the benefit of the improvement to the defendant per the enhanced value of the property. See *Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075 (1912), cited with approval in *Wright*, 305 N.C. at 350, 289 S.E.2d at 350 n.4.

In the instant case, plaintiff did not seek recovery on quantum meruit. Rather, it sought damages for breach of the written contract with defendants and, alternatively, for breach of defendants' promise to pay for the extra stone rendered by plaintiff pursuant to defendants' request. Defendants contend that plaintiff failed to prove any request and promise to pay for the extra stone; that plaintiff's recovery should therefore have been limited to the amount by which defendants' property was enhanced; and that there was a failure of proof as to that enhancement value. We do not agree with the initial premise of that argument.

Defendants admitted that \$9.00 per ton was a reasonable price for extra stone. Furthermore, plaintiff's evidence tended to show that defendants' on-site supervisor specifically ordered that stone be placed on the roadbeds out of sequence even though he was advised that it would result in stone contamination and would ultimately require extra stone at \$9.00 per ton; that construction traffic did contaminate the stone as predicted; and that extra stone was in fact placed on the site as evidenced by the stone tickets and other testimony. Evidence that, prior to final invoicing, plaintiff did not inform defendants specifically of the amount of extra stone being used, or that extra stone was in fact needed as discussed, was evidence going to the credibility of plaintiff's claim; such evidence did not defeat that claim as a matter of law. Plaintiff was therefore entitled to the instruction on the law of implied in fact contract and to recover the reasonable value of the extra stone. These assignments of error are therefore overruled.

THOMPSON-ARTHUR PAVING CO. v. LINCOLN BATTLEGROUNDS ASSOC.

[95 N.C. App. 270 (1989)]

[5] Plaintiff contends on appeal that the trial court erred in awarding interest only on \$31,749.97 of the \$51,749.97 judgment. We hold that plaintiff was entitled to interest on the entire judgment.

N.C. Gen. Stat. § 24-5 provides: "In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach." N.C. Gen. Stat. § 24-5(a) (1988). The trend in this State is to allow interest in almost all types of cases involving breach of contract. *Environmental Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 307, 330 S.E.2d 627, 629 (1985). See also *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 402-03, 331 S.E.2d 148, 158-59, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). "Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money." *Parker v. Lippard*, 87 N.C. App. 43, 49, 359 S.E.2d 492, 496, *modified in part on reh'g*, 87 N.C. App. 487, 361 S.E.2d 395 (1987) (quoting *Ripple v. Mortgage & Acceptance Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 157 (1927)).

Although a valid tender of payment for the full amount, plus interest to date, will be effective to stop the running of interest, see *Ingold v. Phoenix Assur. Co.*, 230 N.C. 142, 52 S.E.2d 366 (1949), the \$20,000.00 tendered by defendants was pursuant to a Settlement Agreement, which, according to the jury, plaintiff was entitled to rescind. We believe that, in refusing the check for \$20,000.00 tendered by defendants pursuant to an agreement entered into by mistake, plaintiff was deprived of the \$20,000.00 and is entitled to recover interest on that amount. To rule otherwise would be inconsistent with the jury's verdict. We therefore remand with instructions that the trial court award interest at the legal rate on the entire judgment of \$51,749.97.

No error; remanded for additional award of interest.

Judges PHILLIPS and PARKER concur.

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

STATE OF NORTH CAROLINA v. KIMBERLY KAY DREWYORE

No. 886SC1033

(Filed 5 September 1989)

1. Evidence § 40— nonexpert opinion testimony—admissibility

Opinions and inferences stated by a customs agent were rationally based on his perceptions and helpful to an understanding of his testimony about the investigation resulting in defendant's arrest so that they were admissible under N.C.G.S. § 8C-1, Rule 701.

2. Narcotics § 3.1— trafficking in marijuana—relevancy of evidence

In a prosecution for trafficking in marijuana by possession and by transportation, evidence of defendant's driving activities was relevant to show that defendant was arrested while she was on a trip which followed the same general route as trips which she had previously taken; evidence about the accessibility of a beach cottage to an inlet was relevant to partially explain why surveillance of the cottage was instituted; evidence about a boat outside the cottage was relevant to show why customs agents thought the cottage may have been involved in drug smuggling; and evidence that the same type of boat was present several months earlier in a campground in which defendant was then living was relevant to show that the boat had some connection to the person who paid the cottage's electric bill.

3. Searches and Seizures § 12— lawfulness of investigatory stop and search

Officers had a reasonable and articulable suspicion that a crime was being committed so that an investigatory stop of the rental truck defendant was driving was justified and a search of the vehicle was lawful where officers were conducting an investigation of suspected drug smuggling activities at a beach cottage for which defendant paid the utilities; a boat which officers believed to be of a type used in drug smuggling was parked outside the cottage; three days before the investigatory stop, officers observed defendant driving a circuitous route and using countersurveillance techniques often employed by drug traffickers; and on the day of the investigatory

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

stop a car driven earlier by defendant and the rental truck were seen traveling in tandem and employing counter-surveillance techniques.

4. Bills of Discovery § 6— discovery request—admission of photographs not disclosed

The trial court did not abuse its discretion in permitting the State to introduce photographs not disclosed pursuant to defendant's pretrial discovery motion where the photographs were made available to defendant before they were introduced into evidence; defendant did not request that the court allow her additional time to examine the photographs after she obtained access to them; and defendant did not allege that the prosecutor acted in bad faith. N.C.G.S. §§ 15A-903(d), 15A-910(3).

5. Criminal Law § 102.5— characterization of substance as marijuana—error cured by instructions

Any error in the district attorney's characterization of the substance found in defendant's vehicle as "marijuana" before testimony was given about any chemical analysis of the substance was cured when the trial court instructed the district attorney to stop using this characterization and instructed the jury that "it is for you to determine whether the green vegetable was marijuana."

6. Indictment and Warrant § 14— denial of motion to quash indictment

The trial court properly denied defendant's motion to quash the indictment where the indictment clearly charged defendant with a crime and was not defective.

7. Narcotics § 4— odor of marijuana—knowing possession

The State's evidence was sufficient to prove that defendant knowingly possessed marijuana where it tended to show that the rental truck containing marijuana which defendant was driving when she was arrested emitted a strong odor of marijuana.

APPEAL by defendant from *Lewis, John B., Jr., Judge*. Judgment entered 18 March 1988 in Superior Court, HALIFAX County. Heard in the Court of Appeals 9 May 1989.

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

Defendant appeals from convictions of trafficking in marijuana, by possession of over 100 pounds but less than 2,000 pounds, and trafficking in marijuana by transportation. For these convictions she received an active term of seven years each.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

Cranford, Whitaker & Dickens, by William F. Dickens, Jr., for defendant-appellant.

JOHNSON, Judge.

Defendant's arrest was precipitated by a United States Customs Service investigation of a suspected drug smuggling operation involving activities at an ocean-front cottage on 400 South Atlantic Street in Virginia Beach, Virginia. Checks by the customs agents revealed that although neither the property nor the vehicles parked on the premises were registered or owned by the defendant, she had been paying the electric bill from December 1986 until the time of her arrest, nine months later.

The agents maintaining ground surveillance of the beach cottage on 22 September 1987 followed a Suburban truck, which had been parked at the residence and the Oldsmobile which had been parked there also, from the cottage to a gas station and then from Virginia Beach to Suffolk, Virginia, and then on to Sunbury, North Carolina. Both vehicles pulled into a restaurant parking lot. The Suburban then left the lot, traveled about one-half mile, stopped on the shoulder of the highway, and then turned around and headed back in the same direction from where it had come. About ten minutes later, the Oldsmobile, being driven by a person later identified as the defendant, followed the same route. After having traveled nearly 130 miles, both vehicles then returned to the beach cottage.

On the morning of 26 September 1987, a person matching defendant's description was observed driving a two-tone Ford van which had been rented in defendant's name on the previous day. Her activities were monitored both by ground and air surveillance from that morning until 7:30 that evening. The agents observed the van being driven into and out of shopping center parking lots, either not stopping at all or stopping for a few minutes and then continuing with no one exiting the vehicle at the stops. The ve-

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

hicle eventually was observed following the same route to Sunbury, North Carolina and then back to Virginia Beach, with no apparent destination, as that observed on 22 September.

On 29 September 1987, defendant rented a U-Haul truck in her own name. Later that evening, the agents spotted the truck traveling in tandem with the Oldsmobile which had been parked at the cottage and seen driven by the defendant on at least one occasion. Both vehicles were stopped by customs agents, who detected an overwhelming odor of marijuana as they approached the truck. Defendant and her codefendant Robert Drewyore were then arrested. The agents obtained search warrants for both vehicles. The search of the truck revealed approximately 580 pounds of whole marijuana plants on the stalks. In the trunk of the Oldsmobile, agents found approximately 60 pounds of marijuana and a briefcase containing personal items bearing defendant's name, and in excess of \$52,000.00 in cash, and jewelry. Both the cash and jewelry were forfeited to the State.

The indictments against the two defendants were consolidated for trial, and the jury returned verdicts of guilty on all three counts against both. Neither defendant presented evidence at trial. Verdict and judgment imposed on the count of possession of marijuana with intent to sell and deliver was arrested. The two appeals were taken separately and this appeal concerns defendant Kimberly Kay Drewyore only.

We note at the outset that defendant has failed to comply with the mandatory N.C. Rules of Appellate Procedure. Rule 28(b)(5) of the N.C. Rules of Appellate Procedure provides in part the following concerning the contents of appellant's brief:

Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. (Emphasis added.)

See *Stokes County v. Pack*, 91 N.C. App. 616, 372 S.E.2d 726 (1988), and *Whitehurst v. Crisp R. V. Center*, 86 N.C. App. 521, 358 S.E.2d 542 (1987), for application of Rule 28(b)(5).

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

Our review of defendant's brief reveals no references to the assignments of error pertinent to the questions presented, and no page references. We have, however, decided to consider defendant's assignments of error in our discretion.

[1] Defendant's first contention on appeal is that the trial court erred in overruling defendant's objections to some of the testimony of Customs Service Agent Wayne Whitton because this testimony consisted of Agent Whitton's statements of his opinions. We disagree. Defendant specifically contends that she was prejudiced by the following statements made by Agent Whitton: a boat which was parked in front of the beach cottage was a type of boat which is often used in drug smuggling; the presence of this boat indicated that a smuggling operation may have been taking place; the repeated travel by the Oldsmobile over the same roads indicated that it was involved in a smuggling operation; the use of a van by the suspects followed by the suspects' use of a U-Haul truck a few days later "was an indicator of suspicious activity"; U-Haul trucks can carry large loads of marijuana; and Agent Whitton could identify the smell of marijuana coming from the truck because he had many years of experience smelling marijuana. A non-expert witness is permitted to testify about opinions he has formed and inferences he has made if these opinions and inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." G.S. sec. 8C-1, Rule 701. We find that the opinions and inferences stated by Agent Whitton were rationally based on his perceptions, and we also find that these statements were helpful to a clear understanding of Agent Whitton's testimony about the circumstances which were related to the investigation which resulted in defendant's arrest, so we therefore find that the trial court did not err in overruling defendant's objection to these statements.

[2] Defendant's second contention on appeal is that the trial court erred in overruling defendant's objection to the State's evidence which tended to show defendant's driving activities around the Virginia Beach area, the type of boat which was present several months earlier in a campground in which defendant was living and which was later present outside the beach cottage, and the accessibility of the beach cottage to a nearby inlet. Defendant contends that this evidence did not tend to prove any fact which had to be proved in order for defendant to be convicted, and defendant claims that this evidence was therefore inadmissible. We dis-

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

agree. 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. sec. 8C-1, Rule 401. We believe that the evidence in question is relevant according to this standard. Testimony which tended to show that defendant drove around Virginia Beach on 26 September 1987 also tended to show that defendant drove to Sunbury, North Carolina later that day. Defendant also made two other trips to Sunbury, including the trip during which defendant was arrested, so the evidence of defendant's driving activities tended to show that defendant was arrested while she was on a trip which followed the same general route as trips which she had previously taken. The evidence about the accessibility of the beach cottage to the inlet partially explained why surveillance of the beach cottage was instituted. The evidence about the boat outside of the beach cottage also tended to show why agents thought that the cottage may have been involved in illegal activities, and the evidence about the boat being at the campground showed that the boat did indeed have some connection to the person who paid the cottage's electric bill. We therefore find that the trial court did not err in overruling defendant's objection to the State's evidence in question.

[3] Defendant's third contention on appeal is that the trial court erred in denying defendant's motion to suppress evidence obtained from the search of the vehicle defendant was driving when she was arrested and in overruling defendant's objections to the admission of this evidence. Defendant's primary argument in support of this contention appears to be that this evidence was obtained as a result of an illegal seizure which violated defendant's Fourth Amendment rights. Defendant claims that this search was illegal because it was not based on any reasonable and articulable suspicion on the part of the agents conducting the search that a crime had been committed. We disagree. The United States Supreme Court has stated that the Fourth Amendment allows an investigatory stop of a vehicle if this stop is "justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 628 (1981). This standard is in accord with our Court's statement that the Fourth Amendment permits a law enforcement officer to make an investigatory stop of a vehicle "if the officer has a reasonable suspicion, that can be articulated,

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

that a crime is being committed." *State v. Trapper*, 48 N.C. App. 481, 486, 269 S.E.2d 680, 683 (1979).

We believe that the trial court's findings of fact, which are not objected to by defendant, indicate that the investigating officers had ample justification for having a reasonable and articulable suspicion that a crime was being committed when they stopped defendant's vehicle. The trial court found that defendant paid the utilities for a beach cottage, and that a boat which agents believed to be of a type used in drug smuggling was parked outside of the cottage. The trial court also found that three days before the investigatory stop in question defendant had driven "along a circuitous route interspersed with U-turns and stops," and that investigating officers believed that this type of driving pattern was a "counter-surveillance" technique employed by drug traffickers. The trial court also found that on the day of defendant's arrest she was seen driving an Oldsmobile, and later on that day this Oldsmobile and the vehicle in question were seen traveling in tandem and employing "countersurveillance" techniques. We therefore find that the search of the vehicle driven by defendant did not take place as a result of an illegal seizure.

[4] Defendant's fourth contention on appeal is that the trial court erred in denying defendant's motion to strike and overruling defendant's objections to the admission of evidence which consisted of photographs of the area in which defendant had been seen driving. Defendant argues that since the State did not make these photographs available to defendant before trial, even though defendant filed a pre-trial motion for discovery requesting a listing and description of any photographs within the State's possession which pertained to defendant's alleged crime, the trial court erred in admitting these photographs as evidence. We disagree. Defendant correctly notes that

[u]pon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs . . . which are within the possession, custody or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

G.S. sec. 15A-903(d). The phrasing of defendant's motion for discovery did not strictly comply with G.S. sec. 15A-903(d), since defendant

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

sought a listing and description of the photographs rather than permission to inspect and copy them, but the State seemed to interpret this motion as one which requested permission to copy and inspect photographs and we will treat this motion as being in compliance with G.S. sec. 15A-903(d) for the purposes of this appeal.

If a party fails to comply with a discovery order, a trial court may, in addition to exercising its contempt powers, carry out any one of five available disciplinary sanctions. G.S. sec. 15A-910. One of these sanctions allows the trial court to "[p]rohibit the party from introducing evidence not disclosed." G.S. sec. 15A-910(3). "[T]he trial court is not required to impose any sanctions for abuse of discovery orders," however, and "what sanctions to impose, if any, is within the trial court's discretion [citation omitted], including whether to admit or exclude evidence not disclosed in accordance with a discovery order." *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). A trial court's decision about whether or not to impose such a sanction will not be reversed unless the trial court's decision was an abuse of discretion. *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983). In the case *sub judice*, the photographs in question were made available to defendant before they were introduced into evidence, defendant did not request that the court allow her additional time to examine these photographs after she had obtained access to them, and defendant has not alleged that the prosecuting attorney acted in bad faith. We find that the trial court did not abuse its discretion by admitting these photographs into evidence, and we therefore find that the trial court did not err in denying defendant's motion to strike and overruling defendant's objections to the admission of this evidence.

[5] Defendant's fifth contention on appeal is that the trial court erred in overruling defendant's objections to the District Attorney's statements regarding a search warrant and the presence of marijuana in defendant's vehicle. Defendant's first claim in support of this contention is that she was prejudiced because the District Attorney made a statement about the content of a search warrant before this search warrant had been mentioned in any witness's testimony. A review of the record reveals that Agent Whitton testified about the search warrant before the District Attorney made the statement in question, so defendant's first claim in support of this contention is incorrect. Defendant's second claim in support of this contention is that she was prejudiced by the fact that the District Attorney made reference, before any testimony

STATE v. DREWYORE

[95 N.C. App. 283 (1989)]

was given about any chemical analysis of the substance in question, to "marijuana" found in the vehicle defendant was driving when she was arrested. A trial court can sometimes prevent an improper question by a prosecutor from being prejudicial error by sustaining a defendant's objection to the question and issuing appropriate curative instructions. See *State v. Hosey*, 79 N.C. App. 196, 201, 339 S.E.2d 414, 417 (1986). In the case *sub judice*, after defendant objected to the District Attorney's characterization of the substance in question as marijuana, the trial court instructed the District Attorney to stop using this characterization and the trial court instructed the jury that "it is for you to determine whether the green vegetable was marijuana." We find that this curative instruction prevented the District Attorney's questions from constituting prejudicial error, and we therefore find defendant's contention about the District Attorney's statements to be without merit.

Defendant does not advance any arguments in support of her sixth, seventh, and eighth contentions on appeal. We therefore find that the assignments of error on which these contentions are based are abandoned.

[6] Defendant's final contention on appeal is that the trial court erred in denying defendant's motions to quash the indictment, set aside the verdict, and arrest judgments. Defendant argues that the trial court should have allowed these motions because the State did not meet its burden of proving that defendant was guilty of the crimes with which she was charged. We disagree. "A motion to quash an indictment lies where a defect appears on the face of the indictment and will be granted when it appears from an inspection of the indictment that no crime is charged or that the indictment is otherwise so defective that it will not support a judgment." *State v. Williams*, 304 N.C. 394, 408, 284 S.E.2d 437, 447 (1981) (citation omitted). The indictment of defendant clearly charges defendant with a crime and the indictment is not defective, so the trial court properly denied defendant's motion to quash the indictment.

[7] A motion in arrest of judgment is granted when "no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5)

HARGETT v. REED

[95 N.C. App. 292 (1989)]

the judgment." *State v. Perry*, 291 N.C. 586, 589, 231 S.E.2d 262, 265 (1977) (citations omitted). Defendant appears to argue that there was a fatal error in the verdict because the State did not prove defendant's guilt. Defendant notes that the State had to prove that defendant knowingly possessed marijuana in order for defendant to be convicted of possessing marijuana, and defendant argues that the State did not introduce evidence at trial which was sufficient to prove that defendant knowingly possessed marijuana. The State's evidence tended to show that defendant was arrested while driving a truck, which emitted an odor of marijuana, so we find that the State's evidence was sufficient to support a finding that defendant knowingly possessed marijuana. We therefore find no fatal error in the verdict, and we find that the trial court properly denied defendant's motion in arrest of judgment.

"A motion to set aside a verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal in absence of abuse of that discretion." *State v. Acklin*, 71 N.C. App. 261, 265, 321 S.E.2d 532, 534 (1984) (citations omitted). Our review of the record indicates that the trial court did not abuse its discretion in denying defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence, and we therefore find that the trial court did not err in denying this motion.

No error.

Judges COZORT and GREENE concur.

SARAH WHITE HARGETT AND COLEY HARGETT, JR. v. MARY VIRGINIA
REED AND EDDIE WINN

No. 883SC740

(Filed 5 September 1989)

**1. Courts § 21.5— automobile accident—transfer of ownership
in Georgia—Georgia law applied**

Due process considerations require that defendant Winn's status as the owner of a car involved in an automobile accident in North Carolina be examined under the law of Georgia where

HARGETT v. REED

[95 N.C. App. 292 (1989)]

Winn, a Georgia resident, claimed that the car had previously been sold in Georgia, that Georgia law controlled the ownership issue, and that under Georgia law ownership passed to the dealer even though the certificate of title was not properly assigned at the time of the sale. It would be manifestly unjust to require a nonresident, who must comply with his own state's requirements for title transfer, to comply with requirements of all other states to which a subsequent purchaser might some day take the vehicle or face being subject to jurisdiction there.

2. Automobiles and Other Vehicles § 5.3— automobile accident— alleged prior transfer of vehicle in Georgia— summary judgment for transferor denied

The trial court properly denied defendant Winn's motion for summary judgment in an action arising from an automobile accident in North Carolina where Winn, a Georgia resident, claimed that he had sold the vehicle in Georgia prior to the accident. Although Winn's evidence regarding the sale of the car, if believed, may have been sufficient to establish that he was not the owner under Georgia law, Winn's own evidence showed that the vehicle was registered in his name, raising the presumption that he was the owner and was responsible for its operation, and the evidence presented regarding the sale of the car was inherently suspect. This inquiry was limited to determining whether North Carolina properly exercised jurisdiction based on the presumption arising from registration of the vehicle and the issue of Winn's responsibility for the operation of the car remains to be determined at trial.

APPEAL by defendant from *Henry A. Lupton, Judge*. Order entered 1 December 1987 in Superior Court, CRAVEN County. Heard in the Court of Appeals 14 March 1989.

Robert G. Raynor, Jr., for plaintiff-appellees.

Ward & Smith, P.A., by David A. Stoller, for defendant-appellant.

BECTON, Judge.

We granted certiorari in this automobile accident case to determine whether the trial judge correctly denied the summary judgment.

HARGETT v. REED

[95 N.C. App. 292 (1989)]

ment motion of one of the nonresident defendants, Eddie Winn ("Winn"). Winn contests this State's exercise of personal jurisdiction over him, contending that he was not the owner of the car involved in the accident. Although denial of a motion for summary judgment ordinarily is not appealable, an appeal will lie, when, as here, the summary judgment motion was based on a challenge to personal jurisdiction. *See, e.g.*, N.C. Gen. Stat. Sec. 1-277(b) (1983); *cf. Poret v. State Personnel Comm'n*, 74 N.C. App. 536, 538, 328 S.E.2d 880, 882, *disc. rev. denied*, 314 N.C. 117, 332 S.E.2d 491 (1985) (appeal from motion to dismiss for lack of jurisdiction over the person). For the reasons that follow, we affirm the order denying summary judgment.

I

The plaintiffs, Sarah White Hargett and Coley Hargett, Jr., alleged in their Complaint that Winn, a Georgia resident, was the owner of the 1979 Buick Regal which struck their car in New Bern, North Carolina, on 27 July 1986, seriously injuring Mrs. Hargett. Plaintiffs also alleged that the Buick's driver, defendant Mary Virginia Reed ("Reed"), also a Georgia resident, operated the car with Winn's permission. Pursuant to this State's long-arm statute, N.C. Gen. Stat. Sec. 1-75.4, and our nonresident motorist statute, N.C. Gen. Stat. Sec. 1-105, plaintiffs attempted substituted service of process on Winn by serving the North Carolina Commissioner of Motor Vehicles.

Winn moved for summary judgment, contending that this method of service was ineffective to confer jurisdiction over him because he was no longer the owner of the Buick, having sold the car to his employer, an automobile dealership, four days before the accident. Winn further alleged that the dealership sold the car the same day to an automobile rental company, which, in turn, rented it to defendant Reed.

Winn supported his motion with the following: (1) Winn's answers to plaintiffs' interrogatories, in which he denied owning the Buick; (2) his affidavit, in which he averred that he sold the Buick on 23 July 1986 to his employer, Sunshine Toyota, and that the employer-dealership subsequently sold the car the same day to H & L U-Save Auto Rentals ("H & L"); (3) attached to the affidavit as an exhibit, a copy of the certificate of title to the Buick—on its face, naming Winn as registered owner, and on the back, signed in blank by Winn, with no date and no indication to whom the Buick was sold;

HARGETT v. REED

[95 N.C. App. 292 (1989)]

(4) also attached as exhibits to the affidavit, two receipts dated 23 July 1986, typed on the employer-dealership's forms, indicating that Winn sold the Buick to the dealership and that the dealership sold it to H & L; (5) defendant Reed's third-party Complaint against H & L, in which Reed alleged that the Buick was rented from H & L and that H & L was the owner of the car; and (6) plaintiffs' Reply to Reed's counterclaim for property damage, in which plaintiffs alleged that H & L, not Reed, was the owner of the Buick.

To oppose the motion, plaintiffs offered the affidavit of the North Carolina state trooper who investigated the accident. In his affidavit, the trooper averred that he "obtained information at the scene . . . indicating the registered owner of [the Buick bearing license number HWA 266] to be Eddie Winn of Bristol, Georgia." Plaintiffs forecast no other evidence.

Winn appeals from denial of his motion for summary judgment, contending that Georgia law controls the ownership issue, and that under that State's law, ownership passed to the dealer even though the certificate of title was not properly assigned at the time of the sale. As a result, Winn asserts, North Carolina lacks personal jurisdiction over him. Winn further contends that the plaintiffs failed to come forward with admissible evidence to resist his motion for summary judgment, and, therefore, that he was entitled to judgment as a matter of law.

II

North Carolina's nonresident motorist statute provides a means for obtaining personal jurisdiction over any nonresident "involved" in an automobile accident in this State by virtue of the operation of a vehicle in North Carolina either "by . . . or for" the nonresident, or by someone "under his control or direction, express or implied." N.C. Gen. Stat. Sec. 1-105 (1983). Under this statute, jurisdiction may be asserted over the owner of the vehicle as well as the driver so long as the owner had the legal right to control the car's operation. *See, e.g., Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960); *Davis v. St. Paul-Mercury Indemnity Co.*, 294 F.2d 641 (4th Cir. 1961) (applying North Carolina law). As the court in *Davis* explained:

[North Carolina] has a strong interest in being able to provide a convenient forum where its citizens may be able to seek,

HARGETT v. REED

[95 N.C. App. 292 (1989)]

from the owner as well as the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the state's interest; it is not pushing the matter too far to recognize that the state may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the state's highways.

294 F.2d at 648.

Proof of registration of the vehicle in a person's name raises a rebuttable statutory presumption that the named person was the owner of the vehicle, that he was legally responsible for the driver's actions, and that the car was operated for his benefit and with his authority, consent, and knowledge. N.C. Gen. Stat. Sec. 20-71.1 (1983). See *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 755-56, 325 S.E.2d 223, 228 (1985). However, this evidentiary presumption is not conclusive, and merely permits, but does not compel, a finding that the driver was the owner's agent. *Id.* at 756, 325 S.E.2d at 228. When the owner presents positive evidence, which, *if believed*, establishes the absence of agency, the only issue becomes whether the judge believes that contrary evidence. *Id.* at 756, 325 S.E.2d at 228.

III

The key issue to be determined is whether Winn successfully proved that he was not the owner of the car involved in the collision. If Winn did so, North Carolina has no basis for asserting jurisdiction over him, and summary judgment should have been granted in his favor. If Winn failed to establish that he was no longer the owner of the car, a genuine issue of material fact remains for trial, and summary judgment was properly denied.

A

[1] We turn first to the parties' choice of law arguments. Winn contends that under the "interest analysis" approach to choice of law questions, Georgia law should determine the ownership issue because Winn's contract to sell the Buick to the dealership was formed in that state. Under Georgia law, Winn asserts, sale of a vehicle is effective to transfer ownership even if the seller fails to properly assign the certificate of title to the buyer.

HARGETT v. REED

[95 N.C. App. 292 (1989)]

Plaintiffs disagree, asserting that North Carolina law controls the ownership question because this State adheres to the traditional choice of law rule that substantive rights and obligations arising out of a tort action are to be determined by the law of the situs of the claim. See *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988). Plaintiffs argue that the alleged sale was ineffective to transfer ownership under North Carolina law because the certificate of title was not properly assigned to the dealer. See N.C. Gen. Stat. Sec. 20-72(b) (1983); see also *Jenkins v. Aetna Cas. & Sur. Co.*, 324 N.C. 394, 378 S.E.2d 773 (1989).

Both parties' contentions are flawed. Section 20-72 applies only to vehicles registered under the provisions of the *North Carolina Motor Vehicle Act*; here, the Buick was registered under *Georgia's Certificate of Title Act*. More importantly, "[c]hoice of law is a separate inquiry from personal jurisdiction and the two should not be confused." *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 694, 376 S.E.2d 47, 51 (1989) (emphasis added). The relevant inquiry in a challenge to a forum state's exercise of personal jurisdiction is whether the nonresident defendant had sufficient minimum contacts with the state so as not to offend "traditional notions of fair play and substantial justice." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 678, 231 S.E.2d 629, 632 (1977) (citations omitted). Winn's only contact with this State is through his alleged ownership of a vehicle involved in an accident here.

In our view, it would be manifestly unjust, if not absurd, to require a nonresident, who must comply with his own state's requirements for title transfer, to comply with the requirements of all other states to which a subsequent purchaser might someday take the vehicle—or face being subject to jurisdiction there. Thus, we believe that in deciding the threshold jurisdiction question, due process considerations require Winn's status as owner to be examined under the law of Georgia, the state governing his title to and registration of the Buick.

B

[2] Georgia's Certificate of Title Act defines an "owner" as "a person, other than a lienholder or a security interest holder, having . . . title to a vehicle." Ga. Code Ann. Sec. 40-1-1(34) (Supp. 1988). Section 40-3-31(d) of the Act provides:

HARGETT v. REED

[95 N.C. App. 292 (1989)]

Except . . . as between the parties, *a transfer by an owner is not effective* until this Code section and Code Section 40-3-32 [concerning transfers to or from a dealer] have been complied with; and no purchaser or transferee shall acquire any right, title, or interest in and to a vehicle purchased by him unless and *until . . . the certificate of title thereto [is] duly transferred* in accordance with this Code section.

Ga. Code Ann. Sec. 40-3-31(d) (Supp. 1988) (emphasis added).

The certificate of title to the Buick was not transferred in accord with the terms of the Act: Winn failed to complete the assignment and warranty of title to the employer-dealership on the certificate of title, *see* Ga. Code Ann. Sec. 40-3-31(a), and the dealership likewise failed to complete the assignment and warranty of title to H & L on the same certificate. *See* Ga. Code Ann. Sec. 40-3-32(a) (Supp. 1988). Winn is still listed on the certificate as the registered owner, and under Georgia law, the certificate is *prima facie* evidence of the facts appearing on it. Ga. Code Ann. Sec. 40-3-25(c) (1985).

Although our reading of the Georgia statutes yields the conclusion that ownership of the Buick did not pass to the dealership or to H & L since the certificate of title was not properly assigned, it appears that Georgia courts interpreting the same statutes would reach a different conclusion. *See, e.g., American Mut. Fire Ins. Co. v. Cotton States Mut. Ins. Co.*, 149 Ga. App. 280, 253 S.E.2d 825 (1979); *Mote v. Mote*, 134 Ga. App. 668, 215 S.E.2d 487 (1975) (holding that ownership of vehicle later involved in accident passed to buyer even though assignment of title not completed). Thus, Winn's evidence regarding the sale of the Buick, *if believed*, may have been sufficient to establish that he was not the owner under Georgia law, thereby rebutting the Section 20-71.1 presumption of control and responsibility and rendering the exercise of personal jurisdiction unwarranted. *See DeArmon*, 312 N.C. at 753, 325 S.E.2d at 226. However, the inquiry does not end here since the trial judge was not required to believe Winn's rebuttal evidence. *See id.* at 756, 325 S.E.2d at 229.

C

As the party moving for summary judgment, Winn bore the burden of establishing that no genuine issue as to any material fact remained for trial. *See Kidd v. Early*, 289 N.C. 343, 366, 222

HARGETT v. REED

[95 N.C. App. 292 (1989)]

S.E.2d 392, 408 (1976); N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56 (1983). Once a motion for summary judgment is supported by proof, the burden then shifts to the nonmoving party to defend his position by offering his own evidence showing that there is a genuine issue for trial. *See id.* at 365, 222 S.E.2d at 408; R. Civ. P. 56(e). If the nonmoving party does not respond, summary judgment ordinarily may be entered against him. *See R. Civ. P. 56(e)*. "However, not every failure of the opposing party to respond will require the entry of summary judgment." *Kidd*, 289 N.C. at 366, 222 S.E.2d at 408. Indeed, if the movant's own evidence raises questions of credibility or otherwise shows that he is not entitled to summary judgment, the court is free to deny the motion. *See id.* at 370, 222 S.E.2d at 410.

Winn contends that the affidavit offered by the plaintiffs was incompetent to establish a genuine issue of material fact. Winn asserts that the trooper's statement that the Buick was registered in Winn's name was based on hearsay information obtained at the scene, rather than from the trooper's personal knowledge, and, as such, could not be considered by the trial court in ruling on the motion for summary judgment. *See R. Civ. P. 56(e); Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972).

However, even though this evidence was incompetent, Winn's own evidence showed that the vehicle was registered in his name. The certificate of title listed Winn as the registered owner, and Winn has forecast no evidence that the car was registered in anyone else's name at the time of the accident. Thus, we conclude that the evidence before the trial judge was sufficient to show that the Buick was registered in Winn's name, thereby raising the presumption under Section 20-71.1 that he was the owner and was responsible for its operation. The remaining question, then, is whether Winn successfully rebutted the presumption of ownership and control.

Because the facts regarding ownership and control are peculiarly within the knowledge of the defendant in cases like this one, most courts require the evidence introduced to rebut the presumption arising from registration to be clear and convincing. *See Annot., Presumption and Prima Facie Case as to Ownership of Vehicle Causing Highway Accident*, 27 A.L.R.2d 167 (1953) (Supps. 1981 & 1989); *Annot., Overcoming Inference or Presumption of Driver's Agency for Owner, or Owner's Consent to Operation of Automobile*, 5 A.L.R.2d 196 (1949) (Supps. 1985 & 1989) and cases cited therein.

HARGETT v. REED

[95 N.C. App. 292 (1989)]

After carefully reviewing the materials before the trial judge, we cannot say that Winn's evidence clearly or convincingly established that he was no longer the owner of the Buick. Instead, in our view, the evidence presented regarding the sale of the Buick was inherently suspect.

The evidence adduced by Winn plainly shows that he failed to comply with the requirements set out in the Georgia Act for effective transfer of title. *See* Secs. 40-3-31(a), (d); 40-3-32(a). The certificate is signed in blank, and does not list the dealer as the transferee, even though the certificate itself states in capital letters printed in bold type that a \$100 fine or 30 days' imprisonment will be imposed for acceptance or delivery of a certificate of title assigned in blank.

Moreover, the alleged sale by the dealer to H & L is not reflected in the appropriate space on the certificate. Under Georgia law, upon transfer to a subsequent purchaser, a dealer must execute the assignment and warranty on the same certificate of title assigned to it by the original owner, listing the name and address of the transferee on the certificate. Sec. 40-3-32(a). One would expect a dealer to be familiar with—and to comply with—title transfer requirements, particularly in light of the penalties for noncompliance, which includes fines, criminal and civil liability, and revocation of the dealer's license to sell motor vehicles. *See* Secs. 40-3-31(a) and 40-3-32(c).

Finally, the only direct evidence of the transaction between Winn and the dealership, and of the subsequent sale to H & L, is through the receipts typed on forms supplied by the dealership, Winn's employer. Winn failed to submit a completed certificate of title, presumably available from the Georgia Commissioner of Motor Vehicles, and gave no reason for his failure to do so.

A summary judgment motion should be denied when, as here, "the movant's supporting evidence is self contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect . . . because he is interested in the outcome and the facts are peculiarly within his knowledge. . . ." *Kidd*, 289 N.C. at 336, 222 S.E.2d at 408 (citation omitted). In ruling on Winn's challenge to the court's jurisdiction, the credibility of Winn's countervailing evidence was for the trial judge to determine. *See DeArmon*, 312 N.C. at 758, 325 S.E.2d at 229. Because that evidence was ques-

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

tionable, we hold that the judge did not err in denying Winn's motion for summary judgment.

Our holding should not be interpreted to mean that the evidence showed that Winn was the owner of the Buick and responsible for its operation. To the contrary, our inquiry was limited to determining whether North Carolina properly exercised jurisdiction over Winn based on the presumption arising from registration of the Buick in his name. Because Winn failed to rebut the presumption, we conclude that it was not error to assert jurisdiction over him. The issue of Winn's responsibility for Reed's operation of the car remains to be determined at trial, and, upon stronger evidence, may well be decided in his favor.

IV

For the foregoing reasons, we affirm the order denying Winn's motion for summary judgment.

Affirmed.

Judges PARKER and ORR concur.

LEON McLAUGHLIN v. BARCLAYS AMERICAN CORP., D/B/A BARCLAYS AMERICAN FINANCIAL, W. T. TYLER AND ROBERT BALLARD

No. 8822SC1211

(Filed 5 September 1989)

1. Master and Servant § 10.2— termination for employee's use of self-defense—no action for wrongful discharge—no public policy exception to employee at will doctrine

The Court of Appeals refuses to recognize as a public policy exception to the employment-at-will doctrine a cause of action for wrongful discharge when the termination results from the employee's use of self-defense, since there are no deleterious consequences for the general public if the Court upholds defendant employer's action in dismissing plaintiff for using self-defense when a subordinate became violent; moreover, the indifference of defendant superiors to plaintiff's requests for help in dealing with a problem employee, their shallow and

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

perfunctory investigation of the incident involving fisticuffs, and their irrational dismissal of plaintiff who had no culpability for the altercation did not amount to bad faith which would justify invoking an exception to the employee-at-will doctrine.

2. Master and Servant § 13— malicious interference with employment contract—summary judgment for defendant proper

The trial court properly entered summary judgment for individual defendants, who were plaintiff's superiors, on plaintiff's claim for malicious interference with his employment contract where there was no allegation in the pleadings and no evidence in the record that defendants at any point acted in a manner which excluded their legitimate business interests in plaintiff's employment, and plaintiff's forecast of evidence did not indicate that defendants' actions in any way were beyond the scope of their authority as vice-presidents of defendant corporation and therefore malicious.

APPEAL by plaintiff from *Judson D. DeRamus, Jr., Judge*. Judgment entered 18 July 1988 in Superior Court, IREDELL County. Heard in the Court of Appeals 16 May 1989.

David W. Minor for plaintiff-appellant.

Elarbee, Thompson & Trapnell, by J. Lewis Sapp, and Petree, Stockton & Robinson, by Richard E. Fay, for defendant-appellees.

BECTON, Judge.

Plaintiff brought this action seeking compensatory and punitive damages for breach of his employment contract, wrongful discharge, violation of public policy, and malicious interference with contractual relations. Plaintiff alleges that his dismissal from his employment following an altercation with another employee was improper in that plaintiff's conduct was limited to his exercising self-defense. Following a hearing on the defendants' motion for summary judgment, the trial court granted summary judgment in their favor. Plaintiff appeals, and we affirm.

I

Defendant Barclays American Corporation ("Barclays"), d/b/a Barclays American Financial, operates a branch office in Statesville, North Carolina. Plaintiff, Leon McLaughlin, served as the manager

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

of that office until Barclays terminated his employment on 21 April 1987. At the time of his termination, Mr. McLaughlin had been employed with Barclays for some 14 years. For purposes of this appeal, we adopt Mr. McLaughlin's account of the events that led to his dismissal.

On 16 April 1987, Mr. McLaughlin attempted to counsel another Barclays' employee ("the subordinate") about the latter's work performance. During the session, the subordinate became argumentative, so much so that Mr. McLaughlin requested that he leave the room. The subordinate refused and continued to argue. Mr. McLaughlin then attempted to end the encounter by leaving the room himself. As he neared the door, the subordinate punched him in the chest. To defend himself, Mr. McLaughlin threw up his right hand; in so doing, he struck the subordinate on the side of the face. No further contact occurred between the two men, and no customer or other employee witnessed the encounter.

Mr. McLaughlin immediately telephoned Barclays' central office in Charlotte and told defendant Robert Ballard, a vice president with Barclays, about the incident. Later that day, another representative from the central office told Mr. McLaughlin that Barclays was sending a person to Statesville to relieve him of his duties. Barclays conducted no formal investigation of the altercation, although it did call Mr. McLaughlin to Charlotte the following day. There, Mr. McLaughlin recounted his version of the incident to Mr. Ballard, to defendant W. T. Tyler, a senior vice president with Barclays, and to another Barclays' representative. None of these three people took down his statement. Five days after the altercation, Mr. McLaughlin's immediate superior, offering "no explanation," informed Mr. McLaughlin that Barclays had decided to terminate his employment.

Prior to the 16 April altercation, Mr. McLaughlin had discussed the subordinate's attitude and behavior with his (Mr. McLaughlin's) superiors. On several occasions, he informed them that the subordinate was a disruptive presence in the branch office. On 15 September 1986, Mr. McLaughlin sent Mr. Ballard a memorandum alleging that the subordinate had made "threats of retaliation" if Mr. McLaughlin "attempt[ed] to do anything about this problem." Mr. McLaughlin ended the memorandum with a request for assistance.

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

In February 1987, during an attempt by Mr. McLaughlin to counsel him, the subordinate threw a cup of coffee at Mr. McLaughlin, splashing him in the chest, face and eyes. Mr. McLaughlin immediately informed Mr. Tyler and Mr. Ballard about the incident, and he again requested assistance in dealing with the subordinate. Neither Mr. Tyler nor Mr. Ballard offered any assistance or advice. Mr. McLaughlin attempted to receive assistance from the central office again in March, but again he received no help.

After his termination, Mr. McLaughlin filed a complaint against Barclays alleging breach of contract, wrongful discharge, malicious interference with contractual relations, and violation of public policy. Following discovery, the trial judge granted the defendants' motion for summary judgment, and Mr. McLaughlin appealed.

II

Summary judgment is appropriate when the pleadings, discovery documents, and affidavits demonstrate that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *E.g.*, *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 334, 307 S.E.2d 412, 414 (1983). As the non-moving party, the evidence in this case must be viewed in a light most favorable to Mr. McLaughlin. *See id.* Therefore, we accept Mr. McLaughlin's contention that his striking the subordinate resulted solely from his efforts to protect himself from battery. We further accept Mr. McLaughlin's claim that he did nothing to provoke the incident, and we accept that defendants had notice that Mr. McLaughlin desired advice and assistance concerning the subordinate's disruptive behavior. The issue before us, then, is whether the evidence, considered in this light, was sufficient to withstand defendants' motion for summary judgment. We hold that, as a matter of law, it was not.

A

[1] Mr. McLaughlin contends that his discharge for acting in his own defense violates public policy. Essentially, he urges this court to recognize, as a public-policy exception to the employee-at-will doctrine, a cause of action for wrongful discharge when the termination results from the employee's use of self-defense.

We note at the outset that Mr. McLaughlin arguably alleges in his complaint that his employment with Barclays was for some definite duration and was not at will. His arguments on appeal,

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

however, are predicated on his status as an at-will employee of Barclays. We do not discuss, consequently, his employment status as an issue in this case; were it at issue, we would hold that his employment with Barclays was at will.

Typically, a person without a definite term of employment is employed "at will" and may be discharged without reason. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). Detailed examinations of the at-will doctrine and its history in North Carolina are found in our Supreme Court's recent decision in *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445 (1989), in Judge Arnold's opinion in the same case in this court, 91 N.C. App. 327, 371 S.E.2d 731 (1988), and in Judge Phillips' opinion in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), the first case in our State to apply a public-policy exception to the doctrine; *see also* Parker, *The Uses of the Past: The Surprising History of Terminable-at-Will Employment in North Carolina*, 22 Wake Forest L. Rev. 167 (1987). An employer's power under the at-will doctrine, however, is not unfettered. In addition to statutory protections that insulate workers in certain situations, *e.g.*, N.C. Gen. Stat. Sec. 97-6.1 (1985) (prohibiting discharge for filing workers' compensation claims), our courts have held that "there can be no right to terminate [an at-will contract] for an unlawful reason or purpose that contravenes public policy." *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). It is this "public-policy exception" that Mr. McLaughlin argues be applied in this case.

"Public policy" is a "vague expression" but has been defined as the principle of law holding that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. *Petermann v. Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959); *see Coman*, 325 N.C. at 175, 381 S.E.2d at 447 n.2; *see also* McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: the Confusing Path from Sides to Guy and the Need for Reform*, 10 Campbell L. Rev. 217, 232-34 (1988). In *Sides*, this court looked to statutory proscriptions against perjury and the intimidation of witnesses, noting that these also were offenses at common law. 74 N.C. App. at 337-38, 328 S.E.2d at 823. We held that "to deny that an enforceable claim has been stated [when an employee allegedly is instructed to testify falsely] would be a grave disservice to the public and the system of law that we are sworn to administer, no principle of which

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

requires that civil immunity be given to those who would defile or corrupt it." *Id.* at 338, 328 S.E.2d at 824.

In *Coman*, a case in which a truck driver was allegedly threatened with a substantial pay reduction for refusing to exceed federally-mandated operating hours, our Supreme Court looked to Federal and State statutes regulating interstate and intrastate motor carriers and to our State statutes regulating the public highways. 325 N.C. at 176, 381 S.E.2d at 447. Additionally, the Court took notice of highway deaths in North Carolina during 1989. *Id.* The Court concluded that when "the public policy providing for the safety of the traveling public is involved, we find it is in the best interest of the state on behalf of its citizens to encourage employees to refrain from violating that public policy at the demand of their employers." *Id.*

The two North Carolina cases which have used public-policy grounds to find exceptions to the at-will doctrine have involved allegations of the employee's being affirmatively instructed to violate the law. In each case, our courts focused on the potential harm to the public at large if those instructions were obeyed. Similar public-policy implications are not present in Mr. McLaughlin's case. We do not perceive the kind of deleterious consequences for the general public, if we uphold Barclays' action, as might have resulted from decisions favorable to the employers in *Sides* and *Coman*.

Along with the compelling public-policy concerns in those cases, moreover, the holdings in *Sides* and *Coman* are consistent with the principle that our courts do not give their imprimatur to employers who discharge employees in bad faith. *See id.*; *Haskins v. Royster*, 70 N.C. 601 (1874). In this case, there is no evidence of bad faith to justify invoking an exception to the at-will doctrine. The evidence here, in a light most favorable to Mr. McLaughlin, shows that his superiors displayed virtual indifference to his repeated requests for help in dealing with a problem employee. Their investigation of the 16 April incident was shallow and perfunctory, and their dismissal of Mr. McLaughlin, who had no culpability for the altercation, was irrational. We cannot say, however, that defendants' actions amounted to bad faith. *Sides*, in language quoted with approval by our Supreme Court, noted the employer's right to terminate an at-will contract for "no reason, or for an arbitrary or irrational reason." 74 N.C. App. at 342, 328 S.E.2d at 826; *Coman*, 325 N.C. at 175, 381 S.E.2d at 447. The conduct of defendants in

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

this case, in its worst light indifferent and illogical, does not demonstrate the kind of bad faith that prompted our courts to recognize causes of action in *Sides* and *Coman*.

We emphasize that our analysis of these facts does not close doors to plaintiffs who are able to show bad faith by the employer in situations similar to this one. Nor are we unmindful that the at-will doctrine may work to place employees in catch-22 dilemmas of choosing between their physical defense and their continued employment. It might be true, moreover, that defendants in this case could legally have discharged Mr. McLaughlin had he made *no* effort to defend himself during the altercation. Mr. McLaughlin's argument, therefore, that our public policy favors encouraging employees to defend themselves is not convincing. As our Supreme Court stated in *Coman*, the employee-at-will doctrine is a judicially-adopted rule, leaving it the appropriate province of the courts to interpret. 325 N.C. at 177, 381 S.E.2d at 448, n.3. The Court did not choose to do away with the doctrine in *Coman*, as some might wish it had done, *see* Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631 (1988), and we do not read the decision as being broad enough to support the exception Mr. McLaughlin would have us announce.

Justice Martin ended the *Coman* opinion by stressing that the Court had not "turned a deaf ear to the warning that [the decision] may have spawned a deluge of spurious claims." 325 N.C. at 178, 381 S.E.2d at 449. While we do not so characterize Mr. McLaughlin's claim, we heed the Court's caution that the at-will doctrine remains in force in this State. Were we to recognize a cause of action in this case, every employee involved in an altercation would assert a self-defense justification, spawning the very deluge warned against by the Court. Employers need not countenance fighting in the workplace, nor are they required to separate workers who are incompatible. The facts of this case are not of sufficient moment for us to apply an exception to the at-will doctrine, and we hold, therefore, that the trial judge correctly granted summary judgment on this issue.

B

[2] Mr. McLaughlin also argues that defendants Tyler and Ballard maliciously interfered with his contract and that genuine issues of material fact remain concerning this allegation. He contends that Mr. Tyler and Mr. Ballard, as representatives of Barclays,

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

[95 N.C. App. 301 (1989)]

had a duty properly to investigate the altercation. Further, he argues that Tyler and Ballard failed to follow the course of progressive disciplinary action advocated by Barclays' own employee policies. On these grounds, Mr. McLaughlin maintains that defendants Tyler and Ballard maliciously interfered with his contractual relationship with Barclays when they recommended his dismissal.

North Carolina recognizes a cause of action for malicious interference with contract in an employment-at-will context. *Smith v. Ford Motor Co.*, 289 N.C. 71, 84, 221 S.E.2d 282, 290 (1976). The elements of an interference action are 1) that a valid contract existed between the plaintiff and a third person, 2) that an outsider to the contract had knowledge of the contract, 3) that the outsider intentionally induced the third person not to perform his or her contract with the plaintiff, 4) that the outsider had no justification for so doing, and 5) that the plaintiff suffered damage as a result. *See id.* at 84-5, 221 S.E.2d at 290. In this case, summary judgment was proper in that the evidence, in the light most favorable to Mr. McLaughlin, was insufficient to raise a genuine issue of material fact concerning the third and fourth elements of a malicious-interference claim.

Although non-outsiders to an employment contract may be liable for interference with it, liability must rest upon "a reason [for the interference] unrelated to that legitimate business interest which is the source of defendant's non-outsider status." *Id.* at 87, 221 S.E.2d at 292. A defendant's classification as an outsider or a non-outsider is relevant to the question of justification for the defendant's action. *Id.* at 88, 221 S.E.2d at 292. In short, the actions of the non-outsider must be unrelated to his or her business interest in the contract, and hence unjustifiable in light of that interest. *See Sides*, 74 N.C. App. at 348, 328 S.E.2d at 830. In this case, there is no allegation in the pleadings and no evidence in the record that Mr. Tyler and Mr. Ballard at any point acted in a manner that exceeded their legitimate business interests in Mr. McLaughlin's employment contract with Barclays. Consequently, Mr. McLaughlin has failed to demonstrate the unjustified interference necessary to remove the non-outsider protections from Mr. Tyler and Mr. Ballard.

For interference with a contract to be *malicious*, moreover, "[p]laintiff's evidence must show that defendant had no *legal* justification for his action. . . ." *Murphy v. McIntyre*, 69 N.C. App. 323,

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

329, 317 S.E.2d 397, 401 (1984) (emphasis in original; citation omitted). Here, Mr. McLaughlin has not shown that Mr. Tyler and Mr. Ballard acted maliciously in a legal sense. Although he alleges that they made their decision to terminate him "without proper investigation and thorough review of the facts" and "contrary to [the progressive disciplinary] policies of Barclays," the forecast of the evidence does not indicate that defendants' actions in any way were beyond the scope of their authority as vice presidents of the corporation. Mr. McLaughlin's evidence, therefore, was insufficient to establish malice and, coupled with his failure to show unjustified interference with his contract, made proper the trial judge's entry of summary judgment for defendants.

III

We hold that summary judgment in favor of defendants was correctly entered in this case, and the judgment of the trial court is

Affirmed.

Judges PHILLIPS and LEWIS concur.

THOMAS GREGORY PAYNE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 8810IC1260

(Filed 5 September 1989)

Schools § 11; Negligence § 30.1— School for the Deaf—injury during shop class—claim denied

The Industrial Commission correctly decided in favor of defendant in a personal injury action brought by a student at the North Carolina School for the Deaf against the North Carolina Department of Human Resources arising from injuries suffered during a shop class where the student was attending a small engine repair class in an area adjacent to a grease shop, which contained hydraulic lifts used to raise automobiles; one of those lifts had been leaking hydraulic fluid and the school's maintenance person was replacing a cylinder seal; the maintenance person asked the instructor to bring a special

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

wrench to him; a plug sealed an opening where hydraulic fluid could be poured into the lift and required a special nut for its removal; the instructor obtained the wrench and nut, took them to the lift, assembled the wrench and placed it over the plug, and turned it one-half to a full turn to be certain he had brought the correct nut; at that point, he left to answer the telephone; plaintiff in the meantime noticed two buckets of hydraulic fluid and presumed, seeing the buckets and that the instructor had placed the wrench on the plug, that the fluid was to be added to the lift; having once watched a fellow student assist in adding that fluid and having discussed the procedure with another student, plaintiff assumed he knew how to put in the fluid; plaintiff went to the lift and turned the wrench to loosen the plug; air pressure in the lift shot the plug out of its hole with explosive force; and plaintiff subsequently required treatment for injury to his right eye with his best-corrective visual acuity in that eye now being 20/200. The standard of care is the exercise of ordinary prudence given the particular circumstances of the situation; the record supports the finding that plaintiff was of sufficient expertise and maturity to be left unsupervised while the instructor spoke on the telephone, the evidence is undisputed that plaintiff was never requested to assist in the repairs on the lift, and plaintiff had been instructed on rules of safety, including a rule requiring that "if it don't pertain to you, don't bother it, leave it alone."

APPEAL by plaintiff from the Decision and Order of the North Carolina Industrial Commission, entered 29 August 1988. Heard in the Court of Appeals 17 May 1989.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by C. Scott Whisnant, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard L. Griffin, for defendant-appellee.

BECTON, Judge.

This is a personal injury action brought by plaintiff, Thomas Gregory Payne, against the North Carolina Department of Human Resources. Plaintiff sought compensation from the State for injuries he suffered during a shop class at the North Carolina School for

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

the Deaf. He contends his injuries resulted from the negligence of his shop instructor. On 19 August 1987, a hearing in this matter was held before a deputy commissioner of the North Carolina Industrial Commission. The commissioner found in favor of defendant and denied plaintiff's claim in a decision filed 8 October 1987. Plaintiff appealed to the Industrial Commission, which affirmed the deputy commissioner's ruling. Plaintiff appeals to this court, and we, too, affirm.

I

The facts found by the deputy commissioner, which we supplement with evidence from the record, showed the following: On 31 October 1985, Thomas Gregory Payne, then aged 16, was a senior at the North Carolina School for the Deaf in Morganton. On that date, Mr. Payne attended a shop class on small-engine repair taught by Clifford Hipps ("Instructor Hipps"). No other students were enrolled in the class during that trimester.

Adjacent to the small-engine repair shop is a "grease shop" area inside of which are hydraulic lifts used to raise automobiles. One of these lifts had been leaking hydraulic fluid. On 31 October, Instructor Hipps' brother, Ray Hipps, the school's maintenance person, was replacing a cylinder seal to stop the leakage. Air pressure, by means of which a hydraulic lift operates, was turned on in the lift being repaired.

Instructor Hipps assigned a task to Mr. Payne for the day's class session. The deputy commissioner was unable to find as a fact what the nature of this assignment was. (Mr. Payne testified he was told to clean the cylinder rings for Ray Hipps; Instructor Hipps testified that, as best he could recall, he had told Mr. Payne to work on a small engine, the work to be done at a station some 40 feet from the lift area. For various reasons detailed in the findings, the deputy commissioner found it to be "possible, [but] unlikely" that Mr. Payne had been told to clean cylinder rings.) During the class session, Ray Hipps asked Instructor Hipps to bring a special wrench to him. A plug, sealing an opening where hydraulic fluid could be poured into the lift, required a special nut for its removal. Instructor Hipps obtained the wrench and a nut and took them to the lift. He assembled the wrench, placed it over the plug, and turned it one-half to a full turn to be certain he had brought the correct nut. At this point, his telephone rang, and he left to answer it.

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

Mr. Payne, in the meantime, noticed two buckets of hydraulic fluid that Ray Higgs had brought into the lift area. He presumed, seeing the buckets and seeing Instructor Higgs place the wrench on the plug, that the fluid was to be added to the lift. Having once watched a fellow student assist "Mr. Higgs" in adding that fluid, and having discussed the procedure with another student, Mr. Payne assumed he knew how to put in the fluid.

Mr. Payne went over to the lift and turned the wrench to loosen the plug. Ray Higgs, at this moment, was seated on the floor of the lift area facing away from the lift itself; Instructor Higgs, talking on the telephone, could not see the small-engine repair shop nor the grease shop. When Mr. Payne loosened the plug, the air pressure in the lift shot the plug out of its hole with explosive force. The plug hit Mr. Payne in the forehead, and oil and dirt blew into his eyes. Mr. Payne subsequently required treatment for an injury to his right eye; his best-corrected visual acuity in that eye is now 20/200.

Among other findings made by the deputy commissioner were that Mr. Payne was "a bright young man [who] generally followed instruction well and was conscientious in his work"; that he was a "good student and was cooperative with his teachers"; that he was trying to be helpful when the accident occurred; and that he had never been instructed in the dangers involved in performing the task he attempted. The Commission, in its decision affirming the deputy commissioner, adopted the commissioner's findings. Mr. Payne argues on appeal that the record does not support the Commission's conclusion that his injury was not the consequence of negligence on the part of Instructor Higgs. We turn now to that question.

II

Appellate review of a decision by the Industrial Commission is confined to two questions of law: 1) whether any competent evidence in the record supports the Commission's findings of fact and 2) whether the findings of fact support the legal conclusions and decision reached by the Commission. *E.g., Paschall v. N.C. Dept. of Correction*, 88 N.C. App. 520, 522, 364 S.E.2d 144, 145, *disc. rev. denied*, 322 N.C. 326, 368 S.E.2d 868 (1988). The single issue presented by this appeal is whether the Commission erred by finding that Mr. Payne's injury did not result from any negligence on the part of his instructor.

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

To establish actionable negligence, a plaintiff must show 1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed and 2) that such negligent breach of duty proximately caused plaintiff's injury. *E.g., Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984). Mr. Payne argues that Instructor Hipps breached the duty of care by failing to adequately supervise him and by failing to instruct and warn him about any risks posed by the lift. We begin by addressing the degree of care owed to Mr. Payne.

A. *Instructor Hipps' Duty of Care*

In North Carolina, a teacher is held to the same standard of care which a person of ordinary prudence, charged with the teacher's duties, would exercise in the same circumstances. *Kiser v. Snyder*, 21 N.C. App. 708, 710, 205 S.E.2d 619, 621 (1974). A shop teacher, moreover, is held to the same standard as is any other teacher. *See Izard v. Hickory City Schools Bd. of Educ.*, 68 N.C. App. 625, 626-27, 315 S.E.2d 756, 757 (1984). "The duty generally amounts to an obligation to warn a student of known hazards, particularly those dangers which he may not appreciate because of inexperience." *Id.* at 627, 315 S.E.2d at 758. Schools, moreover, must supervise their pupils adequately, and although a school does not act as an insurer of student safety, it is liable for foreseeable injuries that result from a lack of teacher supervision. *See Hanley v. Hornbeck*, 127 A.D.2d 905, 906, 512 N.Y.S.2d 262, 263-4 (1987).

In *James v. Charlotte-Mecklenburg Bd. of Educ.*, 60 N.C. App. 642, 300 S.E.2d 21 (1983), this court formulated a standard for adequate supervision in a case involving a child injured during student roughhousing while the teacher was away from the classroom. We said that "foreseeability of harm . . . is the test of the extent of the teacher's duty to safeguard her pupils from dangerous acts of fellow pupils, and absent circumstances under which harm to her pupils might have been reasonably foreseen during her absence," the teacher did not have a duty to remain at all times with her charges. *Id.* at 648, 300 S.E.2d at 24. *James*, in essence, restates the rule that the teacher must act with ordinary prudence and employ "the level of care or vigilance . . . commensurate with the degree of danger inherent in a particular situation." Annotation, *Tort Liability of Public Schools and Institutions of*

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

Higher Learning for Accidents Associated with Chemistry Experiments, Shopwork, and Manual or Vocational Training, 35 A.L.R.3d 758, 763 (1971). That duty, however, does not extend so far as to require the teacher "to anticipate the myriad of unexpected acts which occur daily in and about schools and school premises. . . ." *Morris v. Ortiz*, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); cf. *Hiatt v. Ritter*, 223 N.C. 262, 265, 25 S.E.2d 756, 758 (1943) ("One is bound to anticipate and provide against what usually happens and what is likely to happen . . . [but not] against what is unusual and unlikely to happen. . . ." (citation omitted)).

Mr. Payne argues that Instructor Hipps owed him a duty "greater than normal" 1) because Instructor Hipps knew that plaintiff, being deaf, "was inexperienced and not aware of the potential danger" of the lift, and 2) because Instructor Hipps knew that Mr. Payne had a "generall[y] helpful attitude and . . . [a] general curiosity as a deaf child." Thus, Mr. Payne contends that we "must assign a greater standard of care to [Instructor] Hipps as an instructor of the deaf than would be assigned to a teacher in a regular classroom setting."

It is true that the amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations. See *Raymond v. Paradise Unified School Dist. of Butte County*, 218 Cal. App.2d 1, 10, 31 Cal. Rptr. 847, 853 (1963) (immaturity); *Izard*, 68 N.C. App. at 627, 315 S.E.2d at 758 (inexperience). The standard, however, remains that of the exercise of ordinary prudence given the *particular circumstances* of the situation. See *Kiser*, 21 N.C. App. at 710, 205 S.E.2d at 621. Plaintiff's characteristics are relevant, along with the other conditions present in the situation, in determining whether Instructor Hipps exercised ordinary prudence in that situation. We therefore consider Instructor Hipps' exercise of the duty of care under the standard of ordinary prudence.

B. *Instructor Hipps Observance of the Duty of Care*

Mr. Payne alleges that Instructor Hipps should have foreseen that injury to Mr. Payne "[was] probable under the facts as they existed." He asserts that the teacher "could not be naive enough not to know that by placing a wrench and a bucket of oil close to the lift that [Mr. Payne] would, because of his general[l]y helpful attitude, and because of his general curiosity as a deaf child, attempt to place oil in the lift." Evidence supports Mr. Payne's con-

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

tention that the students at his school possess a "general curiosity." Ray Hipps testified that he did not communicate in sign language to the students and was not encouraged to do so because "[t]he kids have a tendency, if you are doing something, if it's nothing but putting in a light, they want to see what's going on." Notwithstanding this evidence, however, we do not agree that the record lends no support to the Commission's decision.

The Commissioner found that no breach of the duty to use reasonable care in supervising had occurred owing to Instructor Hipps' "past experience with [Mr. Payne], who was of sufficient age and maturity to be left unsupervised for a few minutes while working on an assignment." The record indicates that Mr. Payne, at the time of his injury, had completed two trimesters in automotive study and was into his third. A full year of study is three trimesters. Additionally, Mr. Payne "knew basics" about machinery from having worked with machinery with his father. Mr. Payne testified that he understood a person needed to be careful when working around machines.

We are satisfied that the record supports the finding that Mr. Payne was of sufficient experience and maturity to be left unsupervised while Instructor Hipps spoke on the telephone. At the time Instructor Hipps went to answer the call, Mr. Payne was occupied with a task at his worktable in an area away from the lift. To hold that Instructor Hipps should have foreseen that Mr. Payne would leave his assignment and attempt to add oil to the lift would be to impose a burden on the teacher beyond that of reasonable foreseeability. That Mr. Payne was a curious and helpful student is not enough, in our view, to require Instructor Hipps to have foreseen that Mr. Payne would attempt to perform repairs on the lift. We hold, therefore, that Instructor Hipps was not negligent for leaving Mr. Payne unsupervised prior to the injury.

We likewise reject Mr. Payne's contention that Instructor Hipps failed to adequately instruct or warn him about the dangers posed by the lift. As part of Mr. Payne's automotive instruction, Instructor Hipps had given Mr. Payne instruction on how the hydraulic lift operated; this instruction, however, did not pertain to repair work nor to the adding of oil to the lift. The evidence is undisputed that Mr. Payne was never requested to assist in the repairs being performed by Ray Hipps.

PAYNE v. N.C. DEPT. OF HUMAN RESOURCES

[95 N.C. App. 309 (1989)]

Mr. Payne cites *Izard* and *Kiser* for the proposition that a teacher has a duty to warn a student of dangers the student may not appreciate. We do not read those cases, however, as requiring that warnings be given about *any* danger that an instrumentality might pose. Instruction about the operation of a hydraulic lift need not encompass warnings about what might result from efforts to repair it. Again, to hold otherwise is to require the instructor to issue warnings about every imaginable circumstance and is far outside the standard of reasonable foreseeability.

We note, in addition, that Instructor Higgs did instruct Mr. Payne on rules of safety. Each year, students at the school are given a handbook, and the book is reviewed with the students by their teachers. One of the "golden rules" issued to the students is "If it don't pertain to you, don't bother it, leave it alone." Mr. Payne testified that he was familiar with this rule and understood that it applied to his shop class. This warning was adequate to embrace the situation that existed at the time of the accident. The lift did not "pertain" to Mr. Payne, and he had been instructed, in such circumstances, to "leave it alone." We hold, therefore, that Instructor Higgs was not negligent for failing to adequately instruct or warn Mr. Payne about any potential dangers that might result from his attempt to add oil to the lift.

C. *Contributory Negligence*

As we have affirmed the Commission's ruling that no negligence may be imputed to Instructor Higgs, we do not address the additional finding that Mr. Payne's own negligence led to his injuries. We observe only that we view the record as supporting the commissioner's finding that Mr. Payne "did not act as a reasonably prudent person of his age and maturity would have acted under the same or similar circumstances."

III

We hold that the findings of fact made by the Commission are supported by the evidence in this case, and that the findings support the conclusions of law and the decision of the Commission. The decision in favor of defendant is, therefore,

Affirmed.

Judges PHILLIPS and LEWIS concur.

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

NORTH CAROLINA FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFF v. JOHN RAY, DEFENDANT

No. 8826SC1273

(Filed 5 September 1989)

1. Attorneys at Law § 5.1; Estoppel § 4.5— attorney's negligence in loan closing—estoppel unavailable to attorney

Defendant attorney was negligent in the handling of a construction loan for plaintiff lender by failing at closing to apply a land draw check so as to obtain a release of an existing land loan deed of trust and acquire a first lien on the property for the construction loan deed of trust, and defendant's negligence barred him, as a matter of law, from asserting equitable estoppel as a defense to plaintiff lender's action to recover damages for such negligence.

2. Election of Remedies § 4— affirmative defense—necessity for pleading

An issue of election of remedies was not before the appellate court where defendant did not plead such defense or present that theory at trial.

APPEAL by plaintiff from *Gaines, Robert E., Judge*. Judgment entered 17 June 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 May 1989.

This is a civil action in which plaintiff-client North Carolina Federal Savings and Loan Association appeals from a judgment holding that defendant-attorney John Ray was negligent in the handling of certain legal matters on behalf of the plaintiff, but that the plaintiff is equitably estopped from recovering from the defendant-attorney.

Bailey, Patterson, Caddell & Bailey, by H. Morris Caddell, Jr., for plaintiff-appellant.

J. J. Wade, Jr. for defendant-appellee.

JOHNSON, Judge.

Plaintiff North Carolina Federal Savings and Loan Association (hereinafter "plaintiff" or "NCF") instituted this legal malpractice action against defendant-attorney John Ray (hereinafter "defend-

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

ant") by the filing of its complaint which alleged that defendant was professionally negligent and in breach of his fiduciary duty to plaintiff in handling the closing of a construction loan for plaintiff. Plaintiff asserts that defendant failed at the closing to properly apply an advance of the construction loan, in the form of a land draw check, so as to obtain a release of an existing land loan deed of trust and acquire a first lien deed of trust securing the construction loan. Plaintiff therefore acquired a second lien on the property instead of a first lien. Defendant responded by denying negligence and raising, in the alternative, the affirmative defense of estoppel.

After a nonjury trial of this matter, the court made extensive findings of fact and concluded as a matter of law that defendant was negligent in the closing of the construction loan for plaintiff, but that plaintiff was estopped from recovering from defendant. Plaintiff gave notice of appeal to this Court in apt time.

The trial court made the following findings of fact which are pertinent to this appeal. In October 1980, NCF made a loan (the "land loan") to Allan & Warmbold Construction Co. ("Allan & Warmbold") to enable it to purchase certain property in Mecklenburg County to build a 96 unit condominium project. In consideration for the loan, Allan & Warmbold tendered its promissory note to NCF in the amount of \$400,850.00, along with a deed of trust to Kemp M. Causey, trustee for NCF as security for the note. This land loan deed of trust constituted a first lien on the property.

NCF agreed to release property from the lien upon payment to it of the release price as stated in the land loan deed of trust. This right to release extended to all subsequent owners of the property. After a series of conveyances, most of the property was conveyed to Reginald, Inc. This conveyance was subject to the original land loan deed of trust.

In March 1983, NCF agreed to loan Reginald, Inc. \$773,972.00 for the construction of twenty condominium units (the "construction loan") on part of the property. NCF's commitment letter to Reginald, Inc. required that the construction loan be secured by a first lien deed of trust on the 2.61 acres involved in the project. Defendant Ray was employed as the closing attorney for the loan.

On 18 March 1983, NCF sent Ray instructions for the closing of the construction loan. These included the directive that NCF had

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

approved a first mortgage construction loan to be secured by the 2.61 acre tract. NCF also included a check payable to the order of "Reginald, Inc. and John F. Ray, Trustee" in the amount of \$67,500.00. The check was referred to in these instructions:

The following items are required if CHECKED:

- Personal guarantee form [-] William A. and Candida Christie, Marc L. and Michele Flaster
- Flood letter from registered surveyor
- Corporate resolution
- Loans to one borrower form
- Please have borrower sign loan application
- Please find enclosed our land draw check in the amount of \$67,500.00

The trial court found as fact that it is the normal practice among attorneys in Mecklenburg County to apply a land draw check toward the release of any existing lien on the property to obtain a first lien for the construction loan. More funds, if needed, are to be obtained from the borrower, and sent, along with the land draw check, to the lender.

On 28 April 1983, Ray closed the construction loan. Instead of applying the \$67,500.00 land draw check toward the release of the land loan deed of trust, he disbursed the check to the benefit of Reginald, Inc. As a result of defendant's misapplication of the check, NCF acquired a second lien on the 2.61 acres. Defendant, however, prepared a deed of trust for the construction loan closing which stated that the loan was secured by a first lien deed of trust.

On 3 May 1983, defendant sent NCF certain documents required by the closing instructions. One of these documents received by NCF, a copy of a request for title insurance, clearly showed that the 2.61 acres was subject to the earlier land loan deed of trust. The title insurance policy on the construction loan deed of trust also showed the prior lien.

Even though NCF never received the land draw check from defendant, and twice received evidence that its construction loan to Reginald, Inc. was only secured by a second lien on the 2.61 acres, NCF had no communication with defendant until 3 February 1984. On that date, a Mr. Phillip Hammond, an executive officer of NCF, telephoned defendant to inquire as to defendant's dis-

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

bursement of the \$67,500.00 check. Defendant Ray sent Hammond the following letter in response:

In reviewing my file, I find no indication in any instructions regarding any payment of the monies which I disbursed (\$67,500) to North Carolina Federal. While North Carolina Federal has a first lien on this property[,] I discussed by telephone, with North Carolina Federal loan officers the release of this lien inasmuch as it would affect the property described in the Deed of Trust securing the April 28, 1983 loan. I was advised that the release of the first lien as it affected the 2.61 acre tract would be handled later with the borrower and that I should proceed to close without a release of the 2.61 acre tract from the lien of this Deed of Trust. This arrangement was satisfactory with the borrower and I proceeded to close the loan, disbursed the funds and reported the two Deeds of Trust, both to North Carolina Federal and to the title insurance company. *If your records do not agree with this, please advise.* [Emphasis added.]

Defendant Ray received no response to his letter from Hammond or anyone else at NCF. The court made no finding that defendant was instructed orally by an officer of NCF to close the construction loan without a release of the land loan deed of trust as claimed by defendant in his letter to Hammond.

The court found that from 13 October 1983 through 28 February 1984, defendant, at plaintiff's request, made five updated title searches in connection with the construction loan. After each search, defendant advised plaintiff that there were no changes in the record title which would affect plaintiff's security interest. Based on this advice, plaintiff made continued disbursements on the construction loan.

Subsequent to Phillip Hammond's conversation of 3 February 1984 with defendant, Hammond contacted William A. Christie, a principal of Reginald, Inc. Hammond and Christie amended the arrangement by which funds would be released to Reginald, Inc. upon the sale of each condominium. The parties formally agreed in a letter dated 13 February 1984 that plaintiff would receive \$4,802.00 per condominium unit for release of the land loan, with the remainder of the release price being applied to the construction loan.

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

Thereafter, eight new units were sold. Defendant again at plaintiff's request, handled each of the closings, deducting and forwarding to plaintiff funds for the release of both the land loan and the construction loan. The court found, however, that defendant was never informed of the new agreement between plaintiff and Reginald, Inc. regarding discharge of the construction loan.

Sometime after eight of the twenty units were sold, Reginald, Inc. defaulted on the construction loan and went into insolvency proceedings. The remaining twelve units were sold after the proceedings were initiated.

Phillip Hammond testified at trial that plaintiff instituted foreclosure proceedings when Reginald, Inc. defaulted. In order to foreclose on the twelve remaining units, plaintiff had to release the land loan deed of trust which defendant had failed to release at the 28 April 1983 closing. Plaintiff disbursed \$57,624.00 (\$4,802.00 × 12) from the construction loan funds to release the land loan deed of trust.

The court concluded that defendant Ray owed a duty of care to plaintiff to close the 28 April 1983 loan in accord with its instructions. Although the court found those instructions were ambiguous, defendant was nevertheless negligent for, *inter alia*, failing to inquire as to the proper disbursement of the \$67,500.00 check, and failing to close the loan in accord with the instructions or in accord with the standard of care of other attorneys in Mecklenburg County. Defendant was also found negligent for failing to give plaintiff a first lien deed of trust to secure the construction loan.

However, the court held plaintiff was estopped from recovering against defendant because plaintiff failed to advise defendant of his error in the closing as requested by defendant in his letter of 3 February 1984 and defendant changed his position in reliance thereon. Also, the court found plaintiff estopped for its failure to advise defendant of any complaint during all the times defendant handled the closings of the eight units when, the court says, defendant could have protected himself.

[1] Plaintiff contends in its sole Assignment of Error that the trial court erred, after concluding as a matter of law that defendant was professionally negligent, and then concluding as a matter of law that plaintiff was estopped to recover damages resulting from defendant's negligence. We agree.

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

Our Supreme Court has set forth the elements of equitable estoppel:

[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins v. Finance Corp., 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953) (citations omitted).

The requirement of "lack of knowledge and the means of knowledge of the truth" on the part of one claiming estoppel as an affirmative defense raises principles of negligence as to its application. *Thomas v. Ray*, 69 N.C. App. 412, 417, 317 S.E.2d 53, 56 (1984). The conduct of a party claiming the benefit of estoppel is no less to be considered than that of the one sought to be estopped. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955). Further, one who claims to have been misled by the misrepresentation or concealment of a material fact by another "must not have been misled through his own want of reasonable care and circumspection." *Id.* at 12, 86 S.E.2d at 753, quoting 19 Am. Jur. *Estoppel* sec. 86. In the absence of fraud, estoppel is not available to protect a party from the results of his own negligence. *Five Oaks Homeowners Assoc. Inc. v. Efirds Pest Control Co.*, 75 N.C. App. 635, 331 S.E.2d 296 (1985); *Thomas, supra*.

Turning to the facts of the instant case with these principles in mind, we must conclude that defendant Ray cannot avail himself of the equitable estoppel defense. There is ample evidence to support the trial court's finding that defendant was professionally negligent. His mishandling of the \$67,500.00 land draw check could

N.C. FEDERAL SAV. AND LOAN ASSN. v. RAY

[95 N.C. App. 317 (1989)]

have been avoided if defendant had inquired of plaintiff to clarify the meaning of its instructions for the construction loan closing. The very fact that the instructions were ambiguous as to the disbursement of the check should have alerted defendant to the need to inquire. Defendant was also negligent in his failure to obtain a first lien deed of trust to secure the construction loan as instructed by plaintiff.

When a party is misled through his own lack of diligence and reasonable care, he may not then avail himself of the doctrine of equitable estoppel. *Trust Co. v. Finance Co.*, 262 N.C. 711, 138 S.E.2d 481 (1964); *Thomas, supra*. In this case the trial court's legal conclusion that defendant was negligent, which was supported by the evidence, barred defendant, as a matter of law, from asserting equitable estoppel and the court erred in allowing the defense.

[2] We turn now to defendant's argument that plaintiff is barred from recovering because it has elected inconsistent remedies. Specifically, defendant contends that because plaintiff has pursued its claim against Reginald, Inc. under foreclosure and insolvency proceedings based on the amended loan document, it should be prevented from seeking what defendant terms an inconsistent remedy from him. Plaintiff, in its reply brief, argues that the defense of inconsistent remedies is an affirmative defense, and that as such, it is not properly before this Court since defendant did not raise the issue before this appeal. Again, we agree.

G.S. sec. 1A-1, Rule 8(c), entitled "Affirmative defenses," requires that a party's responsive pleading "shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." Election of remedies is an affirmative defense which must be pleaded by the party relying on it. *New Hanover County v. Sidbury*, 225 N.C. 679, 36 S.E.2d 242 (1945); Annot., *Pleading of Election of Remedies*, 99 A.L.R. 2d 1315 (1965). It "introduces new matter in an attempt to avoid [plaintiff's claim], regardless of the truth or falsity of the allegations in the [claim]." *Roberts v. Heffner*, 51 N.C. App. 646, 649, 277 S.E.2d 446, 448 (1981).

Defendant did not plead election of remedies and did not present that theory at trial. He may not introduce it for the first time on appeal. *MCB Limited v. McGowan*, 86 N.C. App. 607, 359

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

S.E.2d 50 (1987); *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984); *Delp v. Delp*, 53 N.C. App. 72, 280 S.E.2d 27, *disc. rev. denied*, 304 N.C. 194, 285 S.E.2d 97 (1981).

For all the foregoing reasons, we reverse the decision of the trial court and remand for further proceedings to determine plaintiff's damages.

Reversed and remanded.

Judges COZORT and GREENE concur.

IN THE MATTER OF: THE APPEAL OF MORAVIAN HOME, INC. FROM THE DECISION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1986

No. 8810PTC1311

(Filed 5 September 1989)

1. Taxation § 25.11— county's appeal from County Board of Equalization and Review improper— county's appeal from Property Tax Commission proper

Even though respondent county could not appeal from the County Board of Equalization and Review to the North Carolina Property Tax Commission, respondent county's appeal from the decision of the Property Tax Commission to the Court of Appeals was authorized by N.C.G.S. § 105-345(b). Former N.C.G.S. § 105-324(b).

2. Constitutional law § 4.1— constitutionality of tax statute— standing of county to raise

Respondent county did not have standing to raise the constitutionality of N.C.G.S. § 105-275(32), since it was not a member of the class subject to the alleged discrimination of the statute and the county was not the only party in a position to raise the constitutional question.

3. Taxation § 25— home for elderly— exclusion from ad valorem taxation

The Property Tax Commission properly ruled that petitioner's property on which it operated a home for the elderly

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

should be excluded from ad valorem taxation, and sufficient evidence was presented to establish the statutorily required "active program to generate funds . . . to assist the home in serving persons who might not be able to reside at the home without financial assistance or subsidy" where there was testimony that petitioner had established an endowment fund to assist the indigent, actively solicited contributions to the fund, and designated Mother's Day as a day for each reporting church to seek contributions specifically for the endowment fund. N.C.G.S. § 105-275(32)(vi).

APPEAL by respondents from an order of the North Carolina Property Tax Commission entered 24 August 1988. Heard in the Court of Appeals 7 June 1989.

This is an appeal from the North Carolina Property Tax Commission (Commission) sitting as the State Board of Equalization and Review. Petitioner Moravian Home, Inc. (Moravian Home) is a non-profit corporation chartered under Chapter 55A of the General Statutes. On 12 June 1986 the Forsyth County Tax Assessor denied tax exempt status for ad valorem taxes in tax year 1986 on the property of Moravian Home. The Tax Assessor further advised Moravian Home that its property was subject to discovery for tax years 1981 through 1985. Moravian Home appealed the Tax Assessor's decision to the Forsyth County Board of Equalization and Review.

The Forsyth County Board of Equalization and Review unanimously voted to exempt Moravian Home's property from taxation except for certain duplex units and a proportionate allocation of land. Additionally, the Board determined that taxation should be limited to the 1986 tax year.

On 10 December 1986, pursuant to G.S. 105-324(b), Moravian Home filed a letter with the Clerk of the Board of Forsyth County Commissioners and the North Carolina Property Tax Commission appealing the decision of the Forsyth County Board of Equalization and Review for failure to exempt all of the property from taxation. On the same date W. Harvey Pardue, Tax Assessor for Forsyth County, also filed a notice of appeal with the Property Tax Commission. He asserted that the Board erred in holding that only certain portions of Moravian Home's property were taxable and in further holding that the property could not be taxed for years 1981 through 1985.

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

On 10 December 1987 Moravian Home moved to amend its application for hearing by stating an additional ground for appeal, i.e., that all of Moravian Home's real and personal property was exempt from taxation pursuant to G.S. 105-275(32). That statute which became effective 1 January 1987 provides that among the classes of property designated special classes under Article V, Section 2(2) of the North Carolina Constitution and exempt from taxation are included:

(32) Real and personal property owned by a home for the aged, sick, or infirm, that is exempt from tax under Article 4 of this Chapter, and used in the operation of that home. The term "home for the aged, sick, or infirm" means a self-contained community that (i) is designed for elderly residents; (ii) operates a skilled nursing facility, an intermediate care facility, or a home for the aged; (iii) includes residential dwelling units, recreational facilities, and service facilities; (iv) the charter of which provides that in the event of dissolution, its assets will revert or be conveyed to an entity organized exclusively for charitable, educational, scientific, or religious purposes, and which qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986; (v) is owned, operated, and managed by one of the following entities:

- A. A congregation, parish, mission, synagogue, temple, or similar local unit of a church or religious body;
- B. A conference, association, division, presbytery, diocese, district, synod, or similar unit of a church or religious body;
- C. A Masonic organization whose property is excluded from taxation pursuant to G.S. 105-275(18); or
- D. A nonprofit corporation governed by a board of directors at least a majority of whose members elected for terms commencing on or before December 31, 1987, shall have been elected or confirmed by, and all of whose members elected for terms commencing after December 31, 1987, shall be selected by, one or more entities described in A., B., or C. of this subdivision, or organized for a religious purpose as defined in G.S. 105-278.3(d)(1); and

(vi) has an active program to generate funds through one or more sources, such as gifts, grants, trusts, bequests, endowment, or an annual giving program, to assist the home in serv-

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

ing persons who might not be able to reside at the home without financial assistance or subsidy.

Moravian Home also moved for summary judgment claiming that its property should be excluded from ad valorem taxes for all years in dispute pursuant to the statute because the act, by its own terms, "also applies to prior tax years for which contested tax levy proceedings have not been finally determined as of the ratification of this act." N.C. Sess. Laws 1987, c. 356 s. 2. The act was ratified on 12 June 1987.

The matter was heard before the Property Tax Commission on 16 December 1987. The Commission first heard argument on Moravian Home's motions to amend and for summary judgment. After hearing argument the Commission reserved ruling on the motions and proceeded to the merits of the case. Moravian Home argued that pursuant to G.S. 105-275(32) its property was exempt from ad valorem taxes and, further, that Forsyth County did not have standing to raise any constitutional issues. Forsyth County argued that the statute violated the Establishment Clause, the Equal Protection Clause, and Art. I, section 19, and Art. V, section 2 of the North Carolina Constitution.

The Commission issued its final decision on 24 August 1988. The Commission allowed Moravian Home's motion to amend but denied its motion for summary judgment. No appeal was taken from these rulings. After making its findings of fact the Commission first concluded that it did not have the power to rule on the constitutionality of G.S. 105-275(32) and, accordingly, did not rule on the question of whether Forsyth County had standing to challenge the statute's constitutionality. Finally, the Commission determined that all of Moravian Home's property was exempt from taxation for all years in controversy. From the Property Tax Commission's decision, Forsyth County and its Tax Assessor appealed.

Petree Stockton & Robinson, by Ralph M. Stockton, Jr., Daniel R. Taylor, Jr., and Robert H. Lesesne, for petitioner-appellee.

Jonathan V. Maxwell and P. Eugene Price, Jr. for respondent-appellants.

Keith S. Snyder and Hamlin L. Wade for Buncombe County and Mecklenburg County, amicus curiae.

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

Blanchard, Twiggs, Abrams & Strickland, by Charles F. Blanchard, for North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

Turner, Enochs, Sparrow, Boone & Falk, by Charles B. Hahn, Thomas E. Cone, and Laurie S. Truesdell, for Homes for the Aged, amicus curiae.

EAGLES, Judge.

[1] Respondents Forsyth County and its Tax Assessor, W. Harvey Pardue, appeal an administrative decision of the Property Tax Commission ruling that all of Moravian Home's real and personal property is exempt from ad valorem taxes.

G.S. 105-322 provides the mechanism by which a taxpayer may appeal the county tax assessor's listing and appraisal of its property to the County Board of Equalization and Review. In turn the county board's decisions may be appealed to the Property Tax Commission. *Brock v. Property Tax Comm.*, 290 N.C. 731, 228 S.E.2d 254 (1976). In the instant case the applicable statute governing procedure for appeals to the Commission is G.S. 105-324. We note that this statute was repealed effective 1 January 1988. The statute governing appeals to the Commission from a county board now in effect is G.S. 105-290(b). G.S. 105-324(b) provided, in part, that "[a]ny property owner of a county or member of the board of county commissioners or board of equalization and review may except to an order of the board of equalization and review entered under the provisions of G.S. 105-286, 105-287, 105-322, or 105-312 and appeal therefrom to the Property Tax Commission." G.S. 105-290(b) provides that "[a]ny property owner of the county may except to an order of the county board of equalization and review."

We note that no party has the right of appeal from an administrative agency's decision "unless the right is granted by statute." *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963). See also *In re Drainage*, 261 N.C. 407, 134 S.E.2d 642 (1964) (per curiam). Furthermore, compliance with the statutes governing appeals from administrative bodies are conditions precedent to our review. *In re Employment Security Com.*, 234 N.C. 651, 68 S.E.2d 311 (1951).

Here both Moravian Home, a property owner within Forsyth County, and W. Harvey Pardue, Tax Assessor, appealed to the

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

Property Tax Commission. However, G.S. 105-324(b) allows only a "property owner of a county or member of the board of county commissioners or board of equalization and review" to appeal to the Commission. Mr. Pardue, the Tax Assessor, was not a member of the Board of County Commissioners or the Board of Equalization and Review. Accordingly, we hold that Forsyth County and its tax assessor could not appeal from the decision of its County Board of Tax Equalization and Review. Moravian Home was the only party here who could appeal the County Board's decision to the Property Tax Commission.

In appeals from decisions of the Property Tax Commission, G.S. 105-345(b) provides that "[a]ny party may appeal from all or any portion of any final order or decision of the [Property Tax] Commission in the manner herein provided." Accordingly, even though the County could not appeal to the Property Tax Commission, Forsyth County's appeal from the decision of the Property Tax Commission to the Court of Appeals is properly before us.

I

[2] Forsyth County first argues that G.S. 105-275(32) is unconstitutional on its face because it violates the First Amendment's Establishment Clause. We hold that Forsyth County does not have standing to raise constitutional issues in this proceeding. Accordingly, we need not discuss appellant's constitutional issues.

Our Supreme Court in *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 772 (1974), stated that in order to challenge the constitutionality of a tax statute, an appellant must be a "member of the class subject to the alleged discrimination." G.S. 105-275(32) exempts certain homes for aged, sick, or infirm from ad valorem taxation. The County is not a member of this classification.

The County also argues that it has standing because as in *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972), the county is the only party in a position to raise the constitutional question. We disagree. There are other taxpayers within the state who are members of the affected class subject to the alleged discrimination who may still question the statute's validity. *Appeal of Martin* at 75, 209 S.E.2d at 773. Accordingly, we hold that Forsyth County does not have standing to question the constitutionality of G.S. 105-275(32).

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

Forsyth County argues that two cases subsequent to *Martin* have allowed a city and the state, respectively, to challenge the constitutionality of a statute. We find both cases, *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987), and *In re University of North Carolina*, 300 N.C. 563, 268 S.E.2d 472 (1980), distinguishable.

The University of North Carolina and the State appealed the listing and assessment of certain property owned by the University in *In re University*. The question raised there was not, as here, whether the taxing statute was unconstitutional, but whether the North Carolina Constitution exempted from taxation real and personal property belonging to the University. The Supreme Court ruled that the Constitution expressly exempted state owned property from taxation. Here Moravian Home does not argue that its exemptions are based on our Constitution but argues that the General Statutes exempt its property.

The second case is also distinguishable. *Town of Emerald Isle*, relied on by Forsyth County, was a declaratory judgment action, not an administrative proceeding. There the Town of Emerald Isle brought a declaratory judgment action in superior court to determine the constitutionality of an act directing it and the Department of Natural Resources to acquire property near Bogue Inlet and provide public pedestrian access to the property. A declaratory judgment action is a proper method to question the construction or constitutionality of any statute. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971). The instant case arose through administrative agency appeals pursuant to Chapter 105 of the General Statutes.

II

[3] Forsyth County next argues that the Commission's decision is not supported by substantial evidence. Specifically, the County claims that sufficient evidence was not presented to establish the statutorily required "active program to generate funds . . . to assist the home in serving persons who might not be able to reside at the home without financial assistance or subsidy." G.S. 105-275(32)(vi). We disagree.

G.S. 105-345.2 sets the standard for judicial review for appeals from the Property Tax Commission. *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981). The reviewing court must "review the whole

IN RE APPEAL OF MORAVIAN HOME, INC.

[95 N.C. App. 324 (1989)]

record." G.S. 105-345.2(c). In addition, if the Commission's findings of fact or conclusions of law are not supported by "competent, material and substantial evidence in view of the entire record as submitted," G.S. 105-345.2(b)(5), we may reverse.

A taxpayer claiming an exemption from ad valorem taxation "has the burden of establishing that the property is entitled thereto." G.S. 105-282.1(a). Additionally, if supported by substantial evidence the Commission's findings are binding on appeal. See *In re Forestry Foundation*, 296 N.C. 330, 250 S.E.2d 236 (1979). Here the Commission expressly found that Moravian Home had an active program to generate funds to assist those who could not pay the fees charged by the Home.

James L. Forkner, Chairman of the Board of Moravian Home, testified that the Home has established an Endowment Fund to assist the indigent. He further claimed that the Home actively solicits contributions for the fund. In addition, Mother's Day was designated as Moravian Home Sunday with each reporting church seeking contributions specifically for the Endowment Fund on that day each year. This evidence is sufficient to support the Commission's finding. We further hold that Moravian Home has met its burden of demonstrating that it falls within the class exempted from ad valorem taxes pursuant to G.S. 105-275(32).

For the foregoing reasons we do not review the constitutionality of G.S. 105-275(32). However, we hold that the Property Tax Commission's ruling that Moravian Home's property should be excluded from ad valorem taxation is correct.

Affirmed.

Judges PARKER and ORR concur.

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

IN THE MATTER OF: DR. J. EVERETTE CAMERON, JR., PETITIONER-APPELLANT
v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
RESPONDENT-APPELLEE

No. 884SC1380

(Filed 5 September 1989)

1. Administrative Law § 8— review of dental board— consideration of record— no error

The trial court did not err when reviewing an action by the State Board of Dental Examiners, despite Dr. Cameron's contention that the trial court failed to review the entire record, where the judgment clearly stated that the court "considered the arguments and briefs of counsel and the entire record of proceedings before the Board as submitted . . ." and there was no evidence to the contrary in the record. N.C.G.S. § 150B-51.

2. Administrative Law § 4; Appeal and Error § 40— Board of Dental Examiners— notice of hearing— supporting evidence not in record— assignment of error deemed abandoned

An assignment of error to the notice given appellant of a hearing before the Board of Dental Examiners was deemed abandoned where appellant was given 51 days notice of the hearing and, while appellant asserts that he was twice informed by telephone that the hearing date was changed, there is nothing in the record to support his argument except an unsworn assertion and a motion for continuance. Furthermore, appellant did not include in the record the written notice he was allegedly given on 7 August directing him to appear for a hearing on 9 August. Because appellant failed to include in the appellate record evidence necessary to support the assignment of error, it was deemed abandoned.

3. Physicians, Surgeons and Allied Professions § 5; Administrative Law § 8— Board of Dental Examiners— findings regarding patient treatments— supported by evidence

In an action before the Board of Dental Examiners which resulted in a suspension of appellant's license to practice dentistry, there was sufficient evidence in view of the entire record as submitted to support the Board's findings regarding termination of the patient's treatment, the failure to undertake

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

necessary restorative work, and the stripping of interproximate enamel from the patient's teeth.

4. Physicians, Surgeons and Allied Professions § 5; Administrative Law § 8— Board of Dental Examiners— suspension of license— not arbitrary, capricious or abuse of discretion

The action of the Board of Dental Examiners in suspending appellant's license for a period of five years was not arbitrary, capricious and an abuse of discretion where the Board was clearly acting within its statutory authority after making the necessary findings. N.C.G.S. § 90-41.

APPEAL by petitioner from *Reid, Judge*. Judgment entered 22 July 1988 in Superior Court, ONSLOW County. Heard in the Court of Appeals 18 May 1989.

This is a civil case in which Dr. J. Everette Cameron, Jr. (Dr. Cameron) seeks appellate review of the trial court's order affirming the final agency decision of the North Carolina State Board of Dental Examiners (the Board). Based upon findings and conclusions that Dr. Cameron had committed acts constituting negligence and demonstrating incompetence, the Board issued its final agency decision suspending Dr. Cameron's license to practice dentistry for five years. The trial court affirmed the Board's decision and we affirm the trial court's judgment.

Dr. Cameron is licensed to practice dentistry in North Carolina. He has an orthodontic practice in Richlands and at the time of his hearing before the Board had approximately 200 orthodontic patients. On 19 February 1985 Dr. Cameron conducted an orthodontic consultation with Cindy Morton (Cindy) and diagnosed her as having slight anterior crowding and rotated upper lateral incisors.

Dr. Cameron testified that he began treatment for Cindy's condition by placing her in brackets and bands. Subsequently, he began a procedure referred to as "stripping." Stripping is a process where enamel is irreversibly removed from teeth using a diamond-flexy disk. Dr. Cameron testified that extraction of the bicuspids, a procedure he would not perform on a patient of Cindy's age, was an alternative to stripping. Dr. Cameron also testified that he stripped eight of Cindy's posterior teeth in the lower arch, recontoured her lower front teeth with sandpaper, and may have stripped two upper teeth.

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

Three general dentists, Dr. Miller, Dr. Ipock, and Dr. Reid, along with two orthodontists, Dr. Gorman and Dr. Willis, and a professor of orthodontics at the University of North Carolina School of Dentistry, Dr. Proffit, also testified concerning Cindy's condition after examining her and reviewing her dental records. Each practitioner agreed that Cindy had slight anterior crowding but believed stripping of her posterior teeth was both inappropriate and a violation of the standard of practice of dentistry in North Carolina. Dr. Reid also testified, and Dr. Ipock agreed, that 15 of Cindy's teeth had been stripped. Dr. Miller testified correct treatment would have involved a fixed orthodontic appliance or "removable appliances" that would have expanded the arches of Cindy's mouth.

Dr. Cline, a dentist not licensed to practice in North Carolina, testified that posterior stripping was acceptable. He testified that posterior stripping was appropriate in this case, even though he had never examined Cindy.

Dr. Cameron testified that he removed Cindy's brackets and bands on 26 June 1986 before he thought it was appropriate because Cindy insisted. Dr. Cameron planned to recontour her teeth after he removed her brackets and bands. Dr. Cameron also alleges in his brief that he was prevented from doing the necessary reconstructive work because Cindy was then living in New Bern and because she had told his office that she would have Dr. Miller of New Bern perform the needed treatment.

Cindy testified that she thought Dr. Cameron took off the bands "[b]ecause they were ready."

Cindy alleges that as a result of Dr. Cameron's treatment her teeth became sensitive to temperature making it difficult for her to eat and causing her to lose approximately 15 pounds. In addition, Dr. Cameron's treatment allowed food to pack between her teeth which caused tooth decay. Dr. Miller testified that he placed 18 crowns on Cindy's teeth in an attempt to reconstruct her mouth. However, Dr. Proffit testified that contacts between her teeth would never be fully restored. Cindy's parents paid Dr. Cameron's \$1,200 fee.

On 18 March 1987 Cindy filed a complaint with the North Carolina State Board of Dental Examiners. On 18 May 1987 the Board gave Dr. Cameron written notice that it would conduct a hearing on 5 June 1987 to determine whether he had violated

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

various provisions of G.S. 90-41(a). On 26 May 1987 Dr. Cameron was given written notice that the hearing would be continued until 25 July 1987. On 26 June 1987 Dr. Cameron was given another written notice of continuance until 16 August 1987.

Dr. Cameron alleges in his brief that he was notified by the Board during a telephone conversation that his hearing would be continued until 23 August 1987. He also alleges that during another telephone conversation on 4 August 1987 the Board advised him that the hearing would be advanced to 16 August 1987. Finally, Dr. Cameron's brief points out that on 7 August 1987 he "was served with a written notice directing him to appear for the hearing on August 9, 1987." The hearing was conducted on 16 August 1987.

Gray Woods & Cooper, by M. Kevin Lett, and Lanier & Fountain, by Keith E. Fountain, for petitioner-appellant.

Bailey & Dixon, by Patricia P. Kerner, for respondent-appellee.

EAGLES, Judge.

Appellant contends the trial court erred in the following respects: the trial court used the wrong standard of review; appellant was not given adequate notice of his hearing before the Board; there was not substantial evidence to support the Board's findings and conclusions; and appellant's five year suspension is arbitrary, capricious, and an abuse of discretion. We disagree and affirm the court below.

I

[1] Dr. Cameron contends the trial court erred by failing to review the entire record as submitted as required by G.S. 150B-51. The judgment here clearly states that the court "considered the arguments and briefs of counsel and the *entire record of proceedings* before the Board as submitted. . . ." Further, there is no evidence to the contrary in the record. Even where it is only implicit in the judgment that the superior court considered and ruled on all matters presented by the petitioner, we do not disturb the judgment. *See House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 112, 304 S.E.2d 619, 623 (1983), *rev. denied*, 310 N.C. 153, 311 S.E.2d 291 (1984). Where the judgment explicitly states that the court considered the entire record and no basis exists for a contrary conclusion, we will not disturb the judgment. Accordingly, this assignment is overruled.

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

II

[2] Dr. Cameron also contends that the trial court erred in concluding that the Board complied with the notice requirements set out in G.S. 150B-38(b). We disagree. G.S. 150B-38(b) in relevant part provides:

Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing. . . .

In the instant case, Dr. Cameron was given written notice on 26 June 1987 that his hearing was being continued until 16 August 1987. Dr. Cameron had 51 days notice, ample notice to facilitate his preparation.

Additionally, while appellant asserts in his brief that he was twice contacted by telephone that the hearing date was changed, there is nothing in the record to support his argument except an unsworn assertion in a motion for continuance. Additionally, appellant does not include the written notice he allegedly was given on 7 August 1987 directing him to appear for a hearing on 9 August 1987. It is the appellant's responsibility to insure that the record on appeal is properly prepared. *Loeb v. Loeb*, 72 N.C. App. 205, 218, 324 S.E.2d 33, 42 (1985), *reversed on other grounds*, *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986). On appeal this court is "bound by the record as certified and [we] can judicially know only what appears of record." *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E.2d 137, 141 (1980). The appellant here failed to include in the appellate record evidence necessary to support this assignment of error. Because of these deficiencies in the appellate record, this assignment of error is deemed abandoned. *See Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984).

III

[3] Dr. Cameron next contends the Board's findings regarding the termination of Cindy's treatments were not supported by substantial evidence in view of the entire record as submitted. This Court aptly stated the standard of our review in *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 68-69, 306 S.E.2d 534, 536 (1983):

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

The standard of our review is chartered by G.S. 150[B]-51(5) which requires us to determine whether the findings and conclusions are supported "by substantial evidence . . . in view of the entire record as submitted." By case law an insignificant variation of the words "entire record" has become "whole record," and this is the test we must apply.

* * *

The "whole record" test demands that "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." In this context substantial evidence has been held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Therefore, in reaching its decision, the reviewing court is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to them to be, so long as substantial evidence of those findings exist in the whole record. [Citations omitted.]

A.

Dr. Cameron first contends that there was not substantial evidence to support the Board's finding that he terminated Cindy's treatment. We disagree.

Dr. Cameron and Shandra Kirby, Dr. Cameron's dental assistant, testified that Cindy's treatment was terminated at her insistence. However, Cindy testified:

Q: When Dr. Cameron took your bands off, had you demanded that he do it?

A: Every time I saw him, I wanted them off. "When can we get them off? When can we get them off?" In May of 1986, we decided we would take them off the next month. So I knew I was going to have them off.

Q: Did you think they were coming off because you had insisted or because they were ready to come off?

A: *Because they were ready.* [Emphasis added.]

The Board's finding is further substantiated by Dr. Miller's testimony. Dr. Miller's deposition testimony reads in part as follows:

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

Q: You mentioned that when you called Doctor Cameron to discuss Cindy Morton's case, that you discussed he had taken her out of bands prematurely because of her insistence. Did you ask her about that?

A: She just laughed when I said that. She discounted that as being factual. She said, "No, maybe I did want to get out of orthodontics, but I wanted my teeth straight." I think that was about how she put it. . . .

B.

Second, Dr. Cameron contends there is not substantial evidence to support the Board's finding that he failed to undertake necessary restorative work on Cindy's teeth. Dr. Cameron claims that the day after Dr. Cameron removed her brackets and bands, Cindy told his office that she would let Dr. Miller perform the necessary restoration. However, Cindy testified that she did not tell Dr. Cameron's staff that she would see Dr. Miller for treatment in the future until January 1987—seven months after the bands and brackets were removed.

C.

Finally, appellant argues there is not substantial evidence to support the Board's finding that Dr. Cameron stripped "interproximate enamel from virtually all of [Cindy's] posterior teeth." Dr. Cameron testified that he only stripped 8 posterior teeth. However, Dr. Reid testified, and Dr. Ipock agreed, that 15 of Cindy's teeth had been stripped, while Dr. Miller testified that 14 of Cindy's teeth were stripped.

Upon review of the whole record, though there is some evidence to the contrary, we find substantial competent evidence to support each of the agency's findings. Appellant's assignments of error are without merit and the agency findings must stand.

IV

[4] Finally, appellant contends that the order of the Board suspending appellant's license for a period of five years is arbitrary, capricious and an abuse of discretion. We disagree.

G.S. 90-41 provides, in pertinent part, as follows:

IN RE CAMERON v. N.C. BD. OF DENTAL EXAMINERS

[95 N.C. App. 332 (1989)]

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

* * *

(3) Revoke or suspend a license to practice dentistry; and

(4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

* * *

(12) Has been negligent in the practice of dentistry;

* * *

(14) Is incompetent in the practice of dentistry;

* * *

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice. . . .

The Board was clearly acting within its statutory authority when it suspended Dr. Cameron's license after making the necessary findings. This court and the superior court may reverse or modify the decisions of the Board if they are arbitrary or capricious. *See In re Wilkins*, 294 N.C. 528, 543, 242 S.E.2d 829, 838 (1978), *abrogated on other grounds*, *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). Here, we find the Board's suspension of Dr. Cameron's license was neither arbitrary nor capricious.

The order below is

Affirmed.

Judges PARKER and ORR concur.

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

ELIZABETH M. BARBER v. WOODMEN OF THE WORLD LIFE INSURANCE
SOCIETY, A CORPORATION

No. 8829SC1229

(Filed 5 September 1989)

1. Insurance § 29— life insurance proceeds— plaintiff as primary beneficiary— representation by insurer— no application of estoppel principle

There was no merit to plaintiff's contention that defendant made an express representation of coverage regarding the status of her decedent's insurance policies and defendant should now be estopped from claiming that plaintiff was not the primary beneficiary of a \$100,000 life insurance policy, since application of the estoppel principle would require defendant to pay more in benefits than the parties contracted for in the insurance policy.

2. Insurance § 29— beneficiary of life insurance policy— representation by insurer— no breach of fiduciary duty

Plaintiff was not entitled to a directed verdict on her claim for breach of fiduciary duty on a \$100,000 life insurance policy where plaintiff alleged that defendant's misrepresentation as to the beneficiary of that policy proximately caused damage to plaintiff; by the terms of the policy plaintiff's husband could change beneficiaries only by making a written request; his letter to defendant only inquired about the status of his policies and did not constitute a request to change beneficiaries; and the other beneficiaries named in the policy were plaintiff's husband's children by his first marriage who were natural objects of his bounty and affection.

3. Unfair Competition § 1— payment on life insurance policy denied— unfair and deceptive trade practices alleged— directed verdict properly denied

The trial court did not err in denying plaintiff's motions for directed verdict on her claims for unfair and deceptive trade practices in denying payment on insurance policies, since plaintiff was required to show not only that defendant violated N.C.G.S. § 75-1.1, but also that plaintiff suffered an injury as a proximate result of defendant's actions, and whether plaintiff's damages were the proximate result of defendant's actions is almost always a question of fact for the jury.

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

4. Unfair Competition § 1— refusal to pay life insurance proceeds— claim of unfair and deceptive trade practice— refusal to submit issue to jury erroneous

The trial court erred in failing to submit to the jury instructions and issues with regard to plaintiff's claim for an unfair and deceptive trade practice based on defendant's refusal to pay her the proceeds of a life insurance policy.

APPEAL by plaintiff from *Owens, Judge*. Judgment entered 8 July 1988 in Superior Court, HENDERSON County. Heard in the Court of Appeals 12 May 1989.

Plaintiff brings this civil action against defendant Woodmen of the World Life Insurance Society, her deceased husband's insurer, for failure to pay her the proceeds of two life insurance policies. The record shows the following facts.

Dr. Leonard B. Barber, Jr., plaintiff's deceased husband, purchased two separate life insurance policies from defendant. Defendant is a fraternal benefit society engaged in the insurance business with its main offices in Omaha, Nebraska. The two policies had face values of \$10,000 and \$100,000 respectively. In 1983 Dr. Barber learned that he was terminally ill. He wrote to all of his insurance companies, including defendant, and inquired as to the status of each of his policies.

On 27 July 1983 defendant responded to Dr. Barber's inquiry stating that the beneficiaries of Dr. Barber's policies were "Elizabeth M. Barber, wife, in one sum, if living, otherwise to John S. Barber, son, Robert D. Barker [sic], son, and Susan M. Barber, daughter, equally in one sum." Attached to defendant's letter was a copy of the beneficiary endorsement for Dr. Barber's \$10,000 policy with the above stated endorsement. Plaintiff testified that through his correspondence Dr. Barber learned that his first wife was still the beneficiary of a life insurance policy with another insurance company. Dr. Barber changed the beneficiary of that policy to plaintiff. On 13 July 1985 Dr. Barber died.

Shortly after Dr. Barber's death plaintiff made demand for the proceeds of both policies issued by defendant. Defendant refused to pay plaintiff the proceeds of either policy. Accordingly, plaintiff filed this action to compel payment of the proceeds of both policies. Defendant then claimed that its 27 July 1983 letter to Dr. Barber was in error when it named the beneficiaries of Dr.

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

Barber's policies. Defendant acknowledged that the beneficiaries of the \$10,000 policy were as stated in the letter but revealed that the \$100,000 policy still listed plaintiff and Dr. Barber's three children as beneficiaries without any language to signify who might be the primary beneficiary. Plaintiff's complaint alleged that she was entitled to receive the proceeds of both policies and, additionally, that defendant was estopped from asserting otherwise by virtue of its 27 July 1983 letter.

On 23 December 1985 John S. Barber, Robert D. Barber, and Susan M. Barber (the Barbers), Dr. Barber's children from his first marriage, filed a motion to intervene as plaintiffs. The trial court allowed the Barbers' motion to intervene. The Barbers claimed that plaintiff was entitled to receive only 25% of both policies and that the remaining 75% should be distributed to them equally. On 24 June 1986 the Barbers moved for summary judgment.

Before the trial court ruled on the Barbers' motion for summary judgment, plaintiff moved to file an amended complaint. Her amended complaint alleged additional claims of breach of fiduciary duty and unfair and deceptive trade practices against defendant. On 28 January 1987 the trial court allowed plaintiff's motion to amend her complaint and granted the Barbers' motion for summary judgment on the \$100,000 policy. The trial court denied the Barbers' summary judgment motion in regard to the \$10,000 policy. Defendant appealed both the order allowing plaintiff to file her amended complaint and the order granting summary judgment in favor of the Barbers on the \$100,000 policy. In *Barber v. Woodmen of the World Life Ins. Society*, 88 N.C. App. 666, 364 S.E.2d 715 (1988), this court affirmed the trial court's grant of summary judgment in favor of the Barbers on the \$100,000 policy and dismissed defendant's appeal on the issue of amending plaintiff's complaint as interlocutory.

On 5 July 1988 the remaining issues came on for a jury trial. At the close of plaintiff's evidence plaintiff moved for a directed verdict. Defendant conceded that plaintiff was entitled to full payment on the \$10,000 policy and, accordingly, the trial court granted plaintiff's motion for directed verdict on the \$10,000 policy. The trial court denied plaintiff's motion for directed verdict on the \$100,000 policy claim. At the close of all the evidence plaintiff again moved for directed verdict which the trial court denied. The trial court submitted to the jury issues of negligence and unfair

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

and deceptive trade practices relating to the \$100,000 policy. The jury's verdict was that plaintiff was not damaged by defendant's negligence but did not answer the issue of unfair and deceptive trade practices. After the jury rendered its verdict plaintiff moved for judgment notwithstanding the verdict. Defendant admitted that plaintiff was entitled to collect one-fourth of the \$100,000 policy and, accordingly, the trial court ordered that defendant pay one-fourth of the \$100,000 policy to plaintiff. Plaintiff appeals.

Toms & Bazzle, by James H. Toms and Ervin W. Bazzle; Roberts, Baggett, LaFace & Richard, by B. K. Roberts, for plaintiff-appellant.

Francis M. Coiner for defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred in denying her motions for directed verdict at the close of her evidence and at the close of all the evidence as well as denying her motion for judgment notwithstanding the verdict. Plaintiff also argues that the trial court erred in refusing to give her proposed jury instructions and in failing to submit her proposed issues to the jury. In addition, plaintiff contends that the jury's verdict that she was not damaged by defendant's negligence is not supported by the record. We agree that the trial court erred in failing to submit factual questions to the jury concerning plaintiff's claim of unfair and deceptive trade practices on the \$10,000 policy but otherwise, we affirm the judgment below.

We first address plaintiff's contention that the trial court erred in denying her motion for directed verdict. The purpose of a directed verdict motion is to test the sufficiency of the evidence. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982). In reviewing this issue we must consider the evidence in the light most favorable to the non-movant. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973).

[1] Plaintiff argues that it is undisputed that defendant made an express representation of coverage regarding the status of her decedent's insurance policies and, accordingly, defendant should now be estopped from claiming that she is not the primary beneficiary of the \$100,000 policy. We disagree. In *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9 (1985), *affirmed in*

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

part, reversed in part, 316 N.C. 461, 343 S.E.2d 174 (1986), our court held that while the doctrine of estoppel may be used by an insured to prevent forfeiture of a policy's benefits, it may not be used to expand the risks covered. We said that "[t]he theory underlying this rule seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium." *Id.* at 626, 330 S.E.2d at 13. Application of the estoppel principle here would require this defendant to pay more in benefits than the parties contracted for in the insurance policy. Accordingly, we hold that on this record plaintiff may not use the doctrine of estoppel to effectively rewrite the insurance contract.

[2] Plaintiff next argues that the trial court should have granted her motion for directed verdict on her claim for breach of fiduciary duty on the \$100,000 policy. We disagree. We first note that a directed verdict is seldom appropriate in a negligence case. *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981). Furthermore, even where the facts are undisputed, a directed verdict motion should be granted to the party with the burden of proof only when credibility is manifest as well. *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986).

Here an essential element of plaintiff's case is that defendant's misrepresentation proximately caused damage to plaintiff. By the terms of the policy plaintiff's husband could change beneficiaries only by making a written request. His letter only inquired about the status of his policies and does not constitute a request to change beneficiaries. Moreover, the other beneficiaries named in the policy are plaintiff's husband's children by his first marriage who are natural objects of his bounty and affection. We cannot say that plaintiff's credibility here is so manifest as to justify removing the case from the jury. Accordingly, we hold that the trial court did not err in denying the plaintiff's motion for directed verdict on her breach of fiduciary duty claim on the \$100,000 policy.

[3] Plaintiff further contends that the trial court erred in failing to grant her motion for directed verdict on her claim for unfair and deceptive trade practices pursuant to G.S. 75-1.1 on both insurance policies. To prove a Chapter 75 claim the plaintiff must show not only that defendant violated the statute but also that plaintiff suffered an injury as a proximate result of defendant's actions. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

S.E.2d 271 (1980). Our court has held that whether plaintiff's damages were the proximate result of defendant's actions is almost always a question of fact for the jury. *Winston Realty Co. v. G.H.G., Inc.*, 70 N.C. App. 374, 320 S.E.2d 286 (1984), *affirmed*, 314 N.C. 90, 331 S.E.2d 677 (1985). Accordingly, the trial court did not err in denying plaintiff's motions for directed verdict on her claims for unfair and deceptive trade practices.

A motion for judgment notwithstanding the verdict simply renews the movant's directed verdict motion. "The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict." *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E.2d 897, 903 (1974). Since the evidence was sufficient to withstand plaintiff's directed verdict motion, the trial court did not err in denying the motion for judgment notwithstanding the verdict.

[4] Through plaintiff's second and third assignments of error she contends that the trial court erred in failing to submit her proposed jury instructions and issues to the jury. Instead, the trial court formulated its own issues and instructions for its jury charge. Pursuant to Rule 51 of the North Carolina Rules of Civil Procedure the trial court "must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings." *Harrison v. McLearn*, 49 N.C. App. 121, 123, 270 S.E.2d 577, 578 (1980). The trial court need not use the exact language of plaintiff's tendered instructions in instructing the jury. *Anderson v. Smith*, 29 N.C. App. 72, 223 S.E.2d 402 (1976). However, in charging the jury the trial court must explain the law and apply it to each substantial feature of the case. *Hord v. Atkinson*, 68 N.C. App. 346, 315 S.E.2d 339 (1984). Failure to instruct on a substantial feature of a case constitutes prejudicial error. *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987).

In the instant case the trial court failed to submit to the jury and subsequently failed to instruct the jury on the issue of unfair and deceptive trade practices as it related to the \$10,000 policy. This was error. Plaintiff's amended complaint alleged defendant's actions in denying her payment of the proceeds of both policies violated Chapter 75. For claims pursuant to G.S. 75-1.1 the jury finds the facts and, based upon those facts, the trial court determines as a matter of law whether defendant's conduct con-

BARBER v. WOODMEN OF THE WORLD LIFE INS. SOCIETY

[95 N.C. App. 340 (1989)]

stitutes an unfair or deceptive trade practice. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986). Here the trial court failed to submit to the jury those factual questions in need of resolution concerning plaintiff's Chapter 75 claim relating to her decedent's \$10,000 policy. Accordingly, plaintiff is entitled to a new trial on this issue as it relates to the \$10,000 policy.

We note that upon retrial on her Chapter 75 claim as it relates to the \$10,000 policy damages may have to be determined. This court noted in *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E.2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984), that a Chapter 75 claim is a separate and distinct action apart from fraud, breach of contract or breach of warranty. Accordingly, there we held that it "would be illogical" to hold that only those methods of measuring damages could be used to ascertain the damages caused by a Chapter 75 claim. We further stated that the "measure of damages used should further the purpose of awarding damages, which is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.'" [Citation omitted.] *Id.* at 233, 314 S.E.2d at 585.

The trial court submitted issues and instructions on every other substantial feature of the case. We note, however, that plaintiff failed to except to any portion of the trial court's instruction and, accordingly, we may not review whether the instruction as given was proper. N.C. App. R. 10(b)(2).

In summary, we reverse and remand for trial the claim of unfair and deceptive trade practices as it relates to the \$10,000 policy because the trial court failed to submit the issue for the jury's determination. As to all of the remaining issues, we affirm.

Affirmed in part; reversed and remanded in part.

Judges WELLS and PARKER concur.

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

ROY DUDLEY SMITH v. JAMES ALBERT BOHLEN AND BETTY LOU HOLM-
QUIST BOHLEN

No. 8818SC1014

(Filed 5 September 1989)

**1. Automobiles and Other Vehicles § 90.9— automobile accident—
no instruction that negligence may be inferred from rear-end
collision—no error**

The trial court did not err in a negligence action arising from an automobile accident by instructing the jury that no inference of negligence should arise from the fact of injury and damage without also instructing the jury that negligence may be inferred from a rear-end collision. The trial court charged the jury on five different ways in which defendant may have been negligent and plaintiff's requested instruction amounts to an application of the law to the evidence, which is not required. Requests for special instructions must be submitted in writing before the trial court begins its charge to the jury, N.C.G.S. § 1A-1, Rule 51(b), and the denial of a request when the party fails to comply with Rule 51(b) is within the trial court's discretion.

**2. Automobiles and Other Vehicles § 90.9— automobile accident—
rear-end collision— failure to instruct that defendant must come
forward with evidence that he was not negligent—no error**

The trial court did not err in a negligence action arising from an automobile accident by failing to instruct the jury that it could render a verdict for plaintiff unless it found that defendant came forward with evidence to show he was not negligent. Plaintiff did not request such an instruction and therefore cannot assign error to its omission; moreover, no presumption of negligence from an unexplained rear-end collision arises under the law of North Carolina.

**3. Trial § 11.2— automobile accident—improper comments and
questions by defense counsel—no new trial**

The trial court did not err in a negligence action arising from an automobile accident by denying plaintiff's motion for a new trial based on the improper comments and questions by defense counsel where defense counsel commented during opening argument that the case was important to defendant

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

because he was retired, that plaintiff's evidence was incredible and that counsel "did not buy it," and defense counsel asked plaintiff's former employer if plaintiff had left his job because the new owners were immigrants from Lebanon and plaintiff did not want to work for foreign people. Although counsel's statements and question were improper, the trial court sustained objections, struck the question, and instructed the jury to disregard them.

4. Trial § 11.2— negligence action—improper argument by defense counsel—no prejudicial error

The trial court did not err by not acting *ex mero motu* to correct an impropriety in the closing argument of defense counsel in an automobile negligence action where defense counsel made a remark that, in the context of the case, could only be interpreted as a reference to publicity concerning lawsuits and their effect on the insurance industry, but the meaning of the remark was somewhat vague and there was no indication in the record that counsel made any other statements along the same lines.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Morgan (Melzer A., Jr.)*, Judge. Judgment entered 19 April 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 March 1989.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, for plaintiff-appellant.

Frazier, Frazier & Mahler, by Robert A. Franklin and James D. McKinney, for defendant-appellees.

PARKER, Judge.

Plaintiff brought this action to recover for personal injuries he allegedly sustained in an automobile accident. Plaintiff's evidence tended to show that his car was struck from behind by a car driven by defendant James Bohlen and owned by defendant Betty Lou Bohlen. The accident occurred as plaintiff was making a right-hand turn into a driveway. Plaintiff offered evidence to show that he suffered a permanent injury to his neck and permanent nerve damage as a result of the collision.

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

Defendants offered no evidence. The jury found that plaintiff was not injured by the negligence of defendant James Bohlen. The trial court denied plaintiff's motion for a new trial and entered a judgment upon the verdict.

On appeal plaintiff brings forward five assignments of error. Plaintiff's first three assignments of error are directed to the trial court's instructions to the jury on the issue of negligence. Plaintiff's fourth assignment of error is that the trial court erred in denying plaintiff's motion for a new trial on the basis of improper conduct on the part of defendants' counsel. Plaintiff's fifth assignment of error is that the trial court erred by failing to act on its own motion to censure an improper remark made by defendant's counsel during his closing argument.

[1] Plaintiff first contends that the trial court erred in instructing the jury that no inference of negligence should arise from the fact of injury and damage without also instructing that negligence may be inferred from a rear-end collision. Following the charge, plaintiff's counsel made the following request:

Your Honor charged the jury that the mere fact of a collision doesn't give rise to the inference of negligence. I think, in this case, the jury should be further told that the fact of a collision with a vehicle ahead furnishes some evidence that the following—from which they can but need not infer that the following motorist was negligent as to speed, following too closely, or failing to keep a proper lookout in accordance with 128 Southeast [sic] 2d 562 and a series of other cases.

The record further shows that counsel produced a copy of the case he cited to the court. Research discloses that the cited case is *Parker v. Bruce*, 258 N.C. 341, 128 S.E.2d 561 (1962), in which the Court stated, "[o]rordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Id.* at 343, 128 S.E.2d at 562.

Contrary to counsel's statement, the trial judge did not instruct that the mere fact of a collision does not give rise to the inference of negligence. The instruction was that "negligence is not to be presumed from the mere happening of injury or damage." We first note that plaintiff never objected to the instruction actually given by the trial court, namely, that negligence is not to be

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

presumed from the mere fact of injury or damage. Therefore, plaintiff cannot assign error to that portion of the charge. Rule 10(b)(2), N.C. Rules App. Proc. In any event, the charge is a correct statement of the law. It is included in the pattern jury instructions for automobile negligence, N.C.P.I.—Civ. 102.10, and the proposition that negligence is not presumed from injury is well established in our case law. *See, e.g., King v. Bonardi*, 267 N.C. 221, 227, 148 S.E.2d 32, 37 (1966).

Plaintiff's arguments, both on appeal and in the court below, fail to distinguish the concepts of inference and presumption. An inference is merely a permissible deduction from the evidence; a presumption is compulsory and is binding on the jury unless there is sufficient proof to rebut it. *Henderson County v. Osteen*, 297 N.C. 113, 117, 254 S.E.2d 160, 163 (1979). Thus, when a given set of facts gives rise to an inference of negligence, there is still no presumption of negligence and the jury is free to reject the inference. *See Lentz v. Gardin*, 294 N.C. 425, 241 S.E.2d 508 (1978). Furthermore, such an inference does not arise out of the mere fact of injury, but is a product of the circumstances under which the injury occurred. *See Powell v. Cross*, 263 N.C. 764, 768, 140 S.E.2d 393, 397 (1965).

In the present case, plaintiff testified that defendants' vehicle struck him from behind as he was making a right turn. Because defendants offered no evidence to explain the collision, the collision itself supports an inference of negligence. *See Beanblossom v. Thomas*, 266 N.C. 181, 188, 146 S.E.2d 36, 42 (1966). Nevertheless, we find no error in the trial court's refusal to instruct the jury as requested by plaintiff.

The trial court charged the jury on five different ways in which defendant may have been negligent. The record shows that the trial court instructed the jury that they could find that defendant James Bohlen (hereinafter "defendant") was negligent if he: (i) unreasonably failed to decrease speed; (ii) failed to keep a reasonable lookout; (iii) failed to maintain proper control of his vehicle; (iv) exceeded reasonable speed; or (v) followed plaintiff's vehicle too closely. Thus, the jury was permitted to infer negligence from the evidence and the charge adequately presented the relevant issues. *Cf. Masciulli v. Tucker*, 82 N.C. App. 200, 346 S.E.2d 305 (1986) (in case involving rear-end collision, trial court erred in failing to instruct on proper lookout and control). Plaintiff's

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

requested instruction amounts to an application of the law to the evidence, which is not required. Rule 51(a), N.C. Rules Civ. Proc. Requests for special instructions must be submitted in writing before the trial court begins its charge to the jury. Rule 51(b), N.C. Rules Civ. Proc. When a party fails to comply with Rule 51(b), the denial of a request is within the trial court's discretion. *Id.*; *Hord v. Atkinson*, 68 N.C. App. 346, 351, 315 S.E.2d 339, 342 (1984).

Plaintiff in this case clearly did not comply with Rule 51(b), and we find no abuse of discretion in the trial court's denial of plaintiff's request. Moreover, under the facts of this case, it is unlikely that the requested instructions would have affected the verdict. The only direct evidence of negligence on defendant's part was his admission that he glanced at a traffic light shortly before the collision. Thus, the collision itself was virtually the only evidence to be considered by the jury. In this respect, we also note that the issue submitted to the jury was not merely whether defendant was negligent, but whether plaintiff was injured by defendant's negligence. Plaintiff's evidence of his injuries was primarily based upon diagnoses rendered well after the incident occurred. The jury may have disbelieved this evidence and based its verdict upon a finding of no injury as opposed to no negligence.

[2] Plaintiff next contends that the trial court erred in failing to instruct the jury that it could render a verdict for plaintiff unless it found that defendant came forward with evidence to show that he was not negligent. Plaintiff did not request such an instruction; therefore, he cannot assign error to its omission from the charge. Rule 10(b)(2), N.C. Rules App. Proc. Moreover, plaintiff relies on cases from other jurisdictions in which an unexplained rear-end collision creates a presumption of negligence. *See, e.g., Baughman v. Vann*, 390 So.2d 750 (Fla. Dist. Ct. App. 1980); *Judge v. Kilts*, 27 Mich. App. 502, 183 N.W.2d 868 (1970). No such presumption arises under the law of this State. Where the plaintiff's evidence establishes a prima facie case of negligence, the burden of proof does not shift to the defendant. The burden remains with the plaintiff even if the defendant offers no evidence. *White v. Hines*, 182 N.C. 275, 109 S.E. 31 (1921). Accordingly, we find no error in the trial court's charge to the jury.

[3] Plaintiff next assigns error to the trial court's denial of plaintiff's motion for a new trial on the grounds of improper comments and questions made by defendants' counsel. Two of the comments

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

occurred during counsel's opening statement. Although the opening statement was not recorded, the parties and the trial judge agreed that counsel made statements to the effect that (i) the case was important to defendant because he is retired, and (ii) plaintiff's evidence was incredible and counsel "did not buy it." The trial court sustained plaintiff's objections to these comments. The improper questioning occurred when counsel asked plaintiff's former employer if plaintiff left his job because the new owners were immigrants from Lebanon and plaintiff did not want to work for foreign people. The trial court sustained plaintiff's objection to the question, allowed his motion to strike, and instructed the jury not to consider the question.

The trial court's decision to grant or deny a motion for a new trial is reviewable only for abuse of discretion. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). Although counsel's conduct in this case was improper, we find no abuse of discretion in the trial court's denial of plaintiff's motion.

Counsel's statement that the case was important to defendant because he is retired was improper because it related to defendant's ability to pay damages. *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 273-74 (1983). The impropriety was not prejudicial to plaintiff, however, because the trial court sustained plaintiff's objection and the jury did not reach the issue of damages. *Id.* Counsel's statement to the effect that plaintiff's evidence was not credible was improper because it amounted to an expression of counsel's opinion as to plaintiff's truthfulness. *See State v. Price*, 313 N.C. 297, 302, 327 S.E.2d 863, 866 (1985). *See also* Rule 7.6(C)(4), N.C. Rules of Professional Conduct. Because the trial court sustained plaintiff's objection, however, the improper comment was not prejudicial error. Since the opening statements were not transcribed, the record in this case does not reveal whether the trial court instructed the jury to disregard the comments. *See State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982). Even assuming, however, that the trial court failed to instruct the jury to disregard the comments, the comments were not so inflammatory and prejudicial as to require a new trial.

Counsel's question as to whether plaintiff was willing to work for foreigners was clearly irrelevant and an improper attempt to portray plaintiff as being biased against foreigners. The trial

SMITH v. BOHLEN

[95 N.C. App. 347 (1989)]

court cured any prejudice, however, by striking the question and instructing the jury to disregard it. Moreover, the witness went on to testify that almost all of the establishment's employees left when the new owners took control of the business.

[4] Plaintiff next contends that the trial court erred in failing to act on its own motion to correct an impropriety in the closing argument of defendants' counsel. The record shows that counsel made the following statement in his argument to the jury:

If you were sitting around reading the newspaper and you saw something that upset them [sic] and you said "Why don't they do something about it?" then this is your opportunity to be "they."

Plaintiff did not object to the statement. Plaintiff contends, however, that the statement is an improper reference to the view that there is a "lawsuit crisis" which is causing problems with insurance costs and coverage. Plaintiff also contends that the impropriety was gross so as to require the trial court to take corrective action even in the absence of an objection. See *Watson v. White*, 309 N.C. at 507, 308 S.E.2d at 274.

We agree with plaintiff that, in the context of this case, counsel's remark can only be interpreted as a reference to publicity concerning lawsuits and their effect on the insurance industry. Thus, the remark was an improper appeal to the pecuniary interest of the jurors in that it implied that a verdict for defendant would help to hold down insurance costs. See *Williams v. North River Ins. Co.*, 579 S.W.2d 410, 413 (Mo. Ct. App. 1979). See also 75 Am. Jur. 2d *Trial* § 300 (1974) (improper to appeal to self-interest of jurors as taxpayers). Although we are of the opinion that the trial court could have exercised its discretion to censure the remark on its own motion, we find no reversible error in its failure to do so in this case. The meaning of the remark is somewhat vague, and there is no indication in the record that counsel made any other statements along the same lines. Under these circumstances, it was plaintiff's duty to call the matter to the trial court's attention. Even considering the remark together with counsel's other improper comments, we do not find prejudice to plaintiff warranting a new trial.

For the foregoing reasons, we find that the trial was free of reversible error.

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

No error.

Judge COZORT concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In the context of this unexplained rear-end collision case, the court having seen fit to twice instruct the jury the unnecessary and obfuscatory, though approved, bromide that "negligence is not to be presumed from the mere fact of either personal injury or property damage, or both," the court erred in my judgment by not also instructing them that evidence of the rear-end collision was some evidence of defendant's negligence. As it was the jury was told that they were not to take for granted that defendant was negligent because he ran into the rear of plaintiff's car, and that plaintiff had to prove that defendant was negligent in one of the three ways alleged, but were not told that they could infer from the circumstances of the collision that defendant was negligent in each of the three ways alleged. Thus, the jury may not have considered virtually the only evidence presented as to defendant's negligence. The prejudicial effect of this failure to clarify the situation seems obvious and that effect was probably accentuated by the improper attempts to prejudice the case referred to in the opinion.

LIEF CYMONE YATES AND BIANCA ODESSA YATES, MINORS, BY GARY HENDERSON, THEIR GUARDIAN AD LITEM; AND JEWELL MAXINE YATES, PLAINTIFFS v. J. W. CAMPBELL ELECTRICAL CORPORATION, REX DAVID BASS, AND THE NORTHAMPTON COUNTY BOARD OF EDUCATION, DEFENDANTS, AND J. W. CAMPBELL ELECTRICAL CORPORATION AND REX DAVID BASS, THIRD-PARTY PLAINTIFFS v. TESSIE O. YATES, THIRD-PARTY DEFENDANT

No. 886SC1212

(Filed 5 September 1989)

1. Negligence § 59.1— turning around on school driveway— licensees rather than invitees

Although a high school was open to the public for an athletic event at the time of plaintiffs' accident, plaintiffs were

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

licensees rather than invitees while on a school driveway where they were not on the school property for any purpose for which it was open to the public but merely drove their vehicle onto the driveway in order to turn around.

2. Negligence § 59.2— child licensee—accompaniment by adult—level of care by landowner

While a landowner owes a higher level of care to a young child who is unable to appreciate a potential danger even though he is a licensee, this higher level of care is not owed when the child is accompanied by a parent or other custodial adult who has full knowledge of the potential hazard.

3. Negligence § 59.2— minor licensees—duty of care by landowner—unawareness of children's presence on property

Defendant board of education did not owe a higher measure of care to the minor licensees while the minors were on school property where the board was unaware that the minors were on its property.

4. Evidence § 47— expert in traffic design—incompetency to state opinion on legal questions

An expert in civil and traffic engineering and highway design was not competent to render an opinion that defendant board of education showed "substantial disregard for the lives and safety of motorists using the driveway in question" by "actively" allowing cars to park in the driveway, since the opinion stated legal conclusions, and the witness was not competent to render any opinion on legal questions.

5. Negligence § 59.3— action by licensees—design and maintenance of driveway—ordinary negligence—summary judgment for landowner

Summary judgment was properly entered for defendant school board in an action by plaintiff licensees to recover for injuries received in a collision while plaintiffs' vehicle was backing out of a school driveway where plaintiffs' forecast of evidence showed that defendant's negligence, if any, in the design and maintenance of its driveway was at most ordinary and passive in nature, and plaintiffs failed to forecast evidence that defendant was either willfully or wantonly negligent or that it acted to increase the danger while plaintiffs were on its property.

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

APPEAL by plaintiffs from *Brown, Frank R., Judge*. Judgment entered 1 July 1988 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 11 May 1989.

Plaintiffs instituted this civil action on 12 May 1987 by the filing of their complaint in which they seek damages for injuries sustained when the vehicle in which they were riding was backed out of a driveway in front of Northampton High School West, which driveway was under the control of defendant Northampton Board of Education. Plaintiffs' vehicle collided with another vehicle driven by defendant Rex David Bass.

Plaintiffs' complaint alleges, *inter alia*, that defendant Board of Education was negligent in improperly designing the entrance to the parking lot in front of the high school because there is only one way to enter and exit the parking lot; that it failed to maintain the parking lot in a reasonably safe condition; and that it failed to properly direct traffic out onto the highway, or provide caution signals or adequate lighting. On 28 March 1988, plaintiffs moved to amend their complaint to allege, in the alternative, that if plaintiffs were held to have the status of licensees rather than invitees, that defendant Board of Education's negligence be deemed to be active, as well as willful and wanton. This motion was granted on 18 July 1988.

The defendant Board of Education's answer to the original complaint denied negligence. On 8 March 1988, defendant Board of Education moved for summary judgment, and the motion was granted on 1 July 1988. Plaintiffs gave notice of appeal to this Court in apt time.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, and Koonz, McKenney and Johnson, by William P. Lightfoot, for plaintiff-appellants.

Robert E. Smith for defendant-appellee Northampton County Board of Education.

JOHNSON, Judge.

Viewed in the light most favorable to plaintiffs, as we are required to do on motion by defendant for summary judgment, the evidence tends to show the following: On 2 January 1985, plaintiff Jewell Maxine Yates and her two children, plaintiff Lief Cymone Yates, then six months of age, and plaintiff Bianca Odessa Yates,

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

then three years, were passengers in a 1982 Chevrolet van being operated by third-party defendant Tessie O. Yates. At approximately 5:45 p.m., it was dark and raining when Tessie Yates drove the van into a driveway to turn around in front of Northampton High School West from highway 186 which bounds the school on the south. Plaintiffs, who are residents of Washington, D.C., did not know that the driveway had no outlet and necessitated coming out in the same place they entered. There was a basketball game going on at the school when plaintiffs drove in. None of the plaintiffs, however, exited the van after it entered the driveway. Tessie Yates then backed the van straight out onto the westbound lane of highway 186. Plaintiffs' van was then hit on the passenger side by an oncoming automobile owned by defendant J. W. Campbell Electrical Corporation and driven by defendant Rex David Bass. Defendant Bass was traveling in the westbound lane of highway 186 when he collided with plaintiffs' van. Defendants Bass and Campbell Electrical Corporation are not involved in this appeal.

The issue before us is whether the trial court erred in granting summary judgment in favor of defendant Northampton County Board of Education (hereinafter the defendant). Summary judgment is appropriate for a defendant only when there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E.2d 363 (1982). If the forecast of evidence, viewed in the light most favorable to plaintiff, shows that he will be unable to make out a *prima facie* case at trial, then defendant is entitled to summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

[1] First, plaintiffs urge us to reverse the trial court's order because they contend that there is a genuine issue of material fact regarding their status while on the public property under defendant's control. They argue that their status was that of invitee rather than licensee, and that therefore defendant owed them the corresponding higher duty of care. We disagree.

Our Supreme Court has set forth the distinction between an invitee and a licensee as follows:

The distinction between an invitee and a licensee is determined by the nature of the business bringing a person to the premises. A licensee is one who enters on the premises with the possessor's permission, express or implied, *solely for his own purposes* rather than the possessor's benefit. An invitee is a person who

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979); *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959).

Mazzacco v. Purcell, 303 N.C. 493, 497, 279 S.E.2d 583, 586-87 (1981) (emphasis in original).

Plaintiffs urge, however, that their status while on defendant's driveway was that of invitee because the high school is public property and at the time was open to the public for an athletic event. In support of their argument plaintiffs cite us to *Walker v. Randolph County*, 251 N.C. 805, 112 S.E.2d 551 (1960). In *Walker*, the plaintiff was injured when she fell down stairs in the Randolph County Courthouse. At the time she was reading notices of the public sale of real property posted on a bulletin board which extended about nineteen inches over an unguarded stairway leading to the basement. In upholding a verdict for the plaintiff, the Court found her to be an invitee rather than a mere licensee:

G.S. 1-339.17 requires that notice of public sale of real property shall be posted at the courthouse in the county in which the property is situated, for thirty days immediately preceding the sale. The fact that such notices are required to be posted, a person interested in such notices and who seeks to find the same on the bulletin board maintained by the county for such purpose, is not a mere licensee but an invitee, and we so hold.

Id. at 811, 112 S.E.2d at 555.

We think the situation in *Walker* is clearly distinguishable from that in the case *sub judice*. The *Walker* plaintiff was in the public building for the purpose of looking for a public notice which, by statute, was required to be posted there. She was there for one of the purposes for which the building was open to the public. Conversely, the plaintiffs in the instant case were not on the school property for any purpose for which it was open to the public. Plaintiff Jewell Maxine Yates admitted in one set of interrogatories that no one in her van attended the athletic event taking place at Northampton High School West. She also made the following statements in a different set of interrogatories:

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

21. Where were you coming from at the time of the accident?

ANSWER: The District of Columbia.

22. Where were you going at the time of the accident?

ANSWER: To take my grandmother home.

Although plaintiffs allege in their unverified complaint that they attended the sporting event, they candidly admit in their brief that they "pulled into the Defendant's driveway to turn around." Unlike the plaintiff in *Walker*, the Yates plaintiffs were there solely for their own benefit and not in response to any express or implied invitation of defendant's.

We find support for our position in the case of *Martin v. City of Asheville*, 87 N.C. App. 272, 360 S.E.2d 467 (1987). In *Martin*, the plaintiff, an ambulance attendant employed by Buncombe County, was gratuitously permitted by oral agreement between the County and the City of Asheville to use fire station facilities owned by the City. Plaintiff was injured when he slipped and fell on a pool of diesel fuel in the fire station as he crossed the station to give the keys to the ambulance to a crew that was going to answer an emergency call. This Court held that plaintiff was at the city fire station solely for his own benefit and strictly as a matter of accommodation. Therefore, his status was that of mere licensee, not invitee. As in *Martin*, the plaintiffs in the case at bar were on defendant's property solely for their own accommodation and therefore have the status of licensees rather than invitees.

[2, 3] It is well settled in North Carolina that a landowner's duty of care to a licensee is to refrain from willful or wanton negligence, and from doing any affirmative acts which result in increased danger to the licensee while he is on the premises. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959); *Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E.2d 630 (1977). Plaintiffs, however, contend that even if the two minor plaintiffs were licensees, that the defendant owed them a higher degree of care because of their tender years. We recognize that a landowner owes a higher level of care to a young child who is unable to appreciate a potential danger even though he is a licensee. *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974). This higher level of care is not owed, however, when the child is accompanied by a parent or other custodial adult who has full knowledge of the potential hazard. *Freeze v.*

YATES v. J. W. CAMPBELL ELECTRICAL CORP.

[95 N.C. App. 354 (1989)]

Congleton, 276 N.C. 178, 171 S.E.2d 424 (1970). We think the instant case falls under the rule of *Freeze* since third-party defendant Tessie Yates, who was present and operating plaintiffs' van, should have realized the danger involved in backing out onto a highway at night. Plaintiffs, of course, assert that plaintiff Jewell Yates did not have full knowledge of the danger and therefore defendant owed a higher duty of care to the minor plaintiffs. We disagree, but find that the issue is moot, since the critical point is that there is no evidence that defendant was aware that the minor plaintiffs were on its property. Without such knowledge, defendant did not owe a higher measure of care to the young children. *Street v. Moffitt*, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

Last, allowing for the possibility that we would decide that plaintiffs lacked the status of invitee, as we have, plaintiffs urge us that summary judgment is inappropriate because defendant was willfully and wantonly negligent, and its negligence was active. We disagree.

In addressing this question, we note that under G.S. sec. 1A-1, Rule 56, when a party moving for summary judgment has presented sufficient evidence to show that at trial he would be entitled to a directed verdict, then the nonmoving party may not rely upon the mere allegations of his complaint, but must present a forecast of his evidence which would prevent the movant from being entitled to judgment as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979).

[4] For this purpose, plaintiffs present the affidavit of Ronald E. Kirk, an expert in the field of civil engineering, highway design, and traffic engineering. It was his opinion that defendant showed "substantial disregard for the lives and safety of motorists using the driveway in question" by "actively" allowing cars to park in the driveway on 2 January 1985. In order for a witness to be competent as an expert, he must have skill or experience in the subject about which he testifies. *Hopkins v. Comer*, 240 N.C. 143, 81 S.E.2d 368 (1954). We think that Mr. Kirk has ventured out of his areas of expertise by giving an opinion as to the defendant's state of mind as being in "substantial disregard for the lives and safety of motorists" and characterizing its conduct as "active." These are legal conclusions, and as a specialist in civil engineering, highway design, and traffic engineering, the witness is not competent to render an opinion on legal questions.

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

“ ‘Wilful and wanton’ negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others. ‘Carelessness and recklessness,’ though more than ordinary negligence, is less than wilfulness or wantonness.” *Siders v. Gibbs*, 31 N.C. App. 481, 485, 229 S.E.2d 811, 814 (1976) (citation omitted).

[5] Reviewing the record before us with these standards in mind, we find nothing to indicate that plaintiffs will be able to make out a *prima facie* case of willful or wanton negligence at trial. The principal of the high school testified that to his knowledge the driveway had never extended past the school and back to the street. Although he stated that he had previously discussed the possibility of installing a blinking light in front of the school to slow down logging trucks, this simply does not rise to the level of showing willful or wanton negligence.

Defendant’s negligence, if any, in the design and maintenance of its driveway was at most ordinary and passive in nature. Plaintiffs have failed to forecast evidence that defendant was either willfully or wantonly negligent or that it acted to increase the danger while plaintiffs were on the premises. Therefore, the trial court’s granting of summary judgment for the defendant Board of Education must be upheld.

Affirmed.

Judges COZORT and GREENE concur.

PHYLLIS DENISE HOWARD, RICHARD LEE HERRING, JOSHUA JAY HOWARD,
BY HIS GUARDIAN AD LITEM CHESTER C. DAVIS, JOHNNIE JAY HOWARD
AND NANCY HOWARD v. JAMES ANDREW PARKER, KELVIN DENARD
LONG, MARSHALL T. WILLS AND JEAN WILLS

No. 8821SC1317

(Filed 5 September 1989)

Automobiles and Other Vehicles § 91.5— automobile collision—intoxication alleged—punitive damages not submitted to jury

In an action to recover for personal injury and property damage resulting from an automobile collision, allegations of

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

intoxication alone are not a sufficient basis to permit a punitive damages claim to be submitted to the jury.

APPEAL by plaintiff from *Ross, Judge*. Judgment entered 23 August 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 June 1989.

This is a civil case in which the plaintiffs seek compensatory and punitive damages for personal injury and property damage resulting from an automobile collision. Defendant alleged contributory negligence. The trial court entered summary judgment for the defendant on the punitive damages claim.

At about 4:00 p.m. on 21 June 1987 plaintiff Phyllis Howard was driving south in the 1700 block of Pleasant Street in Winston-Salem in a 1983 Chevette owned by plaintiff Johnnie Howard. Plaintiffs Richard Herring and Joshua Howard, a minor, were passengers. Plaintiff Nancy Howard is Joshua's mother. Defendant James Parker was parked in a 1973 green Cadillac on the west curb of Pleasant Street facing north against a southbound flow of traffic in the nearest or west lane. Two vehicles, a car and a black van, were parked immediately in front of Parker facing south. As Ms. Howard proceeded south on Pleasant Street, the defendant edged his northbound car from in front of the van into the plaintiff's southbound lane of traffic. The cars collided head-on.

In her deposition Ms. Howard testified that the black van blocked her vision of Parker's car, and that she did not see Parker's car until the collision occurred. Richard Herring's deposition agreed.

Similarly, in his deposition Parker stated: "I had to pull out into the traffic to see what was coming, 'cause it's hard to see where I was parked at. And so as I was pulling out into the traffic, she came up, but it was—she was up on me too fast before I could back back in there, and we just hit head on." Parker also admitted that he had consumed two twelve ounce beers before noon that day and a third twelve ounce beer while at home for lunch, that he refused to take a breathalyzer test, and that he pled guilty to driving while impaired under the misapprehension that he was pleading guilty to failing to take the breath analysis test. As a result of his guilty plea, Parker was fined \$1,085 and served 14 days in jail.

Counsel for plaintiffs stipulated that pending claims against Kelvin Long, Marshall Wills, and Jean Wills will be dismissed after

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

this appeal is determined. Counsel also stipulated that the claims of Joshua and Nancy Howard "have been resolved and that said claims are no longer in dispute." Additionally, both Richard Herring and Johnnie Howard filed voluntary dismissals with prejudice. The matters remaining are Phyllis Howard's claim for compensatory and punitive damages against James Parker. Phyllis Howard appeals the trial court's entry of summary judgment on the punitive damages claim.

Peebles & Schramm, by John J. Schramm, Jr., for plaintiff-appellant.

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

EAGLES, Judge.

Plaintiff contends the trial court erred in granting summary judgment for the defendants. We disagree and affirm the court below.

I

Initially, we recognize this is an interlocutory appeal under both G.S. 1-277 and G.S. 7A-27. "Both G.S. 1-277 and G.S. 7A-27(d) provide for immediate appeal of a judicial order or determination that affects a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). "Since the order of the trial court dismissing plaintiff's claim for punitive damages did affect a 'substantial right' of the plaintiff . . ." this appeal is properly before us. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 109, 229 S.E.2d 297, 300 (1976).

II

Summary judgment is proper when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Summary judgment is "designed to allow a 'preview' or 'forecast' of the proof of the parties in order to determine whether a jury trial is necessary." *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903-04 (1981). "The determination of what constitutes a 'genuine issue as to any material fact' is often difficult." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). A genuine issue is one which can be maintained by substantial evidence. *Koontz v. City*

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

of *Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). A party may show that there is no genuine issue as to any material fact by showing that the party with the burden of proof in the action cannot produce substantial evidence which would allow that issue to be resolved in his favor. *Best v. Perry*, 41 N.C. App. 107, 109, 254 S.E.2d 281, 284 (1979).

The critical issue, then, is whether there is substantial evidence to support the plaintiff's punitive damage claim.

Punitive damages, as the descriptive name clearly implies, are awarded as a punishment. They are never awarded as compensation. . . . "They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful." [Citation omitted.] Punitive damages are never awarded merely because of a personal injury inflicted nor are they measured by the extent of the injury; they are awarded because of the outrageous nature of the wrongdoer's conduct.

Cavin's, Inc. v. Atlantic Mut. Ins. Co., 27 N.C. App. 698, 701-02, 220 S.E.2d 403, 406 (1975).

In personal injury cases sounding in negligence punitive damages cannot be awarded where the defendant's wrong amounted to no more than ordinary negligence; they can only be awarded where there is a higher level of misconduct, such as wilfulness, wantonness or recklessness that indicates at least an indifference to or a disregard for the rights and safety of others.

Hunt v. Hunt, 86 N.C. App. 323, 327, 357 S.E.2d 444, 447, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987).

Applying the foregoing principles of law to the instant case we believe the trial court correctly removed the punitive damages issue from the jury. Here the plaintiff relies on the defendant's alleged intoxication as the basis of her punitive damages claim. While we find that intoxication is a factor to be considered in determining whether a punitive damages claim should reach the jury, "we are not disposed to expand [the bases for the recovery of punitive damages] beyond the limits established by authoritative decisions of [our appellate courts]." *Craven v. Chambers*, 56 N.C. App. 151, 159, 287 S.E.2d 905, 910 (1982), *quoting Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956). That task lies solely

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

within the province of the General Assembly. Consequently, in the absence of additional legislation, we conclude that allegations of intoxication alone are not a sufficient basis to permit a punitive damages claim to be submitted to a jury.

Likewise we are not persuaded that the defendant's intent to turn into the lane of traffic was itself a wanton act. "[T]hough the vast majority of motor vehicular collisions result from intentional turns or acts of one kind or another, only a small percentage of such acts exceed the level of ordinary negligence." *Nance v. Robertson*, 91 N.C. App. 121, 124, 370 S.E.2d 283, 285, *rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988).

Plaintiff's reliance on *Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E.2d 711, *rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1984), is misplaced. In *Huff*, the plaintiff sought compensatory and punitive damages for injuries resulting from an automobile collision where the defendant was intoxicated. There the trial court allowed the defendant's Rule 12(b)(6) motion to dismiss. This court reversed, holding that earlier case law was "not inconsistent with the application of the doctrine of punitive damages against impaired drivers in certain situations without regard to the driver's motives or intent." *Id.* at 531, 315 S.E.2d at 714. However, the court went on to point out that the plaintiff there was never afforded the opportunity "to introduce any evidence regarding the conduct of the defendant including his intoxicated condition." *Id.* at 532, 315 S.E.2d at 715. In the instant case, the plaintiff has had an opportunity to present evidence to show a basis for her punitive damages claim. However, the evidence presented "at best discloses a breach of defendant's duty to exercise ordinary care." *Jarvis v. Sanders*, 34 N.C. App. 283, 286, 237 S.E.2d 865, 867 (1977).

King v. Allred, 76 N.C. App. 427, 333 S.E.2d 758, *rev. denied*, 315 N.C. 184, 337 S.E.2d 857 (1985) is also distinguishable. In *King*, the court found substantial evidence to warrant submission of a punitive damages issue to the jury. The defendant readily admitted her intoxication on cross-examination and clearly displayed a wanton disposition. She testified:

I could feel the effects of the beer on me as I started driving my automobile out onto the road and down the service road. As I proceeded down the roadway, I was intoxicated

HOWARD v. PARKER

[95 N.C. App. 361 (1989)]

to the extent I was unable to operate my car in a careful and proper manner.

* * *

I knew I was drunk before I got into the car. I didn't think about whether I could operate the car safely or not when I got in. I knew I was drunk. Knowing I was drunk, I got behind the wheel of the car.

Id. at 431, 333 S.E.2d at 760.

We note that *Ivey v. Rose*, 94 N.C. App. 773, 776, 381 S.E.2d 476, 478 (1989), contains language which states that:

Defendant's intentional act of driving while impaired in violation of G.S. 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.

In *Ivey* we note that there was a rear-end collision in which defendant's vehicle, traveling at about 45 miles per hour, rammed into plaintiff's standing vehicle, the defendant had a breathalyzer reading of .18 and had failed four sobriety performance tests, and the evidence from the investigating officer that defendant's face was flushed, her eyes were glassy and that she was not steady on her feet. In the officer's opinion defendant Rose was impaired.

Here the evidence does not support a finding of wantonness: there is no breathalyzer reading, though defendant pleaded guilty to driving while impaired and admitted having consumed three beers earlier in the day. The complaint alleging impairment is not verified; there are no affidavits or depositions of witnesses to the defendant's impairment. Though the accident report is part of the record, it is not clear what the officer's notations on the report indicate regarding drinking by defendant and impairment.

Accordingly, we believe that *Ivey, supra*, like *King* and *Huff*, is distinguishable on its facts and that summary judgment on the punitive damages claim was proper based on the record before us.

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

III

Finally, because of our disposition of the summary judgment issue, we need not reach the constitutional issue raised by the defendants.

For the reasons stated, the judgment of the trial court is
Affirmed.

Judges PARKER and ORR concur.

BERNIE R. BARNES, PLAINTIFF v. FORD MOTOR COMPANY, DEFENDANT

No. 8811DC1242

(Filed 5 September 1989)

1. Contracts § 20.1— lease of tractor— tractor destroyed by fire— no fault of lessee— contract rescinded— return of advance rent

In an action to recover a pro rata share of the annual rent previously paid by plaintiff to defendant for lease of a tractor which was destroyed by fire halfway through the term of the lease, evidence was sufficient for the jury to find that plaintiff was not at fault for the destruction of the tractor and that he was therefore entitled to have the contract rescinded and the monies advanced returned where the lease required plaintiff to store the tractor only at the address shown on the face of the lease; this address was the plaintiff's residential postal address; plaintiff actually stored the tractor in a barn located on his farm property less than a mile from his residence; and the use of plaintiff's mailing address could reasonably be interpreted to mean the location of plaintiff's farming operations, not a precise location on the farm where the tractor was to be stored.

2. Contracts § 20.1— lease of tractor— destruction by fire— risk of loss on lessor— rescission of contract based on impossibility of performance

In an action to recover a pro rata share of the annual rent previously paid by plaintiff to defendant for lease of a tractor which was destroyed by fire halfway through the term

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

of the lease, there was no merit to defendant's contention that the parties impliedly allocated the risk of loss to plaintiff because the tractor was in his care, custody, and control at the time of the fire and that the doctrine of impossibility of performance therefore would not be available to rescind the contract and void further performance, since the clause in the parties' contract allocating the burden of obtaining insurance against loss due to fire to defendants contemplated that the parties at least implicitly agreed that the defendant had assumed the risk of loss due to fire, and this was further indicated by the fact that defendant retained all of the insurance proceeds.

3. Contracts § 20.1— lease of tractor—destruction by fire—sufficiency of insurance to cover amounts due under lease—issue not submitted—contract rescinded for impossibility of performance

The trial court did not err in refusing to submit as an issue whether the insurance proceeds from destruction of a tractor by fire were sufficient to pay defendant all amounts due under the agreement for lease of the tractor by plaintiff, since the leased tractor was destroyed without fault of plaintiff; the contract was discharged; plaintiff was no longer liable for any of the executory rent payments under the lease; and defendant had been compensated for the value of the destroyed tractor as well as all of the rents owed it through the date the tractor burned.

4. Contracts § 20.1— lease of tractor—destruction by fire—impossibility of performance—instruction proper

The trial court properly instructed on the doctrine of impossibility of performance due to destruction of the subject matter of the contract, since the very nature of the contract, a lease agreement, contemplated the continued existence of the tractor as a condition to the perpetuation of the lease.

5. Trial § 13.1— jury's inspection of lease during deliberations—discretion of trial court

It was within the trial court's discretion to refuse to allow the jury to inspect the parties' lease during its deliberations.

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

6. Attorneys at Law § 7.5— preparation to defend against punitive damages claim—motion for attorney's fees should have been granted

Plaintiff's action was primarily one in the nature of contract, and plaintiff's allegation of defendant's "willful" refusal to pay plaintiff did not give rise to a cause of action sounding in tort and so did not subject defendant to liability for punitive damages; therefore, defendant's motion under N.C.G.S. § 6-21.5 for attorney fees connected with its preparation to defend against the punitive damages claim should have been granted.

APPEAL by defendant from *Pridgen (Elton C.)*, Judge. Judgment entered 13 June 1988 *nunc pro tunc*. Heard in the Court of Appeals 21 August 1989.

Plaintiff is a farmer and grocery store owner in Selma, North Carolina. On November 23, 1982 plaintiff leased a Ford 2-W10 dual-wheel tractor from B&W Tractor, Inc. for a term of five years. Lease payments were to be made annually on or before November 23rd in the amount of \$7,372.71. As specified in the lease, the defendant maintained liability insurance on the Ford tractor to protect itself and plaintiff against fire, theft or similar casualty. Although not required by the terms of the lease, the plaintiff also obtained liability insurance on the tractor. The lease required the plaintiff to store the tractor only at the address shown on the face of the lease. This address was the plaintiff's residential postal address. Plaintiff actually stored the tractor in a barn located on plaintiff's farm property less than a mile from his residence.

On April 11, 1986, the plaintiff's barn as well as the leased Ford tractor were completely destroyed by fire. The cause of the fire was undetermined. Plaintiff's insurer issued a check in the amount of \$9,889.89 jointly payable to plaintiff and defendant. Defendant also received a check in the amount of \$9,111.11 from its own insurer as a result of the tractor's loss. The actual cash value of the tractor at the time it was destroyed was approximately \$18,040.00. Defendant has retained the entire \$19,000.00 represented by these two checks.

Plaintiff filed this action seeking recovery of a *pro rata* share of the annual rent previously paid to defendant for May-November 22, 1986 and seeking punitive damages for Ford Credit's alleged willful refusal to refund rents previously paid. The trial court dis-

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

missed plaintiff's claim for punitive damages. The jury found for the plaintiff on the breach of contract claim and returned a verdict for \$5,000.00, which was later amended on plaintiff's motion to \$4,545.00.

Defendant appeals and we affirm in part and reverse in part.

Thomas H. Lock for plaintiff-appellee.

Faison & Brown, by Aida Fayar Doss and Mark C. Kirby, for defendant-appellant.

LEWIS, Judge.

Defendant first assigns as error denial of its motions for directed verdict and judgment notwithstanding the verdict. A motion for directed verdict presents a question of law as to whether plaintiff's evidence is sufficient for submission to the jury. *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982). The evidence is considered in the light most favorable to the plaintiff. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E.2d 816 (1981). A motion for judgment notwithstanding the verdict is technically a renewal of the motion for a directed verdict, *Harvey v. Norfolk Southern Railway Company, Inc.*, 60 N.C. App. 554, 299 S.E.2d 664 (1983), and the same standard of the sufficiency of the evidence is applied. *Snider v. Dickens*, 293 N.C. 356, 237 S.E.2d 352 (1977).

[1] Plaintiff presented sufficient evidence to submit the case to the jury on the issue of rescission of the contract based upon destruction of the subject matter of the lease agreement. Where the continued existence of the subject matter of a contract is essential to the performance of the contract and the subject necessary for performance is destroyed without the fault of either party, the contract is discharged or may be rescinded. *Blount-Midyette & Company v. Aeroglide Corporation*, 254 N.C. 484, 487, 119 S.E.2d 225, 227 (1961). Before plaintiff can seek rescission based upon this doctrine, he must show the property was destroyed without fault by him. *Id.*; *Pasquotank and North River Steamboat Company v. Eastern Carolina Transportation Company*, 166 N.C. 582, 82 S.E. 956 (1914).

Defendant contends that plaintiff was at fault for the destruction of the tractor because he failed to store the tractor at the residential address listed in the lease agreement. However, viewed

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

in the light most favorable to the plaintiff, the evidence was sufficient to be submitted to the jury and a jury could find that the parties intended to require the lessee to use the leased tractor only on his own farm except with the defendant's written permission. Giving the plaintiff the benefit of every reasonable inference, the use of his mailing address could be reasonably interpreted as showing the location of plaintiff's farming operations and not to designate the precise location on the farm where the tractor was to be stored. The plaintiff cannot be faulted for storing the tractor in his barn, a customary storage place for such farm implements.

In *Blount-Midyette & Company v. Aeroglide Corporation, supra*, the defendant Aeroglide Corporation had contracted with plaintiff to make certain installations of machinery and equipment in, and alterations to, plaintiff's grain elevator for a price of \$23,650.50. 254 N.C. at 485. The defendant was to furnish all labor, materials and equipment necessary to perform the contract. The contract also provided that the plaintiff would close down the operation of its grain elevator and turn it over to the defendant's control on July 22, 1957. Two-thirds of the contract price was payable to the defendant on August 1, 1957, with the balance due on completion of the work by August 27, 1957. On August 16, 1957 the elevator was destroyed by fire. *Id.* Prior to the fire, plaintiff had advanced to the defendant \$16,000. Plaintiff filed suit to recover this amount less a credit for \$1,200 for improvements not destroyed by the fire. The Court affirmed the verdict in plaintiff's favor. Like the plaintiff in *Blount*, Barnes is entitled to monies advanced under the lease agreement. The evidence was sufficient for the jury to find that he was not at fault for the destruction of the tractor and therefore that he was entitled to have the contract rescinded and the monies advanced returned.

[2] Defendant also argues that the parties impliedly allocated the risk of loss to the plaintiff because the tractor was in plaintiff's care, custody and control at the time of the fire. If the allocation of the risk of loss was on the plaintiff, the doctrine of impossibility of performance would not be available to rescind the contract and avoid further performance. *Fraver v. North Carolina Farm Bureau Mutual Insurance*, 69 N.C. App. 733, 318 S.E.2d 340, *cert. denied*, 312 N.C. 492, 322 S.E.2d 555 (1984). However, on the present facts, we find that the risk of loss was not on the plaintiff. Paragraph 3 of the lease agreement requires the defendant to maintain in-

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

insurance on the leased tractor to protect the defendant's ownership of the equipment from fire. This clause in the contract allocating the burden of obtaining insurance against loss due to fire to the defendants contemplates that the parties at least implicitly agreed that the defendant had assumed the risk of loss due to fire. This is further indicated by the fact that the defendant has retained all of the insurance proceeds.

Defendant's motions for directed verdict and judgment notwithstanding the verdict were properly denied.

The defendant also excepts to the issues presented and the instructions given to the jury. The following issues were submitted to the jury:

1. Was the tractor leased by the plaintiff, Bernie R. Barnes, from the defendant's assignor, B & W Tractor Company, destroyed by fire without fault of the plaintiff?
2. Is the plaintiff, Bernie R. Barnes entitled to rescind the leasing contract between the plaintiff and the defendant, Ford Motor Credit Company?
3. What amount, if any, is the plaintiff entitled to recover of the defendant?

[3] The defendant asserts as error the failure of the trial court to also submit to the jury its proposed issue, which read: "Were the insurance proceeds sufficient to pay Ford Motor Credit Company all amounts due under the lease?" The trial court's refusal to submit this issue to the jury was proper because the leased tractor was destroyed without fault of the plaintiff, and the contract was therefore discharged. *Pasquotank, supra* at 585, 82 S.E. at 957 (1914). Therefore, the plaintiff was no longer liable for any of the executory rent payments under the lease and the defendant was not entitled to submit this issue to the jury. The defendant has been compensated for the value of the destroyed tractor as well as all of the rents owed it through the date it burned. Defendant is not entitled to any further rents from the plaintiff nor to that portion of the rent the plaintiff paid in advance for the seven-month period after the tractor was destroyed and not replaced by the defendant.

[4] Defendant also objects to the trial court's instructions on the doctrine of impossibility due to destruction of the subject matter

BARNES v. FORD MOTOR CO.

[95 N.C. App. 367 (1989)]

of the contract. Specifically, the defendant assigns as error the premise that the parties to this lease contemplated the continued existence of the tractor as a condition to the completion of the lease term. We find that the very nature of the contract contemplated the continued existence of the tractor as a condition to the perpetuation of the lease. The lease was for the provision of a tractor for a five-year term. The contract stated that the tractor was to be returned at the end of the lease agreement and thus implies that the parties assumed that the plaintiff would be in possession of the tractor for the entire five-year period. The continued existence of the tractor was a condition precedent to plaintiff's annual rent payments. The fire which destroyed the tractor rendered the defendant's performance impossible and the judge's instructions on this doctrine were proper. We find no error.

[5] Defendant further assigns as error the refusal of the trial judge to allow the jury to inspect the lease during its deliberations. The decision to allow the jury to return to the courtroom and view exhibits is within the sound discretion of the trial court. *Nelson v. Patrick*, 73 N.C. App. 1, 326 S.E.2d 45 (1985).

In *Nelson v. Patrick*, the jury requested to review some of the plaintiff's medical bills during its deliberations. The court inquired whether defendants objected to sending the bills to the jury room. Defendants did object and the court sustained the objection. 73 N.C. App. 13, 326 S.E.2d at 53. The court then ruled in its discretion and allowed the jurors to return to the courtroom and pass the evidence among them. *Id.* Defendants objected but were overruled. In upholding the ruling of the trial court, we stated, "we find no authority, however, which prohibits the court from permitting the jury to view the exhibits in the courtroom in the presence of the parties. In that setting, where subject to objections by the parties and supervision by the court, the viewing may aid the fact-finding process." *Id.* at 14, 326 S.E.2d at 53. We analogized our ruling in *Nelson* to the similar rule contained in G.S. 15A-1233(a) which is the statutory equivalent in criminal trials. In both cases the decision to allow the jury to view the evidence in the courtroom over counsel's objection is within the trial judge's sound discretion. We find no abuse of discretion here.

[6] Finally, defendant asks that its motion for attorney fees on the issue of punitive damages be reversed. We agree with the defendant and reverse the denial of its motion for attorney fees

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

on this issue. The law is well settled in North Carolina that punitive damages in contract may not be recovered except for breach of contract to marry, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979); *Newton v. Standard Fire Insurance Company*, 291 N.C. 105, 229 S.E.2d 297 (1976); *King v. Insurance Company of North America*, 273 N.C. 396, 159 S.E.2d 891 (1968), or breach of contract to purchase a burial plot or funeral service, *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 343 S.E.2d 228 (1986), unless the breach of contract also constitutes identifiable tortious conduct, accompanied by some element of aggravation. The present case is primarily one in the nature of contract and is not within any of these narrowly recognized exceptions. Plaintiff's allegation of defendant's "willful" refusal to pay plaintiff does not give rise to a cause of action sounding in tort and therefore does not subject the defendant to liability for punitive damages. Defendant's motion under G.S. 6-21.5 for attorney fees connected with its preparation to defend against the punitive damages claim should have been granted and we remand for judgment accordingly.

Affirmed in part and reversed in part.

Chief Judge HEDRICK and Judge ORR concur.

ANGUS TINDALL AND WIFE, ELIZABETH TINDALL, PLAINTIFFS v. NORMA WILLIS, ROBERT DARRELL WILLIS, KERRY WILLIS, DIANNE WILLIS, AND BRENDA W. LONG, DEFENDANTS

No. 883DC1251

(Filed 5 September 1989)

1. Appeal and Error § 45— failure to cite authorities—question not considered

The Court of Appeals declined to review a question presented on appeal where defendants failed to comply with Rule 28(b)(5) of the N.C. Rules of Appellate Procedure in that their question for review revealed no citation of any authorities.

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

2. Judgments § 37.5— ownership of real property—prior judgment—res judicata

The trial court in an action concerning ownership of real property correctly found that a prior judgment was *res judicata* as to the location of the boundary line where the court relied upon a judgment in a prior processioning action to determine the location of the boundary line between two adjacent parcels of land involving the present parties' predecessors in interest. Although the court may not have totally complied with N.C.G.S. § 38-3, the court strictly observed the statutory provisions in all material respects.

APPEAL by defendants from *Ragan, James E., III, Judge*. Judgment entered 3 June 1988 in District Court, CARTERET County. Heard in the Court of Appeals 16 May 1989.

Plaintiffs instituted this civil action claiming ownership of a tract of land and praying for injunctive relief as well as damages for trespass and slander of title. By way of answer, defendants denied every material allegation of plaintiffs' complaint and filed a G.S. sec. 1A-1, Rule 12(b)(6) motion for dismissal.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by J. Christy Maroules, for plaintiff-appellees.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for defendant-appellants.

JOHNSON, Judge.

Plaintiffs in the present action are successors in interest to certain real property whose conveyance is recorded in Book 466, Page 70, Carteret County Registry. Their predecessors in interest, as well as defendants' predecessors in interest, were involved in a similar controversy over the same tract in 1964. At that trial two issues were presented to the jury which are as follows: (1) "Are the petitioners [plaintiffs' predecessors in interest] the owners of or entitled to the possessions of land as described in the complaint?" and (2) "Is the true dividing line between the lands of Petitioner and the lands of respondent [defendants' predecessors in interest] the lines shown as AB on Plaintiffs' Exhibit B?" Both questions were answered "yes" by the jury. In its judgment the court designated the boundary line as follows:

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

Beginning at the center of the lane lying between the lands of the Petitioners and Irvin Davis Heirs, on the east side of the main road through the Community of Davis; thence with the centerline of the public lane or road S 56-30 E, 740 feet, more or less, to the highwater mark of the waters of Core Sound.

On 21 May 1975 respondent in the first action (defendants' predecessor in interest) filed a motion to vacate the 1966 judgment. Before the motion was heard, respondent died and his widow (a defendant in the present action) was substituted as a party as administratrix of her husband's estate. On 8 March 1979, an order was entered denying respondent's request.

In 1982, petitioners' heirs conveyed the parcel of property which lies at the heart of the dispute to the plaintiffs. They installed a bulkhead on their property and then attempted to sell it. Defendant in the case *sub judice*, Norma Willis, then informed plaintiffs' real estate agent that she owned the property plaintiffs were attempting to sell. Defendants then continued to go upon the property and plaintiffs then filed suit.

At the trial of this matter, the surveyor, James L. Powell, testified that he had surveyed this property in 1975 and that he surveyed the center of the road as designated in the 1964 judgment. He testified to the following:

Q. Now, sir, in surveying this property, how did you use the map that you have which is before you in the Court file, sir?

A. It's along with the judgment. The judgment—you don't want me to read—the best of my knowledge, described the line on this map, and the judgment defines the beginning point as the center of the road between the property of Ervin Davis and Ross Davis. Those two properties were pointed out to me and the road was shown to me.

The trial court made the following pertinent findings of fact in its 2 June 1988 judgment:

4. That judgment was entered in said cause on the 5th day of March, 1966 by the Honorable Joseph W. Parker, Judge of the Superior Court presiding, which Judge decreed the true boundary line between the lands of the Petitioner and the lands of the Respondent, as defined in accordance with the line AB on Plaintiffs' exhibit B as filed in said cause . . .

. . . .

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

6. That the beginning corner of the old road as shown on the Powell map was established correctly by Powell, but as to whether or not said line as shown on the Powell map is down the center of the existing road is difficult for the Court to determine; however, the Court is satisfied that the line is substantially correct. However, the court cannot determine the exact line of the boundary line, since the Superior Court did not run and mark the boundary line in accordance with North Carolina General Statutes sec. 38-3(c) in 75-CVS-215.

7. The Court further finds as a fact that the actual location of the center of the road is not necessary for this Court to determine that there has been actual trespass by the Defendants, since they have all testified that they have gone on the property of the Plaintiffs in an area that would be substantially north of said road, regardless of where the exact center would be.

8. That the Court finds that the boundary line is located substantially as the plaintiff herein contends, (the boundary line as established by Powell Surveying) however, the Court is without jurisdiction to place the boundary line upon the ground. Only the Superior Court has jurisdiction to run and mark the boundary line in accordance with North Carolina General Statute sec. 38-3.

.....

11. That the judgment rendered in 75-CVS-215 constitutes *res judicata* as to the boundary between the parties hereto, as respective successors in interest to the parties in the Superior Court proceeding.

.....

13. That the Plaintiffs' predecessors in title, and especially Sterling Dixon, exercised control over the property in question for many years, using it for the operation of a store, building docks and landing area, in which he ferried automobiles, hunting and fishing partys [sic] to Core Banks.

14. That the claim of use by the Defendants was not to the exclusion of the Plaintiffs, since as shown on the aerial photographs, Plaintiffs' predecessors in title have built structures, operated a business, parked cars, had ramps and loading facilities, all located on this property, and used by them.

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

Based upon these findings of fact the trial court concluded that the 1966 judgment was *res judicata* as to the location of the boundary line between the parties' properties and that they were bound by it. In addition, the court concluded that defendants were liable for trespass and ordered the payment of nominal damages. From this judgment, defendants appeal.

On appeal, defendants present two questions for this Court's review, to wit: (1) whether the trial court erred in concluding that the 1966 judgment was *res judicata* on the question of the boundary line's location, and (2) whether the court's judgment was erroneous because the prior adjudicated boundary line was mislocated in that its description did not fit plaintiffs' deed description, plaintiffs failed to show proof of title, and the findings of fact and conclusions of law did not support the judgment.

[1] We note at the outset that defendants have failed to comply with the mandatory rules of appellate procedure. Rule 28(b)(5) of the N. C. Rules of Appellate Procedure provides in pertinent part that appellant's brief shall have "[a]n argument, to contain the contentions of the appellant with respect to each question presented. . . . The body of the argument shall contain citation of the authorities upon which the appellant relies."

Our study of defendants' second question for review reveals no citations of any authorities upon which they rely. Therefore, we decline to review this question and consider only assignment of error one.

[2] By this question defendants specifically contend that the 1966 judgment upon which the trial court relied to reestablish the boundary line cannot be *res judicata* because it was patently incomplete and ineffective. We disagree.

Defendants rely upon *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964), to support their argument that the court's failure to order compliance with G.S. sec. 38-3, which requires the court to issue an order to the surveyor to run and mark the boundary lines after they are determined by judgment in a processioning action, renders the 1966 judgment fatally defective. In *Pruden*, the Court reversed a clerk of court's entry of default judgment in a processioning action because petitioners failed to allege sufficient facts in their petition to constitute the location of the boundary line as required by G.S. sec. 38-3. "This provision requires

TINDALL v. WILLIS

[95 N.C. App. 374 (1989)]

that petitioner allege facts as to the location of the [disputed] line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from petitioner's description thereof." *Pruden* at 218, 136 S.E.2d at 608.

We therefore find *Pruden* clearly distinguishable from the facts in the case *sub judice*. Although the court may not have totally complied with G.S. sec. 38-3, we believe that the court strictly observed the statutory provisions in all *material* respects. *Pruden* at 217, 136 S.E.2d at 608, citing *Euliss v. McAdams*, 101 N.C. 391, 7 S.E. 725 (1888), and *Forney v. Williamson*, 98 N.C. 329, 4 S.E. 483 (1887).

Moreover, in *Whitaker v. Garren*, 167 N.C. 658, 83 S.E. 759 (1914), an action to recover land as well as damages for cutting and removing timber from a disputed portion of land between two adjacent tracts, the Court ordered a new trial because the trial court withdrew from the jury the determination of the boundary line between the two adjacent tracts which had been entered in a prior processioning action. On the issue of the *res judicata* effect of the judgment entered in the prior processioning proceeding on the action for damages which was before the court, our Supreme Court stated the following:

If the parties to the proceeding are mere occupants, the adjudication as to the dividing line does not affect the title, and only determines the right to possession on either side of the line; but if they are adjoining owners, and the location of the deeds and grants under which they claim is put in issue and determined, they cannot afterwards litigate this location and contend that the lines of their deeds and grants are *at some other place* than the one settled by the proceeding.

Whitaker at 662, 83 S.E. at 761 (emphasis in original).

Also, quoting *Coltrane v. Laughlin*, 157 N.C. 282, 287, 72 S.E. 961, 962 (1911), the Court stated the following:

'It is well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

material and relevant and were in fact investigated and determined on the hearing.'

Whitaker at 662, 83 S.E. at 761 (citations omitted).

In the case *sub judice*, the court relied upon a former judgment in a processioning action to determine the location of the boundary line between two adjacent parcels of land. The parties in the present action are successors in interest to the parties in the original suit.

We believe that the court correctly found as a fact that the prior judgment was *res judicata* as to the location of the boundary line. See *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). "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." *Pickard Roofing Co. v. Barbour*, 94 N.C. App. 688, 381 S.E.2d 341 (1989), citing *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E. 2d 254 (1986).

We have examined the court's findings against the record evidence before us and conclude that we are bound by them. Because we have found no reason to disturb the court's judgment, it is

Affirmed.

Judges COZORT and GREENE concur.

KEVIN THOMAS TOLBERT v. WILLIAM S. HIATT, COMMISSIONER NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 8825SC1206

(Filed 5 September 1989)

1. Automobiles and Other Vehicles § 2.4— breathalyzer test— additional request for sequential sample not required

An officer's original request that petitioner submit to a chemical breath analysis was sufficient to comply with the provisions of N.C.G.S. § 20-16.2(c) without an additional request before a second breath sample was taken. The statutes require the officer to request a chemical analysis based on

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

sequential breath samples and do not require a sequence of requests for separate chemical analyses. N.C.G.S. § 20-139.1(b3).

2. Automobiles and Other Vehicles § 2.4— refusal to remove portion of dollar bill from mouth—willful refusal to take breathalyzer

Petitioner willfully refused to take a breathalyzer test when he refused the breathalyzer operator's request that he remove the corner of a dollar bill from his mouth, since administrative regulations require the breathalyzer operator to determine that the person to be tested has not eaten in the fifteen minutes prior to the tests, and a reasonable method for determining that the person has not eaten is to prohibit him from placing foreign objects in his mouth.

3. Automobiles and Other Vehicles § 2.4— refusal of breathalyzer test—findings sufficient to support license revocation

The trial court's finding that petitioner willfully refused "without justification or excuse" to submit to a chemical analysis upon the request of the charging officer was a finding on the ultimate facts which supported the court's revocation of petitioner's driver's license.

APPEAL by petitioner from *Ferrell (Forrest A.)*, Judge. Judgment entered 17 August 1988 in Superior Court, CALDWELL County. Heard in the Court of Appeals 11 May 1989.

Wilson and Palmer, P.A., by David S. Lackey, for petitioner.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

GREENE, Judge.

This appeal arises from the Superior Court's affirmance of a Department of Motor Vehicles' order revoking petitioner's driving privileges for an alleged refusal to submit to a breathalyzer test. The evidence at the non-jury trial tended to show petitioner was arrested by Officer Floyd on 7 June 1987 for driving while impaired. After transporting petitioner to the sheriff's department, Officer Floyd noticed petitioner was chewing something which Floyd identified as a penny. Officer Floyd told petitioner "not to put anything in his mouth until we got in to see the breathalyzer operator."

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

At 1:45 a.m., Officer Floyd requested that defendant submit to a chemical analysis to be performed by Patrolman Burleson, a lawfully authorized and licensed breathalyzer operator. During the preparation of the breathalyzer, Patrolman Burleson observed petitioner had placed a piece of paper or foreign matter in his mouth. Patrolman Burleson asked petitioner to remove the substance from his mouth and instructed petitioner that "under North Carolina law if a subject places any foreign matter in his mouth that he could be considered a willful refusal," and a chemical test could not be administered "fairly as required by law." The first breathalyzer test was performed at 2:25 a.m., and the result was a blood/alcohol level of 0.16.

During the preparation for a second test, Patrolman Burleson again observed petitioner chewing on foreign matter which appeared to be the corner of a dollar bill. Patrolman Burleson advised petitioner three times to remove this foreign matter from his mouth or he would be reported as willfully refusing the test. On each of these three times, petitioner stated he did not have anything in his mouth. Despite petitioner's denial, Patrolman Burleson observed petitioner did have the corner of a dollar bill in his mouth. Patrolman Burleson asked petitioner to remove the object from his mouth. Petitioner refused to do so and Patrolman Burleson reported petitioner as willfully refusing the second test five minutes after obtaining the results of the first test.

Based on this evidence, the trial court found in pertinent part:

3. That the petitioner was taken before Patrolman Ken Burleson . . . who informed the petitioner orally and also gave petitioner a notice in writing of all of petitioner's rights as enumerated [by statute].

4. That the petitioner willfully refused, without just cause or excuse, to submit to a chemical analysis upon the request of the charging officer.

From the foregoing facts, the Court concludes that the petitioner is subject to revocation of license pursuant to N.C.G.S. Sec. 20-16.2(d) and the order of the respondent complained of is justified in fact and in law.

Defendant appeals.

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

The issues presented are: I) whether the evidence supported the trial court's finding that petitioner willfully refused without just cause or excuse to submit to a chemical analysis under N.C.G.S. Sec. 20-16.2(d); and II) whether the trial court's revocation was based on adequate findings of fact.

I

Section 20-16.2(c) (1983) states that, "the charging officer, in the presence of the chemical analyst who has notified the person of his rights under subsection (a), must request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but refusal does not preclude testing under other applicable procedures of law." Section 20-16.2(d) provides a procedure for revoking a petitioner's driver's license based on his or her refusal to submit to chemical analysis. After 1 January 1985, the regulations of the Commission for Health Services governing chemical breath analyses "must require the testing of *at least* duplicate sequential breath samples." N.C.G.S. Sec. 20-139.1(b3) (1983) (emphasis added). "A person's willful refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a willful refusal under G.S. 20-16.2(c)." The sense of the word "refusal" as employed in Section 20-16.2 is "the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey." *Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971).

[1] Petitioner first contends he did not willfully refuse to submit to a chemical analysis at the request of the charging officer as required under Section 20-16.2(c) since Officer Floyd did not request any additional chemical analysis after the first test was completed. However, the statutes require the charging officer to request a chemical analysis based on *sequential* breath samples—not a sequence of requests for separate chemical analyses. Thus, Officer Floyd's original request that petitioner submit to a chemical analysis was sufficient to comply with the requirements of Section 20-16.2(c). As this court held on similar facts, "the Legislature did not intend to prescribe such precise terminology or to impose 'such a rigid sequence of events as contended by' plaintiff. Such contrived precision is unnecessary for the protection of suspects and is clearly detrimental to the effective enforcement of drunk driving laws."

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

Mathis v. North Carolina Division of Motor Vehicles, 71 N.C. App. 413, 416, 322 S.E.2d 436, 438 (1984) (citations omitted).

Furthermore, it is undisputed that petitioner refused to follow the instructions of Patrolman Burlison to remove the dollar bill from his mouth in preparation for the second test. In *Bell v. Powell*, 41 N.C. App. 131, 135, 254 S.E.2d 191, 194 (1979), this court held that:

[T]he full import of G.S. 20-16.2(c) requires an operator of a motor vehicle . . . to take a breathalyzer test, which means the person to be tested must follow the instructions of the breathalyzer operator. A failure to follow such instruction, as the petitioner did in this event, provided an adequate basis for the trial court to conclude that petitioner willfully refused to take a chemical test of breath in violation of law.

However, petitioner contends that the above statement in *Bell* must be interpreted in light of the subsequent statement that, "the purpose of administering the breathalyzer test is to produce an accurate result. This is important for the operator of the motor vehicle as well as the State. To administer this test without producing the required result would render the act of the General Assembly useless." *Id.*

[2] Petitioner contends the State failed to show that petitioner's chewing on the corner of a dollar bill would affect the result of the breathalyzer test. However, Section 20-139.1(b) provides that the breathalyzer operator must perform the test according to the methods approved by the Commission for Health Services. Administrative regulations place an affirmative duty on the breathalyzer operator to "insure observation period requirements have been met." 10 N.C.A.C. 7B-0336. The "observation period" requires, among other things, that the chemical analyst determine that the person to be tested has not eaten "in the fifteen minutes immediately prior to the collection of a breath specimen . . ." 10 N.C.A.C. 7B-0102. The regulations do not specify how the breathalyzer operator shall discharge these responsibilities. A reasonable method for determining that the subject has not "eaten" in fifteen minutes is to prohibit him from placing foreign objects in his mouth. Thus, under *Bell*, we conclude petitioner refused the breathalyzer operator's proper instructions and thereby willfully refused to take the breathalyzer test under Section 20-16.2(c).

TOLBERT v. HIATT

[95 N.C. App. 380 (1989)]

II

[3] Petitioner contends, in any event, the trial court's Finding No. 3 was in fact a conclusion of law; therefore, petitioner contends there were no findings by the trial court to support its order of revocation. We disagree. Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature. *Joyner*, 279 N.C. at 234, 182 S.E.2d at 559. In a non-jury trial, Rule 52(a)(1) requires the trial court to "find the facts specially and state separately his conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. Sec. 1A-1, Rule 52(a)(1) (1983). However, the trial court need not recite every evidentiary fact presented at the hearing, but must only make specific findings on the ultimate facts established by the evidence that are determinative of the questions raised in the action and essential to support its conclusions. *Mitchell v. Lowery*, 90 N.C. App. 177, 184, 368 S.E.2d 7, 11 (1988). When findings are required, they must be made with sufficient specificity to allow meaningful appellate review. *Andrews v. Peters*, 318 N.C. 133, 347 S.E.2d 409 (1986). The purpose of this requirement is to permit the reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. *Wohlfahrt v. Schneider*, 82 N.C. App. 69, 76, 345 S.E.2d 448, 452 (1986).

The trial court's finding that petitioner willfully refused "without just cause or excuse" to submit to a chemical analysis upon the request of the charging officer was an ultimate fact finding indicating the trial court rejected all opposing inferences raised by petitioner's evidence that the refusal was not willful or was excused. As such, that finding permits adequate appellate review of the ultimate fact at issue. See *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Accordingly, we reject this assignment of error.

Affirmed.

Judges JOHNSON and COZORT concur.

IN RE APPEAL OF BOOS

[95 N.C. App. 386 (1989)]

IN THE MATTER OF: THE APPEAL OF MARGUERETTE BOOS FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE HYDE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1987

No. 8810PTC1281

(Filed 5 September 1989)

Taxation § 25.4— ad valorem taxes— method of land valuation arbitrary

Evidence was sufficient to support the North Carolina Property Tax Commission's findings of fact and its conclusion of law that the method of land valuation used by the Hyde County tax assessor was arbitrary and that that method produced a value for petitioner's property substantially in excess of the true value in money where the evidence tended to show that the county arrived at the land's value by averaging eight of fourteen comparable sales, omitting entirely six others; the comparable sales should have been adjusted to allow relevant comparisons with petitioner's parcel, then ranked in order of comparability; county witnesses set a figure of \$640 per front foot (sound side) without considering the suitability for building on petitioner's parcel which had two cemeteries, wetlands, and limited depth; petitioner valued her land at \$140,000, while the final assessed value of the property was \$331,000; petitioner had access to a public road over a narrow private path ten feet wide, but her property did not abut the public way; and there was evidence that septic tanks could not be built on petitioner's property.

APPEAL by Hyde County from the final decision of the North Carolina Property Tax Commission entered 6 June 1988. Heard in the Court of Appeals 6 June 1989.

This case concerns the real property tax valuation for a parcel described in part as follows: "beginning at a stake at the edge of Pamlico Sound at a point that bears N 14½ [degrees] E on the mid point of the Ocracoke Coast Guard tower and N 68½ [degrees] E on the spire of the turret of Ocracoke Lighthouse." The parties here are unusually interesting. Hyde County is one of our oldest and most renowned counties having been named for Governor Edward Hyde in 1712 and settled much earlier. Thad Eure, North Carolina Manual (1988). It is a paradise of nature

IN RE APPEAL OF BOOS

[95 N.C. App. 386 (1989)]

with broad, sunlit lowlands and miles of estuarine waterways. Its county seat, Swan Quarter, is well-named as it is the temporary haven for thousands of swans, in season. Its offshore treasure is Ocracoke Island where the notorious pirate Edward Teach met more than his match in the Royal Navy's Lieutenant Maynard in 1718. R. E. Lee, *Blackbeard the Pirate, A Reappraisal of His Life and Times* (1974).

Mrs. Marguerette Boos and her now deceased husband were "newcomers" to the island having arrived in 1952. At age 77, she is the librarian of the State's smallest library which has a space of 8 × 10 feet and some 3,000 volumes. Her approximately 4½ acres comprise a relatively large parcel of the limited 775 acres of privately owned land on the island. The majority of the island is part of Cape Hatteras National Seashore Recreational Area.

The original appraisal value of the total property was \$372,010.00. After appeals through the County Tax Department and the Hyde County Board of Equalization, the assessed value of the property was reduced to \$331,000.00. Mrs. Boos then appealed to the North Carolina Property Tax Commission which found the true value of the property to be \$162,850.00. Hyde County appeals.

Adams, McCullough & Beard, by Charles C. Meeker, for appellee Marguerette Boos.

Merriman, Nicholls & Crampton, P.A., by W. Sidney Aldridge, for appellant Hyde County.

LEWIS, Judge.

The octennial real property reappraisal for Hyde County pursuant to G.S. 105-286 was carried out effective 1 January 1987. The 4.5 acres of land owned by the taxpayer is located on Ocracoke Island, and consists of approximately 2.5 acres of high, sound front land, 1.1 acres of high, interior land, and .9 acres of wetlands. Two cemeteries are located on the property in which repose approximately 13 graves. A frame house on the property, described in the record as being in a poor state of repair is Mrs. Boos' home. She has access to a public road over a narrow private path ten feet wide, but her property does not abut the public way.

The Property Tax Commission sitting as the State Board of Equalization and Review under G.S. 105-290 exercised its preroga-

IN RE APPEAL OF BOOS

[95 N.C. App. 386 (1989)]

tive to take evidence *de novo* and consider the record as well. The Commission made extensive findings of fact and conclusions of law in reaching its determination of the property's value.

Upon appeal from the final decision of the Tax Commission, the scope of appellate review is defined by G.S. 105-345.2 which states in part:

(b) . . . The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. . . .

Our Supreme Court has said valuations fixed by the Commission shall be final and conclusive where no error of law or abuse of discretion is alleged. *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943). Further, the Commission "has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly. Such valuation so fixed is final and conclusive unless error of law or abuse of discretion is shown." *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 579, 160 S.E.2d 728, 733 (1968).

There is a presumption that ad valorem tax assessments are correct. *In re Odom*, 56 N.C. App. 412, 289 S.E.2d 83, *cert. denied*, 305 N.C. 760, 292 S.E.2d 575 (1982). The taxpayer has the burden

IN RE APPEAL OF BOOS

[95 N.C. App. 386 (1989)]

of proving by competent, material and substantial evidence that "(1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; and (3) the assessment *substantially* exceeded the true value in money of the property." *In re Appeal of Amp. Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975) (emphasis original). The question before us is whether there was substantial evidence to support the Commission's findings of fact and its conclusions of law that the method of evaluation by the Hyde County assessor was arbitrary and that that method produced a value substantially in excess of the true value in money.

Hyde County's assignments of error may be grouped into five categories. First, it contends that the taxpayer did not produce competent and material evidence that the county used an arbitrary method of valuation. Second, it contends that the taxpayer did not produce competent and material evidence that the county's value was substantially in excess of the true value in money. Third, it contends that the Commission's value of the property is not based on competent, material and substantial evidence. Fourth, the county assigns error to the opinion testimony of a lay witness, Mr. Senseney. Fifth, the county challenges certain findings of fact as not supported by the evidence. As to these five categories we find substantial evidence to support the findings and conclusions.

First, the county contends the taxpayer did not produce evidence that the county used an arbitrary method of valuation. The Commission's finding, supported by the evidence, is that the county had averaged eight of fourteen comparable sales, omitting entirely, six others. The comparable sales should have been adjusted to allow relevant comparisons with the Boos parcel then ranked in order of comparability. The use of the resulting figures was found to be arbitrary and the evidence supports it. Further, the county witnesses set a figure of \$640.00 per front foot (sound side) without considering the suitability for building on the parcel with two cemeteries, wetlands and limited depth. Setback requirements for the Coastal Area Management Act would significantly affect the extent of available building sites.

Second, the county contends the taxpayer did not produce evidence that the county's value was substantially in excess of the true value in money. Mrs. Boos valued the parcel at \$140,000.00, which she said was based on no particular expertise or knowledge

IN RE APPEAL OF BOOS

[95 N.C. App. 386 (1989)]

but was "out of the blue," though she did know of some other sales. We hold that the owner of real property may testify as to its value. The presence of or lack of an objective basis for such opinion goes to weight, not admissibility. Evidence by the county included several sales offered as "comparables." One of the county's witnesses, Mr. Bell, testified that the Wikstrom sale, comparable sale number one, was "far and away [the] most comparable sale." The "high, soundfront land" was valued at \$50,000 per acre and "high, interior acreage" at \$24,000 per acre for a 41.4 acre tract. The Commission considered this tract and others and in fact adopted the acreage values from the Wikstrom sale. The Commission's findings of fact stated the county had failed to consider that some of the other "comparable sales" lots were entirely buildable whereas the Boos property has .9 acres of wetlands and two cemeteries. The Commission also found the county did not consider limited access to the property or the cemeteries.

The county's third argument is that the value found by the Commission is not based on competent, material and substantial evidence. The Commission had the direct and cross examination testimony of the witnesses of both parties as well as extensive documentary evidence. There was competent, material and substantial evidence upon which the Commission could base its findings and conclusions. The maps and the testimony of the taxpayer indicated the property had no access but by a path owned by others. The county produced nothing to rebut that evidence. Mr. Senseney's evidence as to access in addition to that of the taxpayer could not have been prejudicial.

Fourth, the county assigns error to the opinion testimony of Mr. Senseney, a landowner on the island. He stated it was his opinion that one "[c]ouldn't put a septic tank on it." This testimony occurred in the context of discussing the CAMA (Coastal Area Management Act) regulations requiring setbacks applicable to that property and why there would be no room for a septic tank. We find no prejudice in the admission of this evidence.

As to the county's assertion that other findings of fact by the Commissioner were not supported by evidence, we disagree. "The weight to be accorded relevant evidence is a matter for the factfinder, which is the Commission." *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 712, 379 S.E.2d 37, 38 (1989).

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

We find the findings of fact and conclusions of the Commission are based upon and supported by competent, material and substantial evidence in the record.

The final order of the North Carolina Property Tax Commission is affirmed.

Affirmed.

Judges BECTON and PHILLIPS concur.

CFA MEDICAL, INC., PLAINTIFF v. W. FRED BURKHALTER, DEFENDANT

No. 8921DC192

(Filed 5 September 1989)

1. Appeal and Error § 6.2— motion to dismiss for insufficient process—denial not appealable

Defendant was not entitled to a review of the trial court's denial of his motion to dismiss for insufficient process since he was appealing from an interlocutory order; he failed to indicate what substantial right was affected by the order; avoidance of trial was not a substantial right entitling him to appeal; and any prejudice resulting from failure of the summons to contain the name of the county from which it was issued was alleviated when defendant received an extension for filing his answer.

2. Process § 14.3— foreign corporation—insufficient contacts with North Carolina—exercise of personal jurisdiction in violation of due process

Where defendant promised to receive and convey payment to plaintiff for plaintiff's services which were rendered in North Carolina, this action for breach of contract fell within the long-arm statute's requirements for personal jurisdiction. However, exercise of *in personam* jurisdiction over the nonresident defendant was not consistent with due process where the contract was solicited by plaintiff and entered into in Tennessee; there was no provision in the contract requiring defendant to perform services within North Carolina; defendant

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

performed all services under the contract outside North Carolina; for the life of the contract defendant was not in the state for any purpose; and defendant did not originate contact with any North Carolina market or industry. N.C.G.S. § 1-75.4(5)a.

APPEAL by defendant from *Biggs (Loretta C.)*, Judge. Order entered 5 January 1989 in District Court, FORSYTH County. Heard in the Court of Appeals 12 July 1989.

Plaintiff is a corporation duly organized under the laws of the State of North Carolina doing business in Forsyth County, North Carolina. Defendant is and has been a resident of Chattanooga, Tennessee since 1971. The defendant has never resided in North Carolina and has not traveled to North Carolina to conduct business since 1984. Plaintiff's representatives solicited the defendant and in October 1985 both parties entered into a contract in Chattanooga, Tennessee, whereby the defendant agreed to make sales calls on potential customers and solicit orders on behalf of the plaintiff in several states other than North Carolina. Between 31 October 1985 and 6 February 1986, the defendant obtained and submitted purchase orders from the TVA in Chattanooga, Tennessee and submitted the orders to the plaintiff in Forsyth County, North Carolina. The plaintiff filled the orders and shipped the goods purchased from its office in Forsyth County directly to TVA. TVA forwarded the full amount due to the defendant at his home in Chattanooga. Pursuant to the contract the defendant was then obligated to forward the cost of the goods sold together with 50% of the profit to the plaintiff. When the defendant failed to relay cost and 50% of the profit, plaintiff sued for breach of contract. The summons did not contain the name of the county from which it was issued.

Plaintiff filed this action to recover damages on breach of contract. Defendant moved to dismiss on the grounds of (1) lack of jurisdiction over person, N.C. Rule of Civil Procedure 12(b)2, (2) insufficiency of process, Rule of Civil Procedure 12(b)4, and (3) insufficiency of service of process, Rule of Civil Procedure 12(b)5. The District Court 1) denied the motion to dismiss for lack of personal jurisdiction, citing the presence of minimum contacts, 2) denied the motion to dismiss for insufficiency of summons, and 3) granted motion to dismiss for insufficiency of service of process provided that plaintiff was granted leave to make proper service

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

no later than 2 January 1989. Service was subsequently made within the time allowed.

Defendant appealed. Defendant requested this Court to issue a writ of certiorari on the judge's interlocutory order, excepted to the judge's denial to dismiss for insufficiency of summons, and excepted to the judge's denial to dismiss for lack of personal jurisdiction.

Burge, Miller and Meadows, by John A. Meadows, for plaintiff-appellee CFA Medical, Inc.

Craige, Brawley, Lüpfert & Ross, by William W. Walker, for defendant-appellant W. Fred Burkhalter.

LEWIS, Judge.

I

[1] Appellants ask this Court to issue a writ of certiorari to review the trial court's denial of defendant's motion to dismiss for insufficient process. We decline. This Court in *Fraser v. Di Santi* stated that "[a]n appeal does not lie from an interlocutory order unless the order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *cert. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). Defendant fails to indicate what substantial right is affected by the order. Avoidance of trial is not a substantial right entitling a party to appeal. *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). The defendant bases his claim of insufficiency of process on the absence of the county's name from the face of the summons. The defendant does have a substantial right to know where he is being summoned to appear. However, in the present case any prejudice which may have resulted from this defect was alleviated by the extension defendant received for filing his answer. In this instance the addresses of both plaintiff and plaintiff's attorney are located in the county where the summons was issued. Neither does the court see how hearing an appeal of the trial judge's order will facilitate a final resolution of the issues.

II

[2] Defendant also appeals denial of his motion for lack of personal jurisdiction. Analysis of a question of whether a nonresident de-

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

defendant is subject to the personal jurisdiction of our courts is a two-pronged procedure. *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985). First, the transaction must fall within the language of the State's long-arm statute. Second, the exercise of jurisdiction must not violate the due process clause of the Fourteenth Amendment. *Id.*

The relevant clause of the long-arm statute states that a non-resident defendant is subject to jurisdiction

in any action which . . . arises out of a promise made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the plaintiff.

G.S. 1-75.4(5)a. The record shows that the defendant had promised to receive and convey payment for plaintiff's services to plaintiff. The plaintiff did perform these services in North Carolina. We conclude that this case does fall within the long-arm statute's requirements for personal jurisdiction.

The second step of the inquiry is the determination of whether the court's exercise of *in personam* jurisdiction over the nonresident defendant is consistent with due process. Where the action arises out of defendant's contacts with the forum state, the issue is one of "specific" jurisdiction. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986). To establish specific jurisdiction, the court analyzes the relation among the defendant, cause of action, and forum state. *Id.* Although a contractual relationship between a North Carolina resident and an out-of-state party does not automatically establish the necessary minimum contacts with this state, a single contract may be sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this state. *Id. Burger King Corp. v. Budzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185-86, 85 L.Ed.2d 528, 545 (1985). In determining whether a single contract may serve as a sufficient basis for the exercise of *in personam* jurisdiction,

it is essential that there be some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.

Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986). For only then will the nonresident have acted in such a way such that "he can reasonably anticipate being haled into

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490, 501 (1980). Otherwise, exercise of *in personam* jurisdiction over a nonresident would violate standards of "fair-play and substantial justice." *Id.*

The issue before this Court is whether the defendant's contract with the plaintiff indicates "purposeful availment" when defendant has had no other contact with the state, when the contract was solicited by the plaintiff and entered into in Tennessee, and when defendant acts only to solicit bids on behalf of plaintiff, and relay payments. We conclude that a contract in which a nonresident defendant solicits bids for goods manufactured in North Carolina, does not in itself indicate the "purposeful availment" necessary to establish personal jurisdiction. The trial judge's order, as well as the plaintiff's brief, cite *Tom Togs, Inc. v. Ben Elias Industries Corp.*, *supra*, which exercised *in personam* jurisdiction over an out-of-state defendant who distributed products which the plaintiff manufactured in North Carolina. The North Carolina Supreme Court there noted that a state has a "manifest interest" in providing its residents with a convenient forum for redress of injuries inflicted by out-of-state actors. 318 N.C. at 367, 348 S.E.2d at 787. We distinguish the instant case from *Tom Togs* in that the plaintiff in our case solicited the initial contact with the defendant. Plaintiff does not contest the defendant's assertion, that the plaintiff first approached the defendant in Tennessee, and that plaintiff traveled to Tennessee to make and sign the contract. Which party initiates the contact is taken to be a critical factor in assessing whether a nonresident defendant has made "purposeful availment." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 350 S.E.2d 111 (1986); *Brickman v. Codella*, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

[T]he touchstone in ascertaining the strength of the connection between the cause of action and defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state.

Phoenix American Corp. v. Brissey, 46 N.C. App. 527, 532, 265 S.E.2d 476, 480 (quoting *Fieldcrest Mills Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977)). Furthermore, where "purposeful availment" is not present, the criterion of "minimum contacts" cannot be minimized simply because of the State's interest in providing a forum of redress for its residents engaged in contractual rela-

CFA MEDICAL, INC. v. BURKHALTER

[95 N.C. App. 391 (1989)]

tionships with nonresidents. *Cameron-Brown v. Daves, supra*, at 287, 350 S.E.2d at 116.

In other cases cited by the trial judge or the plaintiff there existed some crucial connection between the defendant and the forum state which is here absent. In *Williams v. Institute of Computational Studies at Colorado State University*, this Court exercised personal jurisdiction in the absence of defendant's purposeful solicitation because numerous consumers in the state had utilized the defendant's computer services. 85 N.C. App. 421, 355 S.E.2d 177 (1987). We distinguish the present case from *Williams* in that the defendant in the present case is not selling goods or services to be distributed in the state, but serving as the agent for goods or services to be distributed out of state.

Instead, we follow *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, *cert. denied*, 300 N.C. 373, 267 S.E.2d 677 (1980). Where the record is clear that the contract was entered into outside North Carolina, where there is no provision in the contract requiring the defendant to perform services within North Carolina, where the defendant has performed all services under the contract outside North Carolina, where for the life of the contract the defendant has not been in the state for any purpose and, most importantly, where the defendant has not originated contact with any North Carolina market or industry, minimum contacts cannot be found. *Id.* at 624, 263 S.E.2d at 863. The act of entering a contract with a forum resident does not provide the necessary contacts when the defendant's performance is to occur exclusively outside the forum. *Phoenix American Corp. v. Brissey, supra*. Furthermore, the mere mailing of a payment from outside the state is not sufficient to sustain *in personam* jurisdiction in the forum state. *First National Bank of Shelby v. General Funding Corp.*, 30 N.C. App. 172, 226 S.E.2d 527 (1976).

We reverse the trial judge's denial of the motion to dismiss for lack of personal jurisdiction. The motion should have been granted.

Affirmed in part and reversed in part.

Judges PHILLIPS and COZORT concur.

DEHAVEN v. HOSKINS

[95 N.C. App. 397 (1989)]

DOROTHY D. DEHAVEN AND HUSBAND, JAMES L. DEHAVEN v. JAMES H. HOSKINS AND WIFE, BETTY HOSKINS

No. 887SC846

(Filed 5 September 1989)

1. Appeal and Error § 6.8— summary judgment in favor of one defendant—substantial right affected—order immediately appealable

An order granting summary judgment in favor of defendant wife was interlocutory but appealable because it affected a substantial right of plaintiffs to have determined in a single action the question of whether plaintiff wife was injured by the acts of one, both, or neither of defendants so as to avoid the possibility of inconsistent verdicts, especially since the claims against defendants arose from the same series of events.

2. Negligence § 59.3— grease left on stove by homeowner—licensee burned—negligence of homeowner as jury question

A jury question was presented as to whether defendant wife was affirmatively negligent in leaving a pan of oil heating on her stove when she knew that plaintiff licensees were on the premises and knew that heated oil is susceptible to catching fire, and the trial court therefore erred in entering summary judgment for defendant wife.

APPEAL by plaintiffs from *Charles B. Winberry, Judge*. Judgment entered 12 May 1988 in Superior Court, NASH County. Heard in the Court of Appeals 14 March 1989.

Henson & Fuerst, P.A., by Thomas W. Henson and Robert L. Fuerst, for plaintiffs-appellants.

Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendants-appellees.

BECTION, Judge.

The plaintiffs appeal from an order granting summary judgment to one of the two defendants in this personal injury action. For the reasons that follow, we reverse.

DEHAVEN v. HOSKINS

[95 N.C. App. 397 (1989)]

I

On the evening of 24 July 1986, the plaintiffs, Dorothy and James DeHaven, went to visit their next-door neighbors, defendants Betty and James Hoskins, to show them their new car. Betty Hoskins had begun to prepare dinner before they drove up, and was heating a pan of vegetable oil on the stove to make french fries when Dorothy DeHaven came to the door and asked her to come outside. Betty Hoskins went out, leaving the pan on the stove. While the neighbors stood in the Hoskins' driveway admiring the car, the cooking oil burst into flames. James Hoskins was the first to see the fire coming from the kitchen, and he raced into the house. Betty Hoskins hurried in after him. James Hoskins picked up the flaming pan and carried it to the kitchen door while Betty Hoskins started to clean up the oil spilled on the stove and floor.

Dorothy DeHaven ran toward the house to see if she could help. She approached the kitchen door from the carport just as James Hoskins was coming through the door with the flaming pan. They either collided, or James Hoskins threw the oil out the door, or he was burned and lost control of the pan. In any event, the hot oil splashed on Dorothy DeHaven, severely burning both arms and one leg.

Dorothy and James DeHaven brought the present suit against Betty and James Hoskins, alleging that the negligence of both of them was responsible for Dorothy DeHaven's injuries. Betty Hoskins moved for summary judgment, contending that she did not violate the duty of care owed to Dorothy DeHaven, a licensee under traditional premises liability law. The trial judge granted the motion.

The DeHavens' appeal, assigning error to the entry of summary judgment in favor of Betty Hoskins, and to the failure of the trial judge to grant their motion to vacate the judgment. They argue that Dorothy DeHaven was injured by Betty Hoskins' active and affirmative negligence rather than by a condition of the premises, and, therefore, that Betty Hoskins' duty to Dorothy DeHaven should have been determined according to ordinary negligence principles rather than by premises liability law. The DeHavens further contend that it was for the jury to determine whether Betty Hoskins' negligence was a proximate cause of Dorothy DeHaven's injuries, or whether, instead, that causal connection was superseded by the subsequent acts of James Hoskins.

DEHAVEN v. HOSKINS

[95 N.C. App. 397 (1989)]

Betty Hoskins has filed a motion to dismiss the appeal as interlocutory. She also contends that summary judgment was properly granted in her favor because she engaged in neither "willful or wanton negligence" nor "active and affirmative negligence" while the DeHavens were on the premises. Finally, she contends that Dorothy DeHaven's own contributory negligence barred her recovery in this action.

II

[1] The threshold issue, raised by Betty Hoskins' motion to dismiss, is whether the DeHavens' appeal is premature.

The order granting summary judgment in favor of Betty Hoskins manifestly was interlocutory: it did not fully dispose of the DeHavens' claims, instead leaving the claims against James Hoskins to be determined at trial, and it did not provide that there was "no just reason [to] delay" appeal. See N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 54(b) (1983); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Thus, the order is not immediately appealable unless some "substantial right" of the DeHavens would be affected by delaying the appeal until the case is finally resolved. See N.C. Gen. Stat. Sec. 1-277(a) (1983); N.C. Gen. Stat. Sec. 7A-27(d) (1986). A judgment which creates the possibility of inconsistent verdicts on the same issue—in the event an appeal eventually is successful—has been held to affect a substantial right. See, e.g., *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982).

In our view, a possibility exists that inconsistent verdicts could be rendered in separate trials on the issue of James and Betty Hoskins' joint and concurrent negligence if the DeHavens' appeal ultimately is successful: James Hoskins might conceivably prevail on the ground of sudden emergency, while the jury in a separate trial against Betty Hoskins might conclude that James Hoskins' intervening negligence insulated her from liability for her actions. Accordingly, we hold that the judgment was appealable because it affected a substantial right of the DeHavens to have determined, in a single action, the question of whether Dorothy DeHaven was injured by the acts of one, both, or neither of the defendants, especially since the claims against them arose from the same series of events. *Accord Bernick*, 306 N.C. at 439, 292 S.E.2d at 409; *Fox v. Wilson*, 85 N.C. App. 292, 298, 354 S.E.2d 737, 741 (1987). Betty Hoskins' motion to dismiss the appeal is denied.

DEHAVEN v. HOSKINS

[95 N.C. App. 397 (1989)]

III

[2] Dorothy DeHaven concedes that, as a social guest at the Hoskins' home, she held the status of licensee. *See, e.g., Murrell v. Handley*, 245 N.C. 559, 562, 96 S.E.2d 717, 720 (1957). The duty of care owed to a licensee by an owner or possessor of land ordinarily is to " 'refrain from doing the licensee willful injury and from wantonly and recklessly exposing [her] to danger.' " *McCurry v. Wilson*, 90 N.C. App. 642, 645, 369 S.E.2d 389, 392 (1988) (quoting *Pafford v. J.A. Jones Constr. Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940)). "It follows that, as a general rule, the owner . . . is not liable for injuries to licensees due to the *condition* of the property, or . . . due to *passive negligence or acts of omission.*" *Pafford*, 217 N.C. at 736, 9 S.E.2d at 412 (emphasis added).

A different rule applies, however, when the licensee's injury is caused by the owner's *active conduct* or "affirmative negligence." *See Thames v. Nello L. Teer Co.*, 267 N.C. 565, 569, 148 S.E.2d 527, 530 (1966). *See also Langford v. Shu*, 258 N.C. 135, 140, 128 S.E.2d 210, 213 (1962); *Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 172, 77 S.E.2d 701, 709 (1953). The rule generally is stated as follows:

If the owner, while the licensee is on the premises exercising due care for [her] own safety, is actively negligent in the management of [her] property . . ., as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active or affirmative negligence.

Wagoner, 238 N.C. at 172, 77 S.E.2d at 709.

Thus, when engaging in active conduct on the premises, the owner must exercise reasonable care for the protection of a licensee whose presence is known or reasonably should be known. *Thames*, 267 N.C. at 569, 148 S.E.2d at 530; *see Belk v. Boyce*, 263 N.C. 24, 29, 138 S.E.2d 789, 793 (1964). *See also Prosser & Keeton on Torts* Sec. 60 (5th ed. 1984); Annot., *Liability to Adult Social Guest Injured Otherwise than by Condition of Premises*, 38 A.L.R. 4th 200 (1985).

The DeHavens argue that, while one of the proximate causes of Dorothy DeHaven's injury was James Hoskins' attempt to dispose of the flaming oil, another proximate cause was the active conduct and affirmative negligence of Betty Hoskins in continuing to heat the pan of oil when she went outside. They argue that Dorothy

DEHAVEN v. HOSKINS

[95 N.C. App. 397 (1989)]

DeHaven's injury would not have occurred without the force set in motion by Betty Hoskins, and therefore, that she should be held accountable for her role in the incident. *Cf. Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565-66 (1984) ("When two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted."). On the other hand, Betty Hoskins cites several cases for the proposition that an owner will not be held liable to a licensee for injuries arising, at least in part, from the owner's failure to act to protect the licensee. *See, e.g., McCurry*, 90 N.C. App. at 646, 369 S.E.2d at 392. However, those cases concern conditions of the premises, rather than activities occurring there, and, therefore, are inapposite.

In our view, a jury question was presented whether Betty Hoskins was affirmatively negligent in leaving the oil on the stove when she knew that the DeHavens were on the premises and knew (as she admitted) that heated oil is susceptible to catching fire. *Accord Anderson v. Butler*, 284 N.C. 723, 731, 202 S.E.2d 585, 589-90 (1974) (jury question whether landowner negligent in entrusting minor son with forklift which injured nine-year-old licensee). *Cf. Langford*, 258 N.C. at 140, 128 S.E.2d at 213 (guest's injuries stemming from practical joke did not arise from condition of premises, passive negligence, or acts of omission, and thus jury question presented whether defendant was liable); *Freeze v. Congleton*, 5 N.C. App. 472, 168 S.E.2d 462 (1969) (minor licensee injured when he ran into sliding glass door closed by owner; jury question whether owner negligent in closing door), *rev'd on other grounds*, 276 N.C. 178, 171 S.E.2d 424 (1970) (evidence of owner's negligence insufficient to take case to jury since minor's mother was present, knew door was closed, and failed to warn minor).

The result we reach today is the same as that reached in *Orr v. Turney*, 535 So.2d 150 (Ala. 1988), a case factually similar to this one. There, a landowner lost control of a pan of flaming grease as she went out her kitchen door, severely injuring an infant licensee playing just outside the door. The licensee contended that the owner was negligent both in leaving the pan of oil unattended on a hot stove and in her attempt to dispose of the pan. Applying the active conduct analysis, the court concluded that a jury question was presented whether the owner breached her duty to the licensee to exercise reasonable care for his safety. *Id.* at 154.

MER PROPERTIES-SALISBURY v. GOLDEN PALACE, INC.

[95 N.C. App. 402 (1989)]

We conclude that the trial judge erred in granting summary judgment in favor of Betty Hoskins because the forecast of the evidence failed to show that there was no genuine issue as to any material fact or that she was entitled to judgment as a matter of law. *See* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56(c) (1983). Negligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment. *See generally Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978). This case provides no exception to that general rule.

IV

For the reasons stated, the order granting summary judgment to defendant Betty Hoskins is

Reversed.

Judges PARKER and ORR concur.

MER PROPERTIES-SALISBURY, A PARTNERSHIP, PLAINTIFF v. GOLDEN PALACE, INC., DEFENDANT

No. 8819DC847

(Filed 5 September 1989)

Landlord and Tenant § 13.3— renewal of lease—written notice— not sent by registered mail—sufficient

A lease renewal sent by regular rather than registered mail was sufficient where the original lease was for ten years with two five-year renewal options; a different section of the lease, entitled miscellaneous provisions, required that all notices under the lease be in writing and sent by registered or certified mail; plaintiff presented evidence that it did not receive any notice of defendant's intention to renew more than ninety days prior to the expiration of the original term of the lease; defendant presented evidence that on 29 April 1987, she wrote the check for the May rental, wrote a letter advising plaintiff of defendant's intention to renew the lease for another five years, placed the letter along with the check in an envelope addressed to plaintiff and stamped the envelope, which was

MER PROPERTIES-SALISBURY v. GOLDEN PALACE, INC.

[95 N.C. App. 402 (1989)]

mailed the same day; and the undisputed evidence was that the check was negotiated on 5 May 1987. On the record before the court, plaintiff had timely notice of defendant's intention to exercise its renewal option under the lease. The "problem of proof of notice" would not have been eliminated by defendant's use of registered mail because a registered mail receipt would only have shown that the envelope was sent and received; plaintiff could have admitted receipt of the check but denied receipt of the notice. Moreover, it would seem unduly harsh to penalize the tenant who followed all requirements in a section entitled "Option to Renew" in a twenty-one page lease but failed to also note a miscellaneous provision, and the record does not show that plaintiff was prejudiced in any way by defendant's failure to use registered mail.

APPEAL by plaintiff from *Clarence E. Horton, Jr., Judge*. Judgment entered 30 March 1988 in District Court, ROWAN County. Heard in the Court of Appeals 14 March 1989.

Kluttz, Hamlin, Reamer, Blankenship, and Kluttz, by Malcolm B. Blankenship, Jr., for plaintiff-appellant.

Shuford, Caddell & McCanness, by R. William McCanness, for defendant-appellee.

BECTON, Judge.

In plaintiff's judgment action for summary ejection, the Magistrate entered judgment in favor of defendant. Plaintiff appealed, and, after a trial *de novo* in district court, the jury returned a verdict in favor of defendant.

Although plaintiff asserts numerous assignments of error, the controlling issue in its appeal to this court is whether defendant's notice of renewal, sent by ordinary first class mail, was sufficient to exercise its option to renew, notwithstanding a provision in the lease that notices be given by registered mail. For the reasons that follow, we find no error in the judgment of the trial court.

I

The original lease for the premises occupied by defendant, Golden Palace, Inc., was entered into with plaintiff, MER Properties, on 10 November 1977 for a ten-year period, with two five-year renewal options. Section 204 of the lease sets forth the tenant's

MER PROPERTIES-SALISBURY v. GOLDEN PALACE, INC.

[95 N.C. App. 402 (1989)]

right to renew "upon written notice to Landlord of Tenant's intention to exercise said option, given at least ninety (90) days prior to the expiration of the original term" Section 901 of the lease, entitled "Miscellaneous Provisions," requires that all notices under the lease "shall be in writing and sent by registered or certified mail." The original term expired on 30 November 1987.

At trial, plaintiff, through testimony of the corporate properties director for its management company, presented evidence that it did not receive any notice of defendant's intention to renew more than ninety days prior to the expiration of the original term of the lease. Defendant's witness Lai Yu Mah, vice president of defendant corporation, testified that on 29 April 1987 she traveled from her home in Hickory, North Carolina, to the restaurant in Salisbury, North Carolina. While there, she conferred with her brother, Chung Ming Ng, who managed the restaurant, about how to write the rent checks and when they should be mailed. On that day, according to her testimony, Ms. Mah wrote the rent check to pay the May rental. She also wrote a letter to advise plaintiff of defendant's intention to renew the lease for another five years. This letter was on plain typing paper that had the restaurant's name and address stamped on the top with a rubber-stamp imprint. Ms. Mah testified that she placed this letter along with the May rent check into an envelope addressed to plaintiff, stamped the envelope, and gave it to Mr. Ng to mail. Ms. Mah did not retain a copy of this letter. Mr. Ng testified that he mailed the envelope that same day. He also corroborated his sister's testimony that she wrote the letter to renew the lease. The evidence was undisputed that the May rent check was negotiated on 5 May 1987.

The following issue was submitted to the jury: "Did the Defendant, Golden Palace, Inc., give written notice on April 29, 1987, to the plaintiff, MER Properties-Salisbury, of its intention to renew its lease?" The trial judge instructed the jury that if it found by the greater weight of the evidence that defendant gave written notice to plaintiff on 29 April 1987, by mailing a notice of its intention to renew the lease to plaintiff along with the May rent check, it would answer the issue "yes."

The jury resolved this factual question in defendant's favor, and judgment was entered for defendant based on the verdict. On appeal plaintiff has not challenged the sufficiency of the evi-

MER PROPERTIES-SALISBURY v. GOLDEN PALACE, INC.

[95 N.C. App. 402 (1989)]

dence to support the jury's finding. Plaintiff's contention is that defendant's exercise of the renewal option was ineffectual because defendant did not send the notice by registered mail, as required in the lease, and plaintiff, therefore, was entitled to a directed verdict as a matter of law.

II

Our research discloses no case in which the North Carolina courts have previously decided the narrow issue before us. In other jurisdictions the authorities are split. Some courts have held that a lessee's failure to send the notice by registered mail as required by the lease does not relieve the lessor of its contractual obligations under the renewal provision when it is clear the lessor actually received notice. See *Fletcher v. Frisbee*, 119 N.H. 555, 404 A.2d 1106 (1979); *Gerson Realty, Inc. v. Casaly*, 2 Mass. App. 875, 316 N.E.2d 767 (1974); *University Realty & Dev. Co. v. Omid-Gaf, Inc.*, 19 Ariz. App. 488, 508 P.2d 747 (1973); *Woods v. Cities Serv. Oil Co.*, 142 So.2d 168 (La. Ct. App. 1962); see also *Joseph Steier, Inc. v. City of New York*, 65 Misc.2d 296, 317 N.Y.S.2d 455 (1970) (in which lessor denied receiving notice, but, for purposes of motion to dismiss, it was assumed lessee sent the notice). Other courts, however, have required that the lessee strictly comply with the notice requirement as specified in the lease. See *Western Tire, Inc. v. Skrede*, 307 N.W.2d 558 (N.D. 1981); *Seven Fifty Main Street Assoc. v. Spector*, 5 Conn. App. 170, 497 A.2d 96, cert. dismissed, 197 Conn. 815, 499 A2d 804 (1985); *Matter of Joyner*, 74 Bankr. 618 (U.S. Bankr. M.D. Ga. 1987).

The rationale in the decisions requiring strict compliance is that if the notice provision in the lease had been followed, the problem of proving that notice had actually been sent and received would be eliminated. *Joyner*, 74 Bankr. at 623. Similarly, plaintiff, in the case before us, argues that the requirement of registered mail eliminates the problem of proof of notice and brings certainty to business transactions.

This argument might be persuasive if there was a question of receipt of the notice and defendant were relying on the presumption that arises upon proof of mailing. In this case, however, Ms. Mah testified the notice was included in the envelope with the May rent check, and significantly, the jury so found. Plaintiff negotiated the rent check, and the jury obviously considered this undisputed extrinsic evidence to be some proof that notice was

MER PROPERTIES-SALISBURY v. GOLDEN PALACE, INC.

[95 N.C. App. 402 (1989)]

received. Plaintiff did not challenge the sufficiency of the evidence to support this finding. Therefore, on the record before this Court, plaintiff had timely notice of defendant's intention to exercise its renewal option under the lease.

Further, we are not persuaded, based on the facts of this case, that the "problem of proof of notice" would have been eliminated by defendant's use of registered mail. For example, a registered mail receipt would only have shown that the envelope was sent and received. Had defendant sent the May rent check and notice by registered mail, plaintiff could have admitted receipt of the check but denied receipt of the notice. Use of registered mail would not, on those facts, have avoided litigation.

Moreover, we find the policy argument advanced in defendant's brief compelling:

In addition to the authority cited above favoring excusing the tenant from strict compliance with a registered mail requirement, practical considerations also lead to the same result. In the instant case, Section 204 of the lease containing the option to renew makes no mention of registered or certified mail being required. Rather, it is Section 901 under the heading of "Miscellaneous Provisions" some fourteen pages later that has the registered mail provision. (Plaintiff's Exhibit 1). It would seem unduly harsh to penalize a tenant that followed all requirements in a section titled "Option to Renew" in a twenty-one page lease for failing to also note a "miscellaneous" provision.

Finally, the record does not show that plaintiff was prejudiced in any way by defendant's failure to use registered mail. There was no lapse in rent payment, and plaintiff had "only [begun] to look for replacement [tenants] by the end of the term. . . ."

For these reasons, we are of the opinion that the facts bring this case more nearly in line with the rationale of those decisions excusing strict compliance with the registered mail requirement of a lease when there is no denial that the notice was timely received. As the New Hampshire Supreme Court stated in *Fletcher*:

Although the lease-renewal option required that notice be sent by registered mail, it was sent by regular mail. The landlord asserts that the lessees should not be relieved from their failure to exercise the option in the specified manner. Generally, courts have recognized that any method of giving

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

notice may be employed "which is effective to bring such notice home to the lessor and serves the same function and purpose as the authorized method." Thus, the notice sent by ordinary mail is sufficient here even though the option agreement required that notice be sent by registered mail.

119 N.H. at 560, 404 A.2d at 1109 (emphasis and citations omitted). The purpose of registered mail is to substantiate receipt, and in this case, receipt has been substantiated.

Plaintiff in its brief relies on *Royer v. Honrine*, 68 N.C. App. 664, 316 S.E.2d 93 (1984), to support its argument that strict compliance with the method of renewal is a condition precedent to extension of the term. *Royer* is distinguishable. In *Royer*, the lease required written notice, and no written notice was given. The court found that the oral notice coupled with the lessor's continued acceptance of the old rental payments were not sufficient to constitute waiver of the notice requirement in the lease. In the present case, the notice was in writing and was timely given.

No error.

Judges PARKER and ORR concur.

IN THE MATTER OF: THE APPEAL OF DAVID AND SHERRILL SENSENEY
FROM THE APPRAISAL OF CERTAIN OF THEIR REAL PROPERTY
BY THE HYDE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR
1987

No. 8810PTC1280

(Filed 5 September 1989)

1. Taxation § 25.4— property tax—method of appraisal arbitrary—evidence sufficient

The evidence presented by the taxpayers supported the Property Tax Commission's conclusion that the county's method of appraisal for property tax purposes was arbitrary where the company doing the appraisal used the running foot method based on comparable sales; taxpayers elicited on cross-examination testimony as to variables the running foot method did not take into account; the taxpayer's witness testified that

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

the valuation method of the county's expert witness had no validity because it did not use an income approach and the commercial valuation bears no relationship to the income approach; and the county's expert revealed on direct and cross-examination that his square foot calculations were inaccurate and that one of the comparable sales was actually a transfer to an entity in which the grantor had a 50% interest.

2. Taxation § 25.4— property tax—assessment substantially in excess of land's true value

The taxpayers produced competent, material and substantial evidence that the county's assessed value of land for property tax purposes was substantially in excess of the land's true value where the taxpayer's witness found the value of the land to be \$269,000, the county appraiser valued the land at \$282,000, the county's other witness valued the land at \$282,600 and the Property Tax Commission valued the land at \$179,361. The Commission's valuation is supported by competent, material and substantial evidence and the county's appraised value is substantially in excess of what the Commission found to be the land's true value.

3. Taxation § 25.4— property tax—value found by Property Tax Commission—no error

There was a basis in the evidence for the value the Property Tax Commission placed on real property for property tax purposes where the Commission valued the land at \$6.50 per square foot but no witness testified to that value. The Commission's findings are essentially based on the report of the county's witness, with the correction of what the Commission perceived as errors in calculations of square feet and inclusions in the comparable sales data.

4. Taxation § 25.4— property tax—taxpayer's estimate of value— not a judicial admission

The taxpayers' estimate of value contained in their application for a hearing before the Property Tax Commission was not a judicial admission, but merely served to notify the Commission and the parties of the appealing party's contentions and was some evidence of value but not conclusive.

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

5. Taxation § 25.4— property tax—Property Tax Commission's disregard of comparable sale—no error

The Property Tax Commission did not err by disregarding a comparable sale in a property tax appraisal where it appears that the Commission determined that the method of valuation was sound but that that sale should not have been included in the calculations because it was not a true sale and made the value per square foot inaccurate.

APPEAL by Hyde County from the North Carolina Property Tax Commission. Decision entered 6 June 1988. Heard in the Court of Appeals 6 June 1989.

Merriman, Nicholls & Crampton, P.A., by W. Sidney Aldridge, for appellant Hyde County.

Adams, McCullough & Beard, by Charles C. Meeker, for appellees David and Sherrill Senseney.

LEWIS, Judge.

Hyde County revalued all property for property tax purposes effective 1 January 1987. The taxpayers' land consists of two adjacent lots, Tracts 113 and 114, located on the east side of Silver Lake, a bay on Ocracoke Island.

Tract 113 is a lot approximately 80 feet by 150 feet with a commercial building known as the Community Store. The taxpayers purchased this property in 1980 for \$125,000.00. Hyde County assessed a value of \$120,000.00 on the land and \$112,970.00 on the improvements for a total of \$232,970.00.

Tract 114 is a lot approximately 138 feet by 108 feet improved with commercial structures including a building known as Jack's Store (a hardware store), a dock, and several miscellaneous buildings used to sell craft and souvenir items. The taxpayers purchased this tract in 1984 for \$250,000.00. The county assessed a value of \$162,000.00 on the land and \$77,840.00 on the improvements for a total of \$239,840.00.

The Property Tax Commission (Commission) made findings of fact based on the evidence. It concluded the county's appraisal of the improvements was neither arbitrary nor illegal and did not result in a value in excess of the true value in money. The county's

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

appraisal value of the improvements was upheld and neither party has excepted to the findings and conclusions regarding the value of improvements. As to the land values, the Commission found the county's method was arbitrary and resulted in an appraised value substantially greater than the true value of the land. The Commission valued the land at \$179,361.00. The county appeals.

The county brings forward ten assignments of error grouped into six arguments. First, it contends the taxpayers did not produce competent, material and substantial evidence that the county used an arbitrary method of valuation. Second, the same objection is asserted that the county's assessed value was substantially in excess of the true value in money of the land and to the Commission's value of the property. Fourth, the county challenges finding of fact number 8 as not supported by the evidence. The county also contends the Commission erred in determining a land value less than the amount the taxpayers stated in their petition for review before the Commission. Finally, the county contends the Commission erred in disregarding one of the comparable sales in a witness's report. We have reviewed the county's assignments of error and find them to be without merit. The Commission's order is affirmed.

There is a presumption that ad valorem tax assessments are correct. *In re Odom*, 56 N.C. App. 412, 289 S.E.2d 83, cert. denied, 305 N.C. 760, 292 S.E.2d 575 (1982). Accordingly, the taxpayer has the burden of proving to the Commission by competent, material and substantial evidence that "(1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; and (3) the assessment *substantially* exceeded the true value in money of the property." *In re Appeal of Amp. Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975) (emphasis original). The scope of appellate review is set forth in G.S. 105-345.2(b). In reviewing cases from the Property Tax Commission, this Court "must determine whether the evidence presented to the Commission support[s] its conclusions." *In re Odom*, 56 N.C. App. at 412, 289 S.E.2d at 84. The county's burden of proof is to show the Commission's order is "unsupported by competent, material and substantial evidence in view of the entire record as submitted." G.S. 1-5-345.2(b)(5). The question before us, then, is whether there was substantial evidence to support the Commission's findings of fact and its conclusions that the method of valuation was arbitrary and produced a value substantially in excess of the true value of the property.

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

[1] We first address the county's contention that the taxpayers did not present competent, material and substantial evidence that the county's valuation method was arbitrary. According to Mr. Pearson, whose company completed the 1 January 1987 appraisal for Hyde County, the highest and best use for the taxpayers' property was commercial. Pearson valued the land on Silver Lake at \$1,500.00 per running foot based on comparable sales. He valued the land at \$282,000.00 and improvements at \$190,810.00 for a total value of \$472,810.00. On cross-examination, the taxpayers elicited testimony from Pearson as to variables the running foot method did not take into account. He did not take into account depth of the lot. The taxpayer's witness, Mr. Streb, testified that the valuation method of the county's expert witness, Bell, had no validity because it did not use an income approach and the commercial valuation bears no relationship to the income approach. Bell testified the highest and best use of the property was commercial and valued the property on a market data approach using 14 comparable sales adjusted for time with a 15 percent appreciation rate. He found a value of \$9.00 per square foot for the land and estimated the number of square feet from an aerial photograph. He valued the buildings at \$25.00 per square foot based on two comparable sales. Bell valued the land at \$282,600 and the improvements at \$194,680, for total value of \$477,280. Bell's testimony on direct and cross revealed that his square foot calculations were inaccurate and that one of the comparable sales was actually a transfer to an entity in which the grantor had a 50% interest. "The weight to be accorded relevant evidence is a matter for the factfinder, which is the Commission." *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 712, 379 S.E.2d 37, 38 (1989). We find the evidence presented supports the Commission's conclusion that the county's method of appraisal was arbitrary. These assignments of error are overruled.

[2] Next we address the county's contention that the taxpayers did not produce competent, material and substantial evidence that the county's assessed value of the land was substantially in excess of the land's true value. The taxpayers' witness, Mr. Streb, found the value of the land to be \$269,000.00. The county appraiser valued the land at \$282,000.00, and the county's other witness valued the land at \$282,600.00. The county contends the taxpayers' expert testified to a value essentially the same as the county's value and thus the taxpayers have not proved the county substantially over-

IN RE APPEAL OF SENSENEY

[95 N.C. App. 407 (1989)]

valued the land. However, the Commission valued the land at \$179,361.00. As discussed below the Commission's valuation is supported by competent, material and substantial evidence. The county's appraised value is substantially in excess of what the Commission found to be the land's true value. These assignments of error are overruled.

[3] The county also assigns error to the land value found by the Commission. The Commission valued the land at \$6.50 per square foot for 27,594 square feet resulting in a total value of \$179,631.00. The county contends that since no witness testified to the \$6.50 per square value, the value is not based on competent, material and substantial evidence. The Commission's findings are essentially based on the report of the county's witness. The Commission appears to have determined Mr. Bell's method of valuation was sound but corrected what it perceived as errors in the calculations of square feet and inclusions in the comparable sales data. There is a basis in the evidence for the Commission's value, and these assignments of error are overruled.

The county also assigns error to finding of fact 8. In this finding, the Commission found the true value of both parcels of land was \$179,361.00 or \$6.50 per square foot for 27,594 square feet. The county contends that the finding is not "proper" and that the Commission must set out the specific facts supporting the conclusion. It appears from the record that the \$6.50 per square foot value is based on Mr. Bell's report of comparable sales adjusted to exclude the one sale. The finding is sufficient and the county's contention is without merit.

[4] Next we address the county's contention that the taxpayers are bound by their \$199,500.00 estimate of value contained in their application for hearing. The county contends the application is a judicial "admission" that serves as a lower limit on the value that the Commission may find. We disagree. The application for hearing before the Commission serves to notify the Commission and the parties of the appealing party's contentions. We believe the values stated in the application are only some evidence of value and are not conclusive. If the Commission determines the county's method is arbitrary or illegal and the assessed value is substantially in excess of the true value, it is then free to determine the value based on the evidence presented. This assignment of error is overruled.

NATIONWIDE MUTUAL INS. CO. v. WINSLOW

[95 N.C. App. 413 (1989)]

[5] Now we address the county's final assignment of error. In its order, the Commission disregarded "Sale Number 14" in Mr. Bell's comparable sales report as not being a true sale. The county contends the Commission erred in disregarding this "sale" as the report is intended to show the basis of Mr. Bell's opinion. It appears the Commission determined Mr. Bell's method of valuation was sound but that sale number 14 should not have been included in the calculations because it was not a true sale and made the value per square foot inaccurate. This assignment of error is directed at the weight and credibility of the evidence, matters for the Commission to determine. *Westinghouse Electric, supra*. This assignment of error is overruled.

We have reviewed each of the county's assignments of error and find them to be without merit.

Affirmed.

Judges BECTON and PHILLIPS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. DOUGLAS N.
WINSLOW, DEFENDANT

No. 8810SC1035

(Filed 5 September 1989)

Attorneys at Law § 5.1; Limitation of Actions § 4.2— legal malpractice—accrual of claim—appeal of underlying action—statute of limitations not tolled

Plaintiff insurer's cause of action for legal malpractice based on defendant attorney's failure to file answer on behalf of plaintiff's insureds accrued on the date a default judgment was entered against the insureds, and the statute of limitations was not tolled during pendency of the appeal of the underlying action. Plaintiff's malpractice claim was thus barred under N.C.G.S. § 1-15(c) where it was instituted more than three years after default judgment was entered against its insureds.

Judge PHILLIPS concurring in the result.

NATIONWIDE MUTUAL INS. CO. v. WINSLOW

[95 N.C. App. 413 (1989)]

APPEAL by plaintiff from judgment of *Judge Henry V. Barnette, Jr.*, entered 16 June 1988 in WAKE County Superior Court. Heard in the Court of Appeals 22 March 1989.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and Dean A. Riddle, for plaintiff appellant.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., and Knox Proctor, for defendant appellee.

COZORT, Judge.

This appeal involves the question of whether plaintiff's action for legal malpractice is barred under N.C. Gen. Stat. § 1-15(c). We hold that plaintiff's cause of action accrued more than three years prior to the bringing of suit, and that the statute of limitations was not tolled during the appeal of the underlying action which defendant allegedly was negligent in handling. We therefore affirm the trial court's order of summary judgment in favor of defendant.

On 13 October 1981, a negligence action arising from an automobile accident was filed against Calvin Thomas Tharpe and James Allen Tharpe. The next day, a copy of the complaint was sent to plaintiff, Nationwide Mutual Insurance Company, the Tharpes' insurance carrier. On 16 October 1981, the Tharpes were personally served with process. They immediately thereafter delivered the summonses and complaint to plaintiff. On 20 November 1981, after the time for filing answer to the complaint had passed, plaintiff retained defendant to represent the Tharpes. Plaintiff told defendant that the Tharpes had not been served and that defendant should "verify proper service of process before entering an appearance on behalf of [the Tharpes]." Defendant checked with the clerk's office to verify service, but the returns of summonses had not been filed because the sheriff had sent them to counsel for the plaintiff in that underlying action.

The summonses were not filed until 27 January 1982; on 28 January 1982, an entry of default was made by the assistant clerk of superior court. A Motion for Entry of Default Judgment was filed on 12 May 1982, and hearing on that Motion was set for 30 August 1982. After learning of the hearing, defendant filed a Motion to Dismiss, Motion to Dismiss Entry of Default, and Motion to Set Aside Entry of Default. Those motions were denied

NATIONWIDE MUTUAL INS. CO. v. WINSLOW

[95 N.C. App. 413 (1989)]

by the trial court on 1 September 1982. Default judgment in the amount of \$25,000 was entered 8 March 1983. At that time, defendant was discharged and another attorney took over the Tharpes' defense. The new attorney appealed the trial court's denial of plaintiff's Motion to Set Aside Entry of Default. This Court affirmed the trial court in an unpublished opinion filed 5 June 1984. *Martin v. Tharpe*, 68 N.C. App. 563, 316 S.E.2d 366 (1984). Plaintiff thereafter gave notice of appeal from the trial court's denial of its Motion to Set Aside the Default Judgment. This Court affirmed the trial court in an unpublished opinion filed 7 May 1985. *Martin v. Tharpe*, 74 N.C. App. 607, 330 S.E.2d 525, *cert. denied*, 314 N.C. 116, 332 S.E.2d 482 (1985).

On 29 September 1987, summons was issued and a complaint was filed in the instant malpractice action against defendant. By Order dated 16 June 1988 the trial court granted defendant's motion for summary judgment. Plaintiff appeals. We affirm.

"Civil actions can only be commenced . . . after the cause of action has accrued." N.C. Gen. Stat. § 1-15(a) (1988). In actions for malpractice, whether medical or legal, where there is no damage "not readily apparent to the claimant at the time of its origin," a cause of action accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (1988). When the cause of action accrues, the three-year period under the applicable statute of limitations, *see Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971), begins to run. Once that period begins to run, it is not tolled until appropriate judicial process has been commenced. *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E.2d 234 (1978).

Defendant's alleged negligence arose from his failure to file answer, which resulted in a default judgment being entered and plaintiff sustaining a \$25,000 loss. Plaintiff concedes that defendant's last act occurred on 8 March 1983. Nevertheless, it cites *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *disc. rev. denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984), in support of its argument that it suffered no loss and its cause of action did not accrue until the Supreme Court denied discretionary review on 3 July 1985. Alternatively, it argues that, even if its cause of action accrued when the default judgment was en-

NATIONWIDE MUTUAL INS. CO. v. WINSLOW

[95 N.C. App. 413 (1989)]

tered, the statute of limitations was tolled during pendency of the appeal in the underlying action.

Plaintiff's reliance on *Snipes* is misplaced. In *Snipes* this Court created an accrual rule for the triggering of the statute of limitations period in cases involving malpractice in tax matters. We held that the statute of limitations did not bar the plaintiff's action, because no cause of action had accrued prior to the tax assessment by a third party. We specifically emphasized that the malpractice action in that case was "not directly analogous to professional negligence suits against doctors or attorneys in general." *Id.* at 71, 316 S.E.2d at 661.

We hold that plaintiff's cause of action accrued, and the limitations period began to run, no later than 8 March 1983. We further hold that, absent the commencement of appropriate judicial process by filing a complaint, the statute of limitations was not tolled. The statute was not tolled by the appeal of the underlying action. We therefore affirm the judgment of the trial court dismissing plaintiff's action as barred by the three-year statute of limitations.

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

Whether plaintiff's claim is barred by the statute of limitations need not be determined, in my opinion, because the record shows without contradiction that plaintiff's claim has no merit since the loss that it seeks to recover from defendant was proximately caused by its own inexcusable neglect. The record shows that: Though plaintiff was served with a copy of the suit papers on 14 October 1981 (1) it never checked with the sheriff as to whether the insureds had been served; (2) it did not check with the Clerk's office about the return until 18 November 1981, three days after the time for answering expired; (3) it did not engage defendant to defend the case until five days later and further delayed the defense of the case by instructing defendant not to make an appearance until service on the insureds was verified; (4) the instruction was pointless as the statute of limitations had a year and a half to run and if

GUILFORD MILLS, INC. v. POWERS

[95 N.C. App. 417 (1989)]

the sheriff's return had been uncorrectibly defective the insureds, who were residents of that county, could have been readily reserved. Thus, when plaintiff engaged defendant to defend the case and instructed him to do nothing until a proper return of service was filed in the Clerk's office the claimant was already entitled to a default judgment because of plaintiff's inexcusable inattention to the litigation. Having entitled the claimant to a default judgment by its own neglect, plaintiff cannot recover the sum lost by the judgment from defendant. Similar inattention in attending to its court business by an insurer was held to be *inexcusable* neglect in *Finlayson v. The American Accident Co.*, 109 N.C. 196, 13 S.E. 739 (1891).

GUILFORD MILLS, INC., A DELAWARE CORPORATION v. HELEN A. POWERS,
SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 8818SC1305

(Filed 5 September 1989)

1. Taxation § 32 — intangibles tax — payments to plaintiff for sale of trade accounts — classification as accounts receivable

Plaintiff failed to prove that the trial court erroneously interpreted N.C.G.S. § 105-201 when it determined that the Department of Revenue correctly classified the payments owed to plaintiff for the sale of its trade accounts to factors as accounts receivable since the payments owed to plaintiff were owed from one corporate person to another; there was no evidence in the record on appeal that these payments were supported by negotiable paper; though accounts receivable usually arise from the sale of goods or rendering of services, there is no requirement that they must do so; and the payments owed to plaintiff were amounts owed by one corporate person to another on accounts which had balances which had not been ascertained, that is, they were amounts owed on open accounts.

GUILFORD MILLS, INC. v. POWERS

[95 N.C. App. 417 (1989)]

2. Taxation § 32 — intangibles tax — payments from factors upon sale of trade accounts — no classification as “other evidences of debt”

The trial court did not erroneously interpret N.C.G.S. § 105-202 when it determined that plaintiff's right to payment from its factors upon sale of its trade accounts did not have to be classified as “other evidences of debt” rather than as accounts receivable, since the factoring agreements contained in the record did not import on their faces the existence of a debt.

APPEAL by plaintiff from *Walker, Russell G., Judge*. Judgment entered 17 October 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 June 1989.

Plaintiff instituted this action on 30 March 1988 to recover intangible taxes and interest paid by plaintiff. The trial court denied plaintiff's motion for summary judgment and allowed defendant's motion for summary judgment.

Floyd Greeson Allen and Jacobs, by Jack W. Floyd and Robert V. Shaver, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for defendant-appellee.

JOHNSON, Judge.

Plaintiff is engaged in the business of manufacturing and selling textiles. Plaintiff establishes trade accounts with its customers and enters into written agreements with commercial factors which provide that the factors will purchase plaintiff's trade accounts. A factor assumes the risk that it will not be able to collect an account after it has purchased that account. When a factor purchases an account, it becomes indebted to plaintiff according to the terms agreed upon by the parties.

Plaintiff classified the payment which it was owed by factors for the sale of its trade accounts as “bonds, notes and other evidences of debt” on its intangible personal property tax returns for the years 1981 through 1984. Plaintiff made this classification pursuant to G.S. sec. 105-202, the statute which governs the taxation of bonds, notes, and other evidences of debt. On 31 May 1985, the North Carolina Department of Revenue issued a field auditor's

GUILFORD MILLS, INC. v. POWERS

[95 N.C. App. 417 (1989)]

report which stated that the payment which was owed to plaintiff for the sale of its trade accounts should have been reported as "accounts receivable," which are governed by G.S. sec. 105-201. This report also stated that plaintiff owed \$212,451.23 in back taxes, interest and penalties due to its erroneous classification of the payments it was owed for the sale of its trade accounts and due to other improprieties in plaintiff's tax returns. The Department of Revenue issued notices of tax assessment against plaintiff on 11 June 1985; the partial copy of these notices contained in the record on appeal indicates that the amount assessed against plaintiff was substantially similar to the amount stated in the field auditor's report.

The classification of the payments owed to plaintiff for the sale of its trade accounts affected the amount of tax owed by plaintiff because it affected the type of deductions plaintiff could claim. If the payments owed to plaintiff were classified as accounts receivable then G.S. sec. 105-201 allowed plaintiff to deduct its accounts payable, but if the payments were classified as notes, bonds or other evidences of debt then G.S. sec. 105-202 allowed plaintiff to deduct its "like evidences of debt" instead of its accounts payable.

Plaintiff filed this action on 30 March 1988 to recover the intangible taxes and interest it had paid. Plaintiff claimed that the Department of Revenue had agreed to refund the penalty payments plaintiff had made, and plaintiff claimed that the total amount then in controversy was \$199,374.01. Plaintiff's motion for summary judgment was filed 16 August 1988. Defendant's motion for summary judgment was filed 23 August 1988. On 17 October 1988, the trial court denied plaintiff's motion for summary judgment and allowed defendant's motion for summary judgment.

Plaintiff contends on appeal that the trial court erroneously interpreted G.S. secs. 105-201 and 105-202 in order to determine that the payments owed to plaintiff for the sale of its trade accounts should have been classified on plaintiff's tax returns as accounts receivable. We disagree.

Tax assessments are presumed to be correct. *Riggs v. Coble, Sec. of Revenue*, 37 N.C. App. 266, 245 S.E.2d 831 (1978). Plaintiff therefore bears the burden of proving that the Department of Revenue employed an erroneous interpretation of the relevant taxation statutes in order to make an incorrect tax as-

GUILFORD MILLS, INC. v. POWERS

[95 N.C. App. 417 (1989)]

essment. We find that plaintiff has not met this burden of proof.

[1] Plaintiff has failed to prove that the trial court erroneously interpreted G.S. sec. 105-201 when it determined that the Department of Revenue correctly classified the payments owed to plaintiff for the sale of its trade accounts as accounts receivable. G.S. sec. 105-201 does not define the term "accounts receivable." When a statutory term is not defined in a statute, "the words must be given their ordinary meaning unless the statute contains a clear indication to the contrary, or the words have acquired a technical significance." *Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 614, 274 S.E.2d 853, 855 (1981). This Court has stated that an account receivable "is ordinarily understood to be an amount owed from one person to another usually arising from the sale of goods or rendering of services and not supported by negotiable paper." *Moore and Van Allen v. Lynch*, 61 N.C. App. 601, 602, 301 S.E.2d 426, 427, *disc. rev. denied*, 308 N.C. 677, 304 S.E.2d 756 (1983). The payments owed to plaintiff were owed from one corporate person to another, and there is no evidence in the record on appeal that these payments were supported by negotiable paper. Therefore, these payments can be considered to be accounts receivable according to the *Moore and Van Allen* definition of the term. The payments owed to plaintiff did not arise from the sale of goods or rendering of services, but *Moore and Van Allen* does not state that accounts receivable *must* arise from the sale of goods or rendering of services, it merely states that accounts receivable *usually* arise in this way.

Another widely accepted definition states that "[a]n 'account receivable' in the ordinary and commercial sense is an amount owing by one person to another on an open account." 1 Am. Jur. 2d *Accounts and Accounting* sec. 2 (1962). An open account is "an account the balance on which has not been ascertained . . ." *Id.* sec. 4. The payments owed to plaintiff clearly qualified as accounts receivable according to the definition stated above, since these payments were amounts owed by one corporate person to another on accounts which had balances which had not been ascertained. (The balances on these accounts had not been ascertained because new trade accounts could be added to these accounts at any time during the life of the contracts between plaintiff and its factors.) Another definition states that accounts receivable are "contract obligations owing to a person on open account." 1 C.J.S. *Account*

GUILFORD MILLS, INC. v. POWERS

[95 N.C. App. 417 (1989)]

(1985), and the payments owed to plaintiff also clearly qualified as accounts receivable according to this definition. We find that the definitions stated above indicate that plaintiff has not met its burden of proving that the trial court erred in finding that the payments in question could be classified as accounts receivable.

We also note that plaintiff's contention that an account receivable can only arise from the sale of goods or rendering of services is incorrect. The last paragraph of G.S. sec. 105-201 deals with "the purchase or sale of stocks, bonds or other securities from which such [securities] brokers derive accounts receivable." This statutory language clearly indicates that accounts receivable may arise from the sale of intangible property.

[2] Plaintiff also contends that the trial court erroneously interpreted G.S. sec. 105-202 when it determined that plaintiff's right to payment from its factors did not have to be classified as "other evidences of debt." In order to evaluate plaintiff's claim we must analyze the meaning of the term "other evidences of debt." G.S. sec. 105-202 does not define this term. *Black's Law Dictionary*, however, defines "evidence of debt" as "written instruments or securities for the payment of money, importing on their face the existence of a debt." *Black's Law Dictionary* 499 (5th ed. 1979).

Copies of two factoring agreements are contained in the record on appeal. The factoring agreement between plaintiff and First National Factors of Boston ("First National") stated that plaintiff would sell to the factor its "accounts receivable . . . arising during the term of this agreement," but this agreement did not provide for the sale of any already existing accounts. The sale of plaintiff's trade accounts to First National at some time after the execution of the factoring agreement was therefore a condition precedent to the existence of any financial obligation on the part of First National, so First National was not indebted to plaintiff when the factoring agreement was executed. The agreement between plaintiff and First National therefore did not import on its face the existence of a debt. Plaintiff's factoring agreement with Chemical Bank's Dommerich Division stated that Chemical Bank was buying "all of said receivables acceptable to and approved by you [Chemical Bank]." Although the agreement stated that accounts not accepted by Chemical Bank would nonetheless be assigned to it, the agreement stated that Chemical Bank would have "full recourse" to plaintiff for unaccepted accounts. Chemical Bank may have been

RUSSELL v. BAITY

[95 N.C. App. 422 (1989)]

technically liable to plaintiff for these unaccepted accounts, but plaintiff was in turn liable to Chemical Bank under "full recourse" for these accounts, so as a practical matter Chemical Bank was not indebted to plaintiff for any unaccepted accounts. It appears that Chemical Bank did not become indebted to plaintiff when the factoring agreement was executed. Therefore, Chemical Bank only became indebted to plaintiff when it accepted one of plaintiff's accounts. The factoring agreements contained in the record on appeal did not import on their faces the existence of a debt, so these agreements did not qualify as "evidences of debt" according to the commonly accepted definition stated above. We therefore find that plaintiff has failed to prove that the trial court erroneously interpreted G.S. sec. 105-202 when it determined that plaintiff's right to payment from its factors did not have to be classified as "other evidences of debt."

Affirmed.

Judges COZORT and GREENE concur.

JEFFREY STEVEN RUSSELL AND WIFE, STEPHNEY WRIGHT RUSSELL,
PLAINTIFFS-APPELLEES v. DAROLD T. BAITY D/B/A BAITY'S HEATING AND
AIR CONDITIONING COMPANY; AND PUCKETT ENTERPRISES, INC.,
DEFENDANTS-APPELLANTS

No. 8823SC1386

(Filed 5 September 1989)

1. Sales § 17— heating system—breach of warranty—evidence sufficient

In an action arising from the purchase of a heating system for plaintiffs' home, the evidence was clearly sufficient to support the jury's verdict and the judgment entered thereon that defendant Baity impliedly and expressly warranted to plaintiffs that the heating system would meet state and local codes and be fit for the ordinary purposes for which such systems were used. N.C.G.S. § 1A-1, Rule 50(b).

RUSSELL v. BAITY

[95 N.C. App. 422 (1989)]

2. Trial §§ 6, 58.3— breach of warranty— stipulation that court determine liability between codefendants— trial judge's decision final

The trial judge's decision limiting the liability of the codefendant manufacturer was final in a breach of warranty action arising from the sale of a heating system where the parties' stipulation authorized the trial judge to determine the amount of each defendant's liability to the plaintiffs after the issues had been answered by the jury.

3. Unfair Competition § 1— defective heating system— evidence not sufficient

The evidence was not sufficient to support plaintiff's claim for unfair and deceptive trade practices with respect to the sale and installation of a water stove system.

APPEAL by plaintiffs and defendants from *Mills, Judge*. Judgment entered 13 July 1988 in Superior Court, YADKIN County. Heard in the Court of Appeals 23 August 1989.

This is a civil action wherein plaintiffs seek damages for the alleged breach of an express warranty pursuant to G.S. 25-2-313, for the alleged breach of the implied warranty of merchantability pursuant to G.S. 25-2-314, and for alleged unfair and deceptive trade practices pursuant to G.S. 75-1.1, arising out of a contract between plaintiffs and defendants, in which plaintiffs agreed to purchase and defendants agreed to install a heating system into plaintiffs' home. At the conclusion of the evidence, the trial judge granted defendants' motion for directed verdict on plaintiffs' claim for damages under G.S. 75-1.1. The following issues were submitted to and answered by the jury.

1. Did defendant, Baity, breach the written contract between plaintiffs and defendant, Baity?

ANSWER: Yes

2. Did defendant, Puckett Enterprises, Inc., make an express warranty to plaintiffs that the Aqua II water stove system purchased by plaintiffs would meet all state and local building codes?

ANSWER: Yes

RUSSELL v. BAITY

[95 N.C. App. 422 (1989)]

3. If so, did defendant, Puckett Enterprises, Inc., breach said express warranty?

ANSWER: Yes

4. Did defendant, Baity, impliedly warrant to plaintiffs that the Aqua II water stove system purchased by plaintiffs would be fit for the ordinary purposes for which such systems are used?

ANSWER: Yes

5. If so, did defendant, Baity, breach said implied warranty?

ANSWER: Yes

6. Did defendant, Puckett Enterprises, Inc. impliedly warrant to plaintiffs that the Aqua II water stove system purchased by plaintiffs would be fit for the ordinary purposes for which such systems are used?

ANSWER: Yes

7. If so, did defendant, Puckett Enterprises, Inc. breach said implied warranty?

ANSWER: Yes

8. What amount of damages, if any, are plaintiffs entitled to recover?

ANSWER: \$7,000

The trial court entered judgment on the verdict and concluded that "defendant, Puckett's liability, as between defendant, Baity, and defendant, Puckett, should be restricted to the sum of \$2,084.78." Plaintiffs and defendants appealed.

Shore, Hudspeth and Harding, by N. Lawrence Hudspeth, for plaintiffs, appellees.

David F. Tamer for defendant Baity, appellant.

No brief for defendant, Puckett Enterprises, Inc., appellee.

HEDRICK, Chief Judge.

[1] Defendant argues "the trial court erred in denying the motions of defendant Baity to dismiss at the close of all the plaintiff's

RUSSELL v. BAITY

[95 N.C. App. 422 (1989)]

evidence." Defendant contends that since plaintiffs "undertook to build their own house . . . [plaintiffs] had a substantial responsibility to fully investigate the component parts of the house. . . ." Defendant further argues somewhat confusingly that even though the written contract signed by the parties on 1 February 1985 provided that the equipment and work were "to meet state and local codes," defendant did not make any express warranties because such representations were "done in the context of representations which were made by someone other than defendant Baity."

In ruling on a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a), the court must consider the evidence in the light most favorable to the nonmovant. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973). Also, the court must resolve any contradictions, conflicts and inconsistencies in the evidence in the nonmovant's favor in determining the sufficiency of the evidence to withstand a motion for a directed verdict. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E.2d 407 (1980). The motion may only be granted if the evidence is insufficient to justify a verdict for the plaintiff as a matter of law. *Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 300 S.E.2d 37 (1983). In determining if a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b) should be granted, the same factors are considered as in the directed verdict decision. *Id.*

The evidence in the present case is clearly sufficient to support the jury's verdict and the judgment entered thereon that defendant Baity impliedly and expressly warranted to plaintiffs that the heating system would "meet state and local codes" and be fit for the ordinary purposes for which such systems are used. These assignments of error are overruled.

[2] Defendant next asserts the "trial court erred in limiting the liability of codefendant Puckett Enterprises, Inc. to defendant Baity to the sum of \$2,084.78." This assignment of error is based on an exception to the trial judge's conclusion that "defendant, Puckett's liability, as between defendant, Baity, and defendant, Puckett, should be restricted to the sum of \$2,084.78," citing, *Wilson v. Chemical Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972), and *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979). Defendant argues that he, as a retailer, should be able to recover his entire loss from the manufacturer, defendant Puckett, since defendant Baity

HAYWOOD v. HAYWOOD

[95 N.C. App. 426 (1989)]

resold the heating system to plaintiffs with the same warranties as defendant manufacturer made. We disagree.

The parties, according to the judgment, "stipulated that the issue of respective liability of each defendant should be reserved for decision by the Court after the jury answered the issues submitted. . . ." This stipulation authorized the trial judge to determine the amount of each defendant's liability to the plaintiffs after the issues had been answered by the jury. By this stipulation, defendant Baity, in effect, authorized the trial judge to determine defendant Puckett's liability to defendant Baity from the evidence presented. The trial judge's decision in this regard is final.

[3] Plaintiffs' sole argument on appeal relates to the trial court's entering a judgment directing a verdict for defendants with respect to plaintiffs' unfair and deceptive trade practices claim pursuant to G.S. 75-1.1 *et seq.*

While the evidence is clearly sufficient to support the jury's verdict finding that defendants breached both express and implied warranties, we hold the evidence is not sufficient to support plaintiff's claim for unfair and deceptive trade practices with respect to the sale and installation of the Aqua II water stove system. The judgment of the trial court will be affirmed.

Affirmed.

Judges ORR and LEWIS concur.

EGBERT L. HAYWOOD, JR., PLAINTIFF-APPELLANT v. MARY R. HAYWOOD,
DEFENDANT-APPELLEE

No. 8814DC709

(Filed 5 September 1989)

1. Divorce and Alimony § 18.10— alimony pendente lite and counsel fees—retroactive award improper

The findings of fact in this action did not support an award of alimony pendente lite and counsel fees retroactively from the approximate date the parties separated until the date of the entry of the order over three years later, where

HAYWOOD v. HAYWOOD

[95 N.C. App. 426 (1989)]

there had been no proper order entered with respect to alimony, since the element of urgency, emergency, and immediacy present in alimony pendente lite proceedings was totally lacking in this case; defendant's failure to pursue an alimony pendente lite action demonstrated a total lack of need for an order of temporary alimony and counsel fees; and defendant was able to support herself and employ counsel to protect her interests. N.C.G.S. § 50-16.3.

2. Divorce and Alimony § 30— equitable distribution— consideration of fatally defective temporary alimony order improper

The trial court's equitable distribution order clearly took into consideration a fatally defective order for temporary alimony, and the equitable distribution order must therefore be remanded for new findings, conclusions, and the entry of a new order.

APPEAL by plaintiff from *LaBarre, Judge*. Orders entered 21 December 1987 and 22 December 1987 in District Court, DURHAM County. Heard in the Court of Appeals 13 March 1989.

Plaintiff and defendant were married on 3 March 1978. The parties separated on 3 July 1984, and in November 1984 defendant, then plaintiff, brought an action seeking permanent alimony and alimony *pendente lite*. Thereafter, on 5 July 1985, plaintiff filed a complaint seeking an absolute divorce. Defendant answered and requested an equitable distribution of the parties' property pursuant to G.S. 50-20 *et seq.*, alimony and counsel fees. An absolute divorce was granted on 20 September 1985. On 21 December 1987, an order was entered requiring plaintiff to pay defendant "temporary alimony" in the amount of \$750.00 per month from 1 August 1984 through 30 June 1985 and requiring plaintiff to pay defendant "temporary alimony" in the amount of \$1,400.00 from 1 July 1985 through 31 December 1987 and "continuing during the pendency of this action until such time as the said equitable distribution order entered simultaneously herewith is fully paid and executed." The equitable distribution judgment was entered 22 December 1987. This judgment divided the marital property equally between plaintiff and defendant. Thereafter, plaintiff filed motions pursuant to G.S. 1A-1, Rules 52, 59 and 62 to amend the alimony and equitable distribution judgments, or in the alternative for a new trial, and for a stay of enforcement of the alimony and equitable distribution judgments pending hearing on the motions. On 27 January 1988,

HAYWOOD v. HAYWOOD

[95 N.C. App. 426 (1989)]

Judge LaBarre denied these motions except that Finding of Fact No. 16 in the judgment was amended to reflect the pendency of litigation against the estate of plaintiff's father, Egbert L. Haywood, Sr. Also on 27 January 1988, Judge LaBarre entered an amended alimony judgment and order. Plaintiff appealed from the equitable distribution judgment and order, the alimony judgment and order, and the order of the court denying his motions under Rules 52 and 59.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and E. Elizabeth Lefler, for plaintiff, appellant.

Randall, Yaeger, Jervis & Hill, by John C. Randall, for defendant, appellee.

HEDRICK, Chief Judge.

[1] The first question presented on this appeal is whether the trial court, under the circumstances of this case, erred in ordering plaintiff husband to pay defendant wife temporary alimony and counsel fees retroactively from 21 December 1987, the date of the entry of the order, to 1 August 1984, approximately one month after the date the parties separated. Stated another way, the question is whether the findings of fact in this case support an award of alimony *pendente lite* and counsel fees from approximately the date the parties separated and the date of the entry of the order, where there had been no prior order entered with respect to alimony.

G.S. 50-16.3 provides:

(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony *pendente lite* when:

- (1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony *pendente lite* is made, and
- (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

HAYWOOD v. HAYWOOD

[95 N.C. App. 426 (1989)]

(b) The determination of the amount and the payment of alimony *pendente lite* shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made.

The remedy of alimony *pendente lite* and counsel fees is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at the trial upon substantially equal terms. *Brady v. Brady*, 273 N.C. 299, 160 S.E.2d 13 (1968). The purpose of an award of alimony *pendente lite* is to provide for the reasonable and proper support of the wife in an emergency situation, pending the final determination of her rights. *Schloss v. Schloss*, 273 N.C. 266, 160 S.E.2d 5 (1968). The purpose of the speedy proceedings for support *pendente lite* is to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This support puts the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim. *Black v. Black*, 30 N.C. App. 403, 226 S.E.2d 858, *disc. rev. denied*, 290 N.C. 775, 229 S.E.2d 31 (1976). An order awarding support *pendente lite* is intended to go no further than provide subsistence and counsel fees pending the litigation. *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976). The purpose of a hearing for alimony *pendente lite* is not to determine property rights or to finally determine what alimony the dependent spouse may receive if she wins her case on the merits, but instead it is to give the dependent spouse reasonable subsistence pending trial and without delay. *Kohler v. Kohler*, 21 N.C. App. 339, 204 S.E.2d 177 (1974).

The element of urgency, emergency and immediacy is totally lacking in the present case. While defendant might have maintained successfully a claim for alimony *pendente lite* and counsel fees from the date the parties separated, her failure to do so demonstrates a total lack of need for an order of temporary alimony and counsel fees. The record vividly discloses that defendant was able to support herself and employ counsel to protect her interests. In fact, she brought an action for alimony and counsel fees within a few months of the separation, yet she did not pursue that claim or a claim for alimony *pendente lite* from 1984 until the date the order was entered. The provision in the temporary alimony and counsel fees order that defendant must pay alimony "continuing during the pendency of this action until such time as the said equi-

HAYWOOD v. HAYWOOD

[95 N.C. App. 426 (1989)]

table distribution order entered simultaneously herewith is fully paid and executed" is merely a lightly disguised effort to coerce plaintiff into complying with both orders. The order awarding temporary alimony and counsel fees is not supported by the findings and conclusions and must be reversed.

[2] Next we come to consider the order for equitable distribution dated 22 December 1987. G.S. 50-20(f) states:

The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

In this regard we perceive a conscious effort, albeit largely unsuccessful, upon the part of the able trial judge not to violate the provisions of G.S. 50-20(f). The equitable distribution order, however, when considered together with the order for temporary alimony and counsel fees, clearly indicates it was not entered without regard to the order for alimony *pendente lite* and counsel fees. The two orders are interdependent. Therefore, since the equitable distribution order in the present case clearly took into consideration the fatally defective order for temporary alimony, we must vacate the order for equitable distribution and remand the cause to the district court for new findings, conclusions and the entry of a new order of equitable distribution. Such findings, conclusions and order will be made from the present record without further hearing.

The result is: the order for alimony *pendente lite* and counsel fees is reversed; the order for equitable distribution is vacated and the cause remanded to the district court for further proceedings.

Reversed in part; vacated and remanded in part.

Judges WELLS and LEWIS concur.

HAIR v. HALES

[95 N.C. App. 431 (1989)]

EUGENE HAIR, JEAN G. HAIR, J. DAVID GUNTHER, ROGER HOLMES,
WILMA SEWELL, RUDOLPH BYRD AND KAY BYRD, PLAINTIFFS v. JAMES
ROBERT HALES AND WIFE, GLENDA G. HALES, DEFENDANTS

No. 8812DC1272

(Filed 5 September 1989)

1. Deeds § 20.6— restrictive covenants— filed one minute before deed—not enforceable against purchaser

Summary judgment was properly granted for defendants in an action to enforce restrictive covenants allowing mobile homes only during construction of a permanent dwelling and for no longer than one year where defendants contracted with plaintiffs to purchase two lots on May 30, 1986; closing took place on May 30, 1986; the deed of conveyance was recorded on June 4, 1986; the deed conveying the property to defendants contained no express exception for restrictive covenants; and plaintiffs recorded restrictive covenants one minute prior to the deed's recordation. If the restrictive covenant is contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed, a purchaser has no constructive notice of it and is not bound.

2. Frauds, Statute of § 3— sale of real property—restrictive covenants—statute of frauds raised as defense

Defendants in an action to enforce restrictive covenants properly raised the statute of frauds as a defense by specifically alleging in their answer that the restrictive covenants were not on record at the time of the conveyance to the defendants and successfully arguing that defense in the hearing on a motion for summary judgment.

APPEAL by plaintiffs from *Pate (Warren L.)*, Judge. Order entered 27 June 1988 in District Court, CUMBERLAND County. Heard in the Court of Appeals 21 August 1989.

Prior to May 30, 1986 defendants orally contracted with plaintiffs to purchase lots 6 and 7 in a residential subdivision known as the Eugene Hair Property located in Cumberland County, North Carolina for a purchase price of \$36,000.00. Closing took place on May 30, 1986, and at that time the defendants tendered \$3,000.00 cash and executed a purchase money note and deed of trust for \$30,000.00 and agreed to pay the \$3,000.00 balance in cash within

HAIR v. HALES

[95 N.C. App. 431 (1989)]

12 months of closing. The deed of conveyance was recorded on June 4, 1986. The deed conveying the property to defendants contained no express exception for restrictive covenants. One minute prior to this deed's recordation, plaintiffs recorded restrictive covenants designed to govern the use of all of the lots in the Eugene Hair subdivision. Restrictive covenant #5 provides that "mobile homes will be permitted only during construction of a permanent dwelling and in such event for no more than one year." Defendants have erected a double-wide mobile home on their property and have maintained this dwelling in excess of the one-year restrictive covenant.

On January 21, 1988 plaintiffs filed suit against defendants to enforce covenant #5 and enjoin defendants from continuing to maintain their mobile home on the property. In their answer and counterclaim, defendants denied that they were properly notified of the existence of the restrictive covenants and by means of their "Second Counterclaim," alleged that the restrictive covenants constituted a cloud on their title. On May 26, 1988, plaintiffs moved for summary judgment as to all claims and counterclaims. The defendants responded and cross-moved for summary judgment on all matters. After a hearing on June 16, 1988, District Court Judge Warren L. Pate entered an order granting defendants' motion as to the plaintiffs' claims against them. In addition, summary judgment was granted in favor of defendants with regard to their second counterclaim. At the same time, summary judgment in favor of the plaintiffs was granted as to the defendants' first and third counterclaims. Plaintiffs appeal and we affirm.

Beaver, Thompson, Holt and Richardson, by Jack A. Thompson, for plaintiff-appellants.

Rose, Rand, Ray, Winfrey & Gregory, P.A., by Steven J. O'Connor, for defendant-appellees.

LEWIS, Judge.

[1] The entry 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 judgment as a matter of law." G.S. 1A-1, Rule 56(c). The burden of establishing the absence of any issues as to a material fact rests on the moving party. *Kidd v. Early*, 289 N.C. 343, 222

HAIR v. HALES

[95 N.C. App. 431 (1989)]

S.E.2d 392 (1976). An issue of fact is "material" for purposes of determining whether a motion for summary judgment should be denied, "if the facts as alleged would constitute a legal defense or would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action." *Isbey v. Crews*, 55 N.C. App. 47, 49, 284 S.E.2d 534, 536 (1981). Summary judgment should be looked upon with favor where no genuine issue of material fact is presented. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

We find no issue of material fact in this case. The long standing rule in North Carolina is that restrictive covenants are an interest in land, conveyance of which is within the Statute of Frauds. *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942). Restrictive covenants restrain the owner of the servient estate from making certain use of his property. Such restraint may not be effectively imposed except by deed or other writing duly registered. *Davis v. Robinson*, 189 N.C. 589, 127 S.E.2d 697 (1925). If the restrictive covenant is contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed, a purchaser has no constructive notice of it and is not bound. *Turner v. Glenn*, *supra* at 625. North Carolina has consistently held that registration is the one and only means of giving notice of an instrument affecting title to real estate. *Massachusetts Bonding and Insurance Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436 (1942); *Bruton v. Smith*, 225 N.C. 584, 36 S.E.2d 9 (1945); *St. Luke's Episcopal Church v. Berry*, 2 N.C. App. 617, 163 S.E.2d 664 (1968). A purchaser of real property "is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title." *Morehead v. Harris*, 262 N.C. 330, 340, 137 S.E.2d 174, 184 (1964).

In the instant case, defendants' deed made no reference to any restrictive covenants on the property. Furthermore, no other deeds in defendants' chain of title, nor other registered instruments referenced any restrictions on the property.

Plaintiffs contend that the recordation of these restrictive covenants on June 4, 1986 acted as constructive notice to defendants because the covenants were recorded just prior to the recordation of defendants' deed of conveyance. However, as between the grantor and the grantee, registration is not required to pass title

HAIR v. HALES

[95 N.C. App. 431 (1989)]

to land. A deed becomes operative to pass title upon its delivery. *Newell v. Edwards*, 7 N.C. App. 650, 173 S.E.2d 504 (1970). Moreover, as between the parties, even after registration "[t]he ultimate inquiry is not what the records show but what the terms of the original deed are." *Bowden v. Bowden*, 264 N.C. 296, 302, 141 S.E.2d 621, 627 (1965).

The uncontradicted evidence in this case shows that the deed was executed, acknowledged and dated May 30, 1986, was not in the possession of the plaintiff-grantors after May 30, 1986 and that the recording fees were paid on May 30, 1986 by the grantees. The date on the deed is *prima facie* evidence of the date of delivery. *Williams v. North Carolina State Board of Education*, 284 N.C. 588, 201 S.E.2d 889 (1974). The plaintiffs put on no evidence to contradict the date on the face of the deed showing delivery on May 30, 1986. Legal title passed to the defendants prior to the June 4, 1986 recordation of the restrictive covenants. Therefore, defendants purchased the property without notice of the existence of any covenants burdening their title.

Summary judgment was proper, and accordingly, we affirm.

[2] Plaintiffs' contention that the defendants failed to plead the Statute of Frauds is without merit. Defendants, in the "Third Defense" contained in their answer, specifically alleged that the restrictive covenants were not on record at the time of the conveyance to the defendants. As explained above, in order for the restrictive covenants to be binding upon purchasers of the servient estate, the covenants must be registered or recorded in a deed or instrument in the grantor's chain of title in order to comply with the Statute of Frauds. Defendants not only pleaded this defense in their answer, but argued this defense successfully in the hearing on motion for summary judgment.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

IN RE GUESS

[95 N.C. App. 435 (1989)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 8710SC618

(Filed 5 September 1989)

Physicians, Surgeons, and Allied Professions § 6.2— use of homeopathic remedies—deviation from acceptable and prevailing medical practice—no harm to patients or public—revocation of license improper

Before a physician's license to practice his profession in this State can be lawfully revoked under N.C.G.S. § 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice, it must also appear that the deviation complained of posed some threat of harm either to the physician's patients or to the public; therefore, the trial court did not err in vacating the Board of Medical Examiner's order which revoked respondent's license to practice medicine because he utilized homeopathic medicines in his practice where the Board neither charged nor found that respondent's departures from approved and prevailing medical practices either endangered or harmed his patients or the public.

ON remand from the North Carolina Supreme Court by a decision reported at 324 N.C. 105, 376 S.E.2d 8 (1989).

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for petitioner appellant.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for respondent appellee.

PHILLIPS, Judge.

This appeal by the North Carolina Board of Medical Examiners is from the judicial review of its decision sanctioning the respondent physician. When it was first here we declined to determine it, *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988), because G.S. 90-14.11, still in the books, directs that decisions of the North Carolina Board of Medical Examiners, after being reviewed by the Superior Court, be appealed to the Supreme Court, and because several years after G.S. 7A-27(b) authorized this Court to receive appeals from the judicial review of administrative decisions our Supreme

IN RE GUESS

[95 N.C. App. 435 (1989)]

Court in *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), accepted an appeal from the Superior Court's review of a decision by the North Carolina Board of Medical Examiners and stated that it had jurisdiction to do so. Our decision was vacated by the Supreme Court, which held that this Court had initial appellate jurisdiction over the appeal because the enactment of G.S. 7A-27(b) in 1967 in effect repealed G.S. 90-14.11, and we herewith determine it as directed.

The pertinent facts are few and essentially undisputed. Following notice and a hearing the Board of Medical Examiners of the State of North Carolina conditionally revoked the license of Dr. George Albert Guess, a specialist in family medicine situated in Asheville, to practice medicine in this state. The action was taken under G.S. 90-14(a), which authorizes the Board to suspend or revoke licenses to practice medicine for several improper activities or practices, one of which is—

- (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, . . .

Proceeding under this provision the Board charged Dr. Guess with unprofessional conduct in that he customarily treated patients with preparations known generally as "homeopathic medicines," a practice not in accord with the standards of acceptable and prevailing medical practice in this state. From the evidence presented at the hearing the Board found that the charge had been sustained; *viz*, that in treating patients Dr. Guess customarily administered "homeopathic medicines" to his patients and that such administration was contrary to acceptable and prevailing medical practices in this state. From these findings the Board concluded that Dr. Guess' utilization of homeopathic medicines in his practice was unprofessional conduct under G.S. 90-14(a)(6) and revoked his license to practice, but stayed the revocation upon the condition that he not use homeopathic medicines in his practice and otherwise conform to acceptable and prevailing medical practice in this state. Following Dr. Guess' appeal to the Superior Court the order was vacated upon findings and conclusions that the Board's findings of fact and conclusions of law were not supported by competent evidence and were arbitrary and capricious.

IN RE GUESS

[95 N.C. App. 435 (1989)]

The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principal findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients. Nor is the Board's conclusion of law that such departure from acceptable and prevailing medical practice was unprofessional conduct and a ground for punishment arbitrary and capricious, as the court ruled, for the Board's conclusion is based upon the provisions of G.S. 90-14(a) which explicitly state that "any departure" from the standards of acceptable and prevailing medical practice in this state is unprofessional conduct and a ground for suspending or revoking a physician's license.

Nevertheless, we believe that the order vacating the Board's order is correct and we affirm it. We do this because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners. For the General Assembly created the Board of Medical Examiners to "properly regulate the practice of medicine and surgery" in this state, G.S. 90-2; and since "[t]he State can only regulate for the protection of the public," *State v. McKnight*, 131 N.C. 717, 724, 42 S.E. 580, 582 (1902), its purpose could have only been to protect the public. Thus, implicit in the provisions granting the Board power to revoke a medical license for practices not in conformity with the standards of acceptable and prevailing medical practice in the state is the requirement that the nonconforming practices endanger or harm the public in some way. Without that implicit requirement G.S. 90-14(a)(6) would permit the Board of Medical Examiners to suspend the license of any physician whose methods or practices, though harmless or even beneficial to his patients and the public, differ in some particular from those of most practitioners. Such unqualified power by an administrative

IN RE GUESS

[95 N.C. App. 435 (1989)]

agency would be contrary to the public interest, and was not the legislature's to give in any event.

Emphasizing that G.S. 90-14(a)(6) expressly makes it unnecessary to establish that a patient was injured by any unapproved medical practice and makes departures from approved and prevailing medical practice unprofessional conduct and a ground for sanctions, the Board contends that the legislature intended thereby to require it to establish only a departure from accepted and prevailing medical practice before suspending or revoking a physician's license. This argument is rejected. In not making injury to a patient an element of improper medical practice that warrants suspension from the practice the General Assembly only recognized the commonly known fact that not every improper or even irresponsible act of a physician results in injury to a patient; and that it did not go farther and provide that potential harm to the public need not be established is an indication that it understood that innocuous departures from prevailing medical practice cannot be a ground for suspending or revoking a physician's license.

Our holding, therefore, is that: Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public. This decision, of course, is no bar to any future proceeding by the Board against Dr. Guess or any other medical practitioner based upon charges and evidence that practices or conduct contrary to approved and prevailing medical practices in this state have exposed either persons or the public to harm.

Affirmed.

Judges WELLS and PARKER concur.

WALLACE COMPUTER SERVICES v. WAITE

[95 N.C. App. 439 (1989)]

WALLACE COMPUTER SERVICES, INC., PLAINTIFF v. RICHARD B. WAITE
AND WILLAMETTE INDUSTRIES, INC., DEFENDANTS

No. 8826SC1253

(Filed 5 September 1989)

**Contracts § 7.1; Master and Servant § 11 — covenant not to compete
— legitimate business interest — enforceability under Illinois law**

A noncompetition clause in a sales representative agreement was valid and enforceable under Illinois law since plaintiff had a legitimate business interest in need of protection by a noncompetition agreement based on plaintiff's near permanent relationship with its customers and defendant's acquisition of confidential information detailing the purchasing history of each customer.

APPEAL by plaintiff from *Snepp, Judge*. Order and judgment entered 9 June 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 June 1989.

Plaintiff, in suing Richard B. Waite, a former employee, and Willamette Industries, Inc., his new employer and plaintiff's competitor in the business forms and computer service industry, alleged the following causes of action—(1) against Waite for breaching his contract not to compete with plaintiff for two years following the termination of his employment; (2) against Waite and Willamette for common law unfair competition; (3) against Willamette for tortious interference with contract; (4) against Waite and Willamette for tortious interference with prospective economic advantage; and (5) against Waite and Willamette for violating the North Carolina Trade Secrets Protection Act. After various developments the court denied plaintiff's request for a preliminary injunction and dismissed all the actions by summary judgment upon findings and conclusions, in substance, that though the scope of the restrictive covenant was reasonable, it was not reasonably necessary to protect any legitimate business interest plaintiff had, and thus was not enforceable under Illinois law, which the parties agree governs the case.

The exhibits and other materials before the court indicate the following: Defendant Waite had no previous experience in the business forms and computer service industry when plaintiff employed him as a sales representative by an agreement providing as follows:

WALLACE COMPUTER SERVICES v. WAITE

[95 N.C. App. 439 (1989)]

1. Scope of Employment: Under the direction of the Company, the Sales Representative shall devote his whole time and best efforts, as a non-exclusive sales representative of the Company, to the solicitation of orders for such products of the Company, and in such territory or with respect to such accounts, as shall be assigned to him from time to time. . . .

2. Confidential Information: The Sales Representative shall not disclose to any unauthorized person any confidential information he may obtain regarding the Company's products, customers or methods of doing business, nor use such information, either during the term of his employment by the Company or thereafter, except in the furtherance of the business of the Company.

. . . .

4. Competition: For a period of two years commencing with the termination of this Agreement pursuant to its terms, the Sales Representative shall not sell to, contact or deal with the accounts or customers to which he had been assigned or that he had otherwise dealt with during his employment by the Company with respect to products or services which are then competitive with one or more products or services of the Company. During said period of time, the Sales Representative shall not induce or attempt to induce any sales representative or other employee of the Company to leave its employ, engage in any competing business, or to otherwise aid or assist any person or company which is or intends to be in competition with the Company. The legal and equitable remedies available to sales representatives or other employees of the Company against the Sales Representative for violations of the provisions of this paragraph shall in no way detract from, but shall be in addition to, such remedies available to the Company.

Defendant Waite worked for plaintiff primarily in the Charlotte, North Carolina area for over five years, first as a sales representative, then as District Manager. While there he had access to plaintiff's records, which *inter alia* document the entire purchasing history of each customer in the district, including the type, quantity and frequency of products purchased, price concessions made for each product, and the gross profit derived from the sale of each product to each customer. Many of the customers covered by plaintiff's records had been regular customers of plaintiff for several

WALLACE COMPUTER SERVICES v. WAITE

[95 N.C. App. 439 (1989)]

years. Within a month after leaving plaintiff and joining defendant Willamette Industries Waite *inter alia* used information acquired at Wallace in preparing a list of Charlotte area businesses that own and use particular types of laser printers; and gave his supervisor copies of computer customer information obtained from Wallace's records.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson and Keith Weddington, and Butler, Rubin, Newcomer, Saltarelli & Boyd, Chicago, Illinois, by Ellen Claire Newcomer and Stephanie Leider, for plaintiff appellant.

Petree Stockton & Robinson, by John T. Allred and J. Neil Robinson, for defendant appellees.

PHILLIPS, Judge.

The only question raised by plaintiff's appeal is whether the non-competition agreement between plaintiff and defendant Waite is unenforceable as a matter of law under the law of Illinois; for all of plaintiff's actions are based upon the contract and the court dismissed them on the sole ground that the contract is not enforceable under the law of Illinois. The ruling is erroneous, and we vacate it.

While the general rule in Illinois is that an employer has no proprietary interest in its customers, *The Packaging House, Inc. v. Hoffman*, 114 Ill. App. 3d 284, 448 N.E.2d 947 (1983), it has been repeatedly held there, as stated in *The Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 892, 480 N.E.2d 1273, 1279 (1985) and the many cases cited therein, that an employer can have a proprietary interest in its customers for the purpose of enforcing a covenant not to compete—

(1) where the former employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit, and (2) where, by nature of the business, the customer relationship is near-permanent and, but for his association with plaintiff [the employee], would not have had contact with the customers in question.

Plaintiff's forecast of proof indicates that both of these situations exist in this case. The detailed customer information plaintiff recorded through the years, that its salesmen used in getting orders from the customers, and that Waite took to the competitor was clearly

RIVER HILLS COUNTRY CLUB v. QUEEN CITY SPRINKLER CORP.

[95 N.C. App. 442 (1989)]

confidential and of a type to give Willamette an advantage in seeking orders from plaintiff's customers, many of whom had regularly bought supplies from plaintiff for many years and would not have been known to Waite except for his employment by plaintiff. Illinois permits employers to protect themselves against such tactics. *Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 389 N.E.2d 1300 (1979).

And for that matter in *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988), our Supreme Court held that under Illinois law an employer can properly prevent a former employee from disclosing information of the type here involved to its competitors. This holding was enlarged upon in *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 526, 379 S.E.2d 824, 826 (1989), also involving Illinois law, where it was said, "customers developed by a salesperson are the property of the employer and may be protected by contract under which the salesperson is forbidden from soliciting those customers for a reasonable time after leaving his . . . employment."

Vacated and remanded.

Judges BECTON and LEWIS concur.

RIVER HILLS COUNTRY CLUB, INC. v. QUEEN CITY AUTOMATIC SPRINKLER CORPORATION

No. 8826SC1264

(Filed 5 September 1989)

Negligence § 13.1 — sprinkler system — failure to drain low points — no expertise by plaintiff — no contributory negligence

In an action to recover for damages sustained when a pipe in plaintiff's sprinkler system froze and burst allegedly because of defendant's negligence in failing to locate and drain a low point in the system, the trial court erred in instructing the jury on the issue of contributory negligence since plaintiff had no duty to know the importance of locating the low points in its sprinkler system.

RIVER HILLS COUNTRY CLUB v. QUEEN CITY SPRINKLER CORP.

[95 N.C. App. 442 (1989)]

APPEAL by plaintiff from *Marvin K. Gray, Judge*. Judgment entered 1 July 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 May 1989.

Caudle & Spears, P.A., by Thad A. Throneburg and Harry P. Brody, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, P.A., by John Morris and William J. Garrity, for defendant-appellee.

BECTON, Judge.

Plaintiff, River Hills Country Club, Inc. ("River Hills"), appeals from a jury verdict finding it contributorily negligent for property damage estimated at \$28,250. On 22 January 1985, a pipe in the plaintiff's sprinkler system froze and burst, flooding the Cove Room in plaintiff's clubhouse. The jury found defendant, Queen City Automatic Sprinkler Corp. ("Queen City"), negligent and River Hills contributorily negligent. We conclude that the evidence in this case is insufficient to demonstrate contributory negligence and, accordingly, we reverse.

I

Queen City entered into a service contract with River Hills in 1977, agreeing to maintain the country club's already existing dry sprinkler system. A dry sprinkler system differs from a wet one in that it is filled with air instead of water. The owner of a dry system, therefore, does not have to worry about the possibility of water in the pipes freezing during cold weather. To ensure this, however, all low points—regions where a downward sloping pipe meets an upward sloping pipe—must be drained of any water that has collected when the system is flushed. Until January 1985, Queen City serviced and inspected the system twice a year. During these visits, the service technician would, among other things, flush the system with water and drain the low points.

An inspection report completed on 5 December 1984 by Queen City stated that all low points in the system had been drained. In truth, however, one low point, the access to which was hidden by drapery, was not drained. Because the access door was obscured, neither River Hills nor Queen City knew of the low point's existence. As a result, it had never been drained. When the water at that point froze, the pipe broke, thereby lowering the air pressure and releasing water into the Cove Room.

RIVER HILLS COUNTRY CLUB v. QUEEN CITY SPRINKLER CORP.

[95 N.C. App. 442 (1989)]

II

River Hills contends that the trial judge erred by 1) instructing the jury on the issue of contributory negligence and refusing to direct a verdict for plaintiff on the ground that there was insufficient evidence of contributory negligence, 2) instructing the jury on theories of contributory negligence which were not pleaded and which were based on inadmissible testimony, 3) incorrectly instructing on plaintiff's duty, and 4) refusing to set aside the verdict as to contributory negligence or, in the alternative, to grant a new trial on the grounds that the jury's verdict was inherently conflicting. It is necessary to address only the first of these assignments of error to decide the ultimate issue in this case: whether the evidence, taken in the light most favorable to Queen City, was sufficient to carry the issue of contributory negligence to the jury or whether the trial judge should have granted the River Hills' motion for a directed verdict.

"For [the] evidence to raise an inference of contributory negligence it would have to show that plaintiffs failed to perform some specific duty required by law in the exercise of ordinary care for their own safety or that of their property." *Watts v. Schult Homes Corp.*, 75 N.C. App. 110, 115, 330 S.E.2d 41, 43 (1985), *disc. rev. denied*, 314 N.C. 548, 335 S.E.2d 320 (1985). The judge instructed the jury that it was to decide whether River Hills (a) failed to ascertain the location of the low points and advise Queen City of the location of such low points, (b) failed to provide Queen City with information and blueprints from which it could properly ascertain the locations of low points in the building; and (c) failed generally to exercise reasonable care under the existing circumstances. We hold that these instructions were improper because River Hills had no duty to know about the importance of locating low points.

Our Supreme Court has said that:

"[w]hen one undertakes a professional assignment, the engagement implies that he possesses the degree of professional learning, skill and ability which others of that profession ordinarily possess, he will exercise reasonable care in the use of his skill and application of his knowledge to the assignment undertaken, and will exercise his best judgment in the performance of the undertaking."

RIVER HILLS COUNTRY CLUB v. QUEEN CITY SPRINKLER CORP.

[95 N.C. App. 442 (1989)]

Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 142, 146 S.E.2d 53, 61 (1966) (citation omitted). Queen City held itself out as a professional sprinkler company to River Hills. River Hills hired Queen City to maintain their system and relied on Queen City to do all that was necessary to keep the system working properly. Since locating low points was critical to ensuring a properly operating dry sprinkler system, Queen City had the duty to determine, by blueprints or otherwise, the location of the points before flushing the system with water. They were not relieved of their duty simply because, as they allege, an "unknown" manager of River Hills in 1977 stated that there were no blueprints available at that time.

In *Firemen's Mutual*, our Supreme Court discussed at length the duty of a sprinkler company when undertaking the conversion of a wet system to a dry one. The Court said that:

[i]n such a situation, knowing that the owner is relying upon him to determine what is necessary to do to the existing system in order to convert it into the system desired, if he, by failure to use due care, omits from his specifications an alteration necessary to avoid danger of damage to the owner's building or other property, he is not absolved from liability for such damage by the fact that the owner accepts his proposal for less than adequate changes in the existing system, the owner being unaware of the condition which makes the proposal inadequate. The duty to use due care to include within the specifications all that is necessary to make the converted system safe continues *into and through the performance of the work*.

Id. at 143, 146 S.E.2d at 61-2 (emphasis added). The same standard applies in the instant case when the sprinkler company undertook to maintain an existing dry system.

We disagree with Queen City that the fact that River Hills is a business operated by trained and experienced persons changes their status as lay persons in the field of sprinkler system maintenance. We decline to hold an employer to the same standard of knowledge and care as that of the independent contractor whom the employer hires. We hold that, as a matter of law, River Hills cannot be found contributorily negligent as River Hills had no duty to know the importance of locating the low points in its sprinkler system.

TALBOT v. N.C. DEPT. OF TRANSPORTATION

[95 N.C. App. 446 (1989)]

III

In a cross-assignment of error, Queen City contends that the trial judge erred by excluding testimony of an expert regarding the standard of care owed by a sprinkler contractor in locating low points. When Queen City attempted to elicit this testimony from its expert at trial, River Hills objected. The judge sustained the objection. Thereafter, Queen City made no offer of proof, and the record fails to disclose what the substance of the expert's evidence might have been. "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). *See also* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 103 (1988); N.C. Gen. Stat. Sec. 15A-1446(a) (1988). Since the essential substance of the witness' testimony is not discernible from the record, we hold that Queen City has waived its right to assert this issue on appeal.

IV

The judgment of the trial court regarding the question of River Hills' contributory negligence is reversed, and the case is remanded for trial on the issue of damages.

Reversed and remanded.

Judges PHILLIPS and LEWIS concur.

FREDDA DIANE BAYNOR TALBOT, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, DEFENDANT

No. 8810IC1036

(Filed 5 September 1989)

1. State § 4.4— negligent issuance of I.D. card— no sovereign immunity

There is no language in N.C.G.S. § 143-291 which prohibits plaintiff from bringing an action for negligent issuance of an I.D. card in her name against the State where the In-

TALBOT v. N.C. DEPT. OF TRANSPORTATION

[95 N.C. App. 446 (1989)]

dustrial Commission found that the DMV employee who issued the card was negligent during the course of his employment and that plaintiff was not contributorily negligent.

2. State § 8.2— negligent issuance of I.D. card—action not prohibited

A provision of N.C.G.S. § 20-37.7(g) prohibiting any action against the State for misuse of a special identification card issued by the State does not apply when the card is negligently issued.

APPEAL by defendant from the Decision and Order of the North Carolina Industrial Commission entered 7 June 1988. Heard in the Court of Appeals 13 April 1989.

Carter, Archie & Hassell, by Sid Hassell, Jr., for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for defendant-appellant.

ORR, Judge.

In December of 1986, the plaintiff, Fredda Diane Baynor Talbot, instituted this negligence action with the Industrial Commission against the defendant, North Carolina Department of Transportation, Division of Motor Vehicles (DMV). Plaintiff claims she suffered personal injury proximately caused by a DMV employee in the course of his employment who issued a special identification card in her name to Joyce Sauls.

A special identification card is issued in accordance with the procedure set out in G.S. 20-37.7. The statute requires that each application "shall be accompanied by a birth certificate and other proof of identification which shall be returned when the special identification card is issued." G.S. 20-37.7(b). According to the record in the case *sub judice*, the DMV employee looked at the birth certificate presented but never turned it over or requested any other form of identification as the statute requires.

Ms. Sauls took the identification with the plaintiff's name on it and used it to cash fraudulent checks drawn on the accounts of David and Judy Bynum and W. E. Tetterton. The forged checks

TALBOT v. N.C. DEPT. OF TRANSPORTATION

[95 N.C. App. 446 (1989)]

were made out to "Freda D. Baynor" and Ms. Sauls used the fake identification card to cash these checks.

The Bynums notified the sheriff's department that the checks were forged. The merchants who cashed the checks tracked down plaintiff and were going to prosecute her for cashing bad checks. Plaintiff alleged emotional distress due to harassing phone calls from the merchants and the threat of going to jail. She was forced to hire a lawyer and a private investigator to clear up the situation. The private investigator linked Ms. Sauls to the cases and plaintiff was ultimately cleared of any wrongdoing.

On 27 October 1987, the Industrial Commission entered a Decision and Order which awarded plaintiff \$20,000.00. The Full Commission affirmed the deputy's decision. The Department of Transportation appeals.

[1] DMV claims that the State's sovereign immunity bars this tort claim action in that the Tort Claims Act, G.S. 143-291 (1987), only serves as a limited waiver to sovereign immunity and does not apply to the situation in the case at bar. The statute reads in part:

The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of one hundred thousand dollars (\$100,000) cumulatively to all claimants on account of injury and damage to any one person.

POORE v. SWAN QUARTER FARMS

[95 N.C. App. 449 (1989)]

We do not see any language in the statute which prohibits plaintiff from bringing this action against the State. The Industrial Commission found the DMV employee was negligent during the course of his employment. Further, the Industrial Commission found that plaintiff was not contributorily negligent. The Industrial Commission's findings were consistent with the necessary findings under the Tort Claims Act. *See* G.S. 143-291.

[2] DMV also argues G.S. 20-37.7(g) prohibits any action against the State for misuse of a special identification card issued by the State. This section of the statute reads:

The fact of issuance of a special identification card pursuant to this section shall not place upon the State of North Carolina or any agency thereof any liability for the misuse thereof and the acceptance thereof as valid identification is a matter left entirely to the discretion of any person to whom such card is presented.

We agree with the Industrial Commission's finding that, "the Legislature by the enactment of this provision of the statute did not contemplate that the State would escape liability if a special identification card was negligently issued. In our view, the cited provision of the statute applies when such a card is properly issued."

The ruling of the Industrial Commission is affirmed.

Affirmed.

Judges BECTON and JOHNSON 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 September 1989)

**Corporations § 12— corporate deed to officer and director—pre-
sumption of invalidity**

The trial court should have entered a directed verdict for plaintiffs invalidating a deed from a corporation to an of-

POORE v. SWAN QUARTER FARMS

[95 N.C. App. 449 (1989)]

ficer and director of the corporation where defendant failed to offer evidence rebutting the presumption against the validity of such a deed.

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. Plaintiffs' Petition for Rehearing allowed for limited purpose of modifying earlier opinion.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for plaintiff-appellees.

Lee E. Knott, Jr. for defendant-appellants.

GREENE, Judge.

In a published opinion filed earlier in this matter and styled *Fred H. Poore and wife, Marie C. Poore v. Swan Quarter Farms, Inc., A. H. Van Dorp and Mary H. Van Dorp*, 94 N.C. App. 530, 380 S.E.2d 577 (1989), this court vacated a jury verdict in favor of the plaintiffs and remanded for entry of a directed verdict in favor of the defendants. In that opinion we failed to distinguish between the 16 June 1962 deed to Swan Quarter Farms, Inc. (corporation) and the 25 March 1969 deed from the corporation to Mary H. Van Dorp. A distinction is necessary because Mary H. Van Dorp, the grantee in the deed from the corporation, was also, at the time of the execution of the deed and its filing, a director of the corporation and its secretary.

When a transfer of property is made from a corporation to an officer or director of that corporation, there is a presumption against the validity of the deed. The purchaser has the "burden of establishing that the purchase is fair, open, and free from imposition, undue advantage, actual or constructive fraud." *Mountain Top Youth Camp v. Lyon*, 20 N.C. App. 694, 697, 202 S.E.2d 498, 500 (1974) (quoting *Green River Mfg. Co. v. Bell*, 193 N.C. 367, 371, 137 S.E. 132, 134 (1927)).

While the plaintiffs bore the burden of offering evidence showing invalidity of the 16 June 1962 deed to the corporation, the defendants had the burden of rebutting the presumption of invalidity of the 25 March 1969 deed from the corporation to Mary H. Van Dorp. Consequently, the plaintiffs' failure to offer any evidence as to the invalidity of the 16 June 1962 deed requires the reversal

STATE v. BENFIELD

[95 N.C. App. 451 (1989)]

of the trial court's refusal to grant the defendants' motion for directed verdict. The trial court did not, however, err in denying defendants' motion for directed verdict as to the deed from the corporation. As to that 25 March 1969 deed, the plaintiffs were entitled to rely on the presumption of invalidity of the corporate deed, and the defendants' failure to offer any evidence to rebut the presumption mandates voiding the 25 March 1969 deed. "If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed facts shall be deemed proved." N.C.G.S. Sec. 8C-1, Rule 301 (1988).

Accordingly, we affirm our prior decision except as herein modified.

Modified and affirmed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA AND DORIS BENFIELD, PLAINTIFF v. FRANK
WILLIAM BENFIELD, DEFENDANT

No. 8824DC1390

(Filed 5 September 1989)

**Divorce and Alimony § 24.10; Parent and Child § 7.2— emancipated
child—termination of child support**

The trial court erred in a civil contempt proceeding by finding that defendant was in arrears for \$500 for the support of his son and in contempt for failure to provide hospital insurance for his son where the son was 18 years old, had graduated from high school, had a part-time job, and was attempting to raise money to go to college. The result remains the same even assuming *arguendo* that plaintiff's evidence is sufficient to show that the son is physically or mentally incapable of self-support because there is no longer a statutory obligation in North Carolina for parents to support their disabled adult children.

STATE v. BENFIELD

[95 N.C. App. 451 (1989)]

APPEAL by defendant from *Ginn, Judge*. Order entered 24 August 1988 in District Court, AVERY County. Heard in the Court of Appeals 23 August 1989.

On the motion of plaintiff, Doris Benfield, a hearing for civil contempt was held before Judge Ginn. Plaintiff alleged defendant was in arrearage for child support payments, that defendant had not provided insurance coverage for their son, and that defendant had not paid all existing medical bills for their son, James LaRue Benfield, as required by a previous order entered 7 December 1987. Defendant claimed that his child support obligations had terminated since his son had reached 18 years of age on 17 May 1988 and had graduated from high school on 5 June 1988.

The trial court found that defendant owed a total of \$500.00 in child support for the months of July and August 1988. The court then ordered defendant jailed for 30 days for civil contempt for failure to provide an adequate insurance policy for James. The court further ordered that defendant could purge himself of the contempt by showing the court that he had obtained an adequate insurance policy covering James, by paying off the arrearage in child support, and paying \$250.00 for plaintiff's attorney's fees. Defendant appealed.

No brief for plaintiffs, appellees.

McMurray, McMurray & Alexander, by John H. McMurray, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant argues the trial court "erred in finding as a fact that defendant was in arrears in the amount of \$500.00 for the support of his son" and in holding defendant in contempt for failure to provide hospital insurance for his son. We agree.

G.S. 50-13.4(c) in pertinent part provides:

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

...

(2) If the child is still in primary or secondary school when he reaches age 18, the court in its discretion may order support payments to continue until he graduates, otherwise ceases to

STATE v. BENFIELD

[95 N.C. App. 451 (1989)]

attend school on a regular basis, or reaches age 20, whichever comes first.

Plaintiff's testimony offered at the hearing shows that James is 18 years old, has graduated from high school, has a part-time job, and is attempting to raise money to go to college. Plaintiff further testified that James is "not a normal eighteen (18) year old" since he was involved in a wreck. Plaintiff stated that after the wreck, James has "a real hard time concentrating," walks with a limp, tires easily, and cannot bend over.

The evidence, affirmatively disclosed by the record, shows that pursuant to G.S. 50-13.4(c)(2), defendant was relieved of any obligation to support his son James after his graduation from high school on 5 June 1988. Assuming, *arguendo*, plaintiff's evidence is sufficient to show that James is physically or mentally incapable of self-support, the result remains the same. In North Carolina, there is no longer a statutory obligation for parents to support their disabled adult children. See *Yates v. Dowless*, 93 N.C. App. 787, 379 S.E.2d 79, 80 (1989); G.S. 50-13.8. Thus, we hold the trial court was without authority to order defendant to pay child support arrearages of \$500.00 for the months of July and August 1988, and the court was also without authority to hold defendant in contempt for failing to provide "an adequate insurance policy covering the child. . . ." This order will be reversed.

Reversed.

Judges ORR and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 SEPTEMBER 1989

GUNN v. GUNN No. 8815DC1412	Alamance (87CVD162) (87CVD37)	Affirmed
HONEYCUTT v. G.E.M. CONSTRUCTORS No. 8828SC1042	Buncombe (87CVS2941)	Affirmed
MORRIS v. PINE ACRES LODGE No. 8916SC228	Scotland (88CVS249)	Affirmed
MORRIS v. TERMINIX CO. No. 8916SC227	Scotland (88CVS156)	Affirmed
N.C. HUMAN RELATIONS COUNCIL v. SUTTON No. 888SC1361	Wayne (88CVS414)	Reversed & Remanded
PARKS CHEVROLET v. GWYN No. 8821DC1243	Forsyth (85CVD1109)	No Error
ROBERSON v. ROBERSON No. 899DC279	Vance (88CVD40)	Affirmed
SINK v. SINK No. 8822DC1313	Davie (84CVD29)	Reversed
STATE v. ALSTON No. 897SC272	Nash (88CRS3720) (88CRS3721) (88CRS3722) (88CRS3723) (88CRS3724) (88CRS3725)	No Error
STATE v. ARMFIELD No. 893SC264	Pitt (88CRS2822) (88CRS2823)	No Error
STATE v. BOWES No. 899SC188	Person (86CRS4425)	No Error
STATE v. BROWN No. 8916SC314	Robeson (88CRS4966)	No Error
STATE v. FORBIS No. 8926SC212	Mecklenburg (86CRS88768)	Affirmed
STATE v. GARCIA No. 889SC1287	Vance (88CRS990)	No Error

STATE v. GIBSON No. 8926SC131	Mecklenburg (88CRS29423)	No Error
STATE v. GUINN No. 8924SC364	Avery (88CRS816)	Dismissed
STATE v. JACKSON No. 898SC156	Lenoir (88CRS4770)	Affirmed
STATE v. McALLISTER No. 8811SC1186	Johnston (88CRS3715)	No Error
STATE v. McCAULEY No. 8919SC341	Cabarrus (88CRS10632) (88CRS10634) (88CRS10635) (88CRS10636)	Affirmed
STATE v. MILLER No. 8926SC186	Mecklenburg (88CRS31089)	No Error
STATE v. PHIFER No. 8926SC338	Mecklenburg (88CRS1418)	No Error
STATE v. POLK No. 896SC244	Halifax (87CRS7301) (87CRS7302) (87CRS7303) (87CRS7310) (87CRS7249) (87CRS7250)	Affirmed
STATE v. REID No. 8919SC276	Cabarrus (88CRS3462)	No Error
STATE v. STEPHENS No. 8916SC252	Robeson (87CRS7064) (87CRS7065) (87CRS7066) (87CRS7067) (87CRS7068) (87CRS7069) (87CRS7070) (87CRS7071)	No Error
STATE v. WIGFALL No. 893SC137	Carteret (87CRS8239) (87CRS8240)	No Error
STEPHENS v. SMITH No. 8929DC412	Rutherford (88CVD461)	Dismissed

WARD v. COUNTY DEPT. OF SOC. SERVICES No. 898DC243	Wayne (88CVD1029)	Affirmed
WATSON v. WATSON No. 896DC6	Halifax (88CVD503)	Dismissed
WOOLARD v. ROPOSH No. 8810DC1161	Wake (87CVD6941)	Affirmed

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

THOMAS L. THRASH AND LORA R. THRASH v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, W. LOUIS BISSETTE, MAYOR OF THE CITY OF ASHEVILLE, MARY LLOYD FRANK, VICE-MAYOR OF THE CITY OF ASHEVILLE, WALTER BOLAND, WILHELMINA BRATTON, GEORGE TISDALE, NORMA PRICE AND KENNETH MICHALOVE, CITY COUGILPERSONS OF THE CITY OF ASHEVILLE

BASF CORPORATION v. CITY OF ASHEVILLE

JOHN F. TYNDALL AND WIFE, HELEN TYNDALL, WILLARD HINTZ AND WIFE, ELIZABETH HINTZ, ALVA L. WALLIS, JR. AND WIFE, KANNIE WALLIS, BEULAH WILSON AND INA N. FISHER v. CITY OF ASHEVILLE

No. 8828SC1261

(Filed 19 September 1989)

1. Municipal Corporations § 2.1— annexation—challenge to—burden of proof

An annexation ordinance which recites compliance with all applicable statutory provisions establishes prima facie substantial compliance with those provisions and the burden is on the petitioners challenging the ordinance to show by competent evidence that the City in fact failed to meet the statutory requirements.

2. Municipal Corporations § 2.2— annexation—number of lots

The court did not err in reviewing an annexation ordinance by classifying a tract known as the Owenby property as eighteen separate lots, each less than five acres in size, where the property was subdivided by a plat recorded 25 March 1976 showing eighteen lots and two roads; the owner conveyed the entire property to his daughter in 1984 by a deed in which the property was described by metes and bounds; and the deed restricted the use of the property to residential purposes with construction to be similar to an adjacent subdivision. The property may be considered as separate lots even though it remains undeveloped because the subdivision was recorded with the Register of Deeds; the 1984 restrictive covenant showed a lack of intent to actually withdraw the subdivision plat, even though the 1984 transfer was without reference to the subdivision plat; and the present owner received eighteen separate tax bills on the property until 1987, when she requested that the lots be consolidated for tax purposes. N.C.G.S. § 160A-42(2).

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

3. Municipal Corporations § 2.2— annexation—property counted as separate lots

The City did not err in an annexation by counting as separate lots the Heyward and Ball properties where all of the lots were listed as separate lots for tax purposes; the Heyward property consisted of four contiguous lots, three of which were landlocked without access from the fourth, and only one of which had a residence and was in a subdivision; the Ball lots consisted of two adjacent lots with one requiring access over the other; the two Ball lots were acquired ten years apart; and the Heyward lots were acquired in three separate conveyances. N.C.G.S. § 160A-54(3) permits the use of county tax maps to determine subdivision and petitioners in the instant case have failed to show that the City's classifications of their properties were not reasonably accurate.

4. Municipal Corporations § 2.2— annexation—classification as to use

The City in an annexation properly classified a 47-acre tract as in commercial use where all of the 47 acres except 19.75 acres had been developed as a commercial shopping center; the remaining 19.75-acre tract was contiguous to the shopping center and had been cleared and graded and easements had been acquired to serve it; trash and stumps had been dumped on the 19.75 acres during construction of the shopping center; and a Southern Bell long distance line also ran through the property. Although the property was unimproved except for clearing and grading, it indirectly served the shopping center as a dumping ground.

5. Municipal Corporations § 2.2— annexation—institutional use—no error

The City properly classified 5.92 acres owned by the local school board as being in institutional use for annexation purposes where the property, known as "Scratch Ankle," had been used through the summer of 1986 by an agricultural class at Enka High School for growing crops; crops were not grown in the summer of 1987 due to the relocation of the high school, which required that the agriculture instructor do specific work at the new school; the property was not adjacent to Enka High School either before or after its relocation; and there was testimony that the agriculture class had

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

grown crops almost every summer since 1973 and was expected to do so again in the summer of 1988. Because of the consistent use of the property for institutional purposes for about thirteen years prior to the trial, its present disuse was treated as merely a brief hiatus which would not disqualify the property from being in urban use.

6. Municipal Corporations § 2.6— annexation— extension of police services

The trial court did not err in an annexation challenge by finding that the City's report of plans for the extension of police service to the annexed area meets the requirements of N.C.G.S. § 160A-47 where the City promised to provide the full range of police protection on the same basis and manner as in the present municipality, the City's report outlined the specific services it currently provides to include a regular patrol division, criminal patrol investigation, ordinance enforcement and traffic control; and the City was willing to commit to specific new acquisitions of personnel and equipment, particulars not generally provided.

7. Municipal Corporations § 2.6; Sanitary Districts § 3— annexation— water and sewer district— not a municipal corporation

The trial court did not err in an annexation challenge by holding that the City could lawfully annex part of a water and sewer district because, although a water and sewer district has certain powers, it is much more limited in its authority and responsibilities than a general municipal corporation and does not qualify as a municipal corporation for purposes of Ch. 160A.

8. Municipal Corporations § 2.5; Sanitary Districts § 3— annexation— water and sewer district— outstanding bonds

The existence of outstanding bonds was not a bar to annexation of part of a water and sewer district where the City Manager and other officials began trying to negotiate an equitable distribution of revenue with county staff prior to the adoption of the annexation ordinance and letters were introduced from the City outlining proposals to provide sewer service and maintenance to the area and for an equitable distribution of costs and revenues associated with the sewer construction project.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

9. Municipal Corporations § 4.2— annexation—1928 resolution by City promising no annexation—ultra vires

The trial court properly concluded in an annexation challenge that a 1928 resolution in which the City stated that it would oppose annexation of property now owned by BASF Corporation was ultra vires and did not estop the City from annexing the property. The power to annex is a discretionary power which must remain unfettered for the public good; any attempt by the City to abridge this governmental power in 1928 was ultra vires and gives BASF no right of action for noncompliance. Moreover, this is not a case in which manifest injustice will result from failure to apply equitable estoppel.

10. Municipal Corporations § 2.2— annexation—industrial use

The trial court did not err in an annexation challenge by classifying a 17.7-acre tract along Hominy Creek as vacant rather than as in industrial use where the record supports the trial court's finding that a large part of the 17.7 acres consists of Hominy Creek and that BASF pumps water from the creek for industrial use and also discharges effluent into the creek, there were pipes across the creek carrying water from a reservoir outside the annexation area to the BASF plant, and another pipe transmitted steam from the BASF plant area to its office area.

11. Municipal Corporations § 2.2— annexation—size of tract—finding supported by evidence

The trial court's finding in an annexation challenge that an area owned by BASF measured 3.85 acres was supported by competent evidence and was therefore binding on appeal even if there was some evidence to the contrary. It was therefore unnecessary to consider the question of classification because, even if the parcel should have been designated as vacant rather than as in industrial use, it would merely comprise another lot of five acres or less which would improve the City's position.

Judge GREENE dissenting.

APPEAL by petitioners from *Sitton, Claude S., Judge*. Judgment entered 20 May 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 May 1989.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

This is a consolidated civil action brought pursuant to G.S. sec. 160A-50 for judicial review of an ordinance passed by the City of Asheville to annex into the corporate limits a certain territory west of the City. Initial review of these petitions in a nonjury trial resulted in affirmance of the annexation ordinance with only minor adjustment concerning calculation of acreage owned by petitioner BASF Corporation and others. From the judgment upholding the ordinance, petitioners appealed in apt time.

Adams, Hendon, Carson, Crow & Saenger, P.A., by S. J. Crow and Martin K. Reidinger, for petitioner-appellants Thrash.

Moore & Van Allen, by Daniel G. Clodfelter and Douglas R. Ghidina, for petitioner-appellant BASF Corporation.

Herbert L. Hyde for petitioner-appellants Tyndall, et al.

William F. Slawter and Sarah Patterson Brison for respondent-appellee City of Asheville.

JOHNSON, Judge.

I

FACTS

On 9 June 1987, the City of Asheville adopted resolution number 87-104 stating its intent to consider the annexation of certain territory west of the City, known as the west annexation area, and announcing the date of a public hearing on the question. On 23 June 1987, the City adopted a resolution approving a plan for the extension of major municipal services into the west annexation area. This plan was amended twice during the month of August.

On 25 August, the City adopted resolution number 1649 which extended the City's corporate limits to include the west annexation area. This resolution stated that the area to be annexed met the statutory requirements of G.S. sec. 160A-48, entitled "[c]haracter of area to be annexed" which sets forth the extent of urban development that is required before an area may be annexed. This statute includes the following relevant requirements:

(a) A municipal governing board may extend the municipal corporate limits to include any area

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

- (1) Which meets the general standards of subsection (b), and
- (2) Every part of which meets the requirements of either subsection (c) or subsection (d).

(b) The total area to be annexed must meet the following standards:

- (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
- (2) At least one-eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
- (3) No part of the area shall be included within the boundary of another incorporated municipality.

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

-
- (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and *is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes consists of lots and tracts five acres or less in size.* (Emphasis added.)

The amended report of plans to extend services, which was fully incorporated into resolution 1649, stated that the City had met both of the requirements of G.S. sec. 160A-48(c)(3), known as the "use" test and the "subdivision" test, in the following manner:

The area to be annexed is developed for urban purposes as defined in the N.C. General Statutes 160A-48(c)(3) in that 558 of the total 724 lots and tracts in the area are used for residential, commercial, industrial, institutional, or governmental pur-

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

poses or 77.1% and is subdivided into lots and tracts such that 64.9% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental, or institutional purposes, consists of lots and tracts five acres or less in size. Acres of land in this area not used for commercial, industrial, governmental or institutional purposes is 680.4 acres of which 441.8 acres are divided into lots and tracts of five acres or less.

II

BURDEN OF PROOF

[1] Before addressing these and other issues, we note that an annexation ordinance before the Court which recites compliance with all applicable statutory provisions establishes *prima facie* substantial compliance with these provisions, and the burden is on the petitioners challenging the ordinance to show by competent evidence that the City in fact failed to meet the statutory requirements. *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E.2d 851 (1971); *Dale v. Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967).

The issues raised by petitioners Thrash and BASF largely relate to the City's compliance with the second half of G.S. sec. 160A-48(c)(3) above, the subdivision test. This test can be expressed as the following fraction:

$$\frac{\text{vacant \& residential acreage} \leq 5 \text{ acres}}{\text{total vacant \& residential acreage}}$$

III

PROPERTY UNDER SUBDIVISION TEST

(A) OWENBY PROPERTY

[2] First, petitioners contend that the court erred in finding that the City correctly classified property known as the Owenby property as eighteen separate lots, each less than five acres in size. This property, an undeveloped subdivision, was subdivided by a plat recorded 25 March 1976 showing eighteen lots and two roads. In 1984, the owner conveyed the entire property to his daughter by a deed in which the property was described by metes and bounds. The deed, however, restricted use of the property to residential purposes with construction to be similar to a certain adjacent subdivision.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

G.S. sec. 160A-42 provides that for purposes of complying with the land subdivision requirement of G.S. sec. 160A-36, "the municipality shall use methods calculated to provide reasonably accurate results." The statute also provides that the reviewing court is to accept estimates "based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source." G.S. sec. 160A-42(2).

The City substantiates subdivision of the Owenby property into eighteen lots each of five acres or less by a recorded plat which shows the subdivision. This source is one which under G.S. sec. 160A-42(2) should be considered to be reasonably reliable. To prevail on appeal, petitioners have the burden of showing by competent evidence that the City's *prima facie* case must fail. *Thompson v. City of Salisbury*, 24 N.C. App. 616, 211 S.E.2d 856, *cert denied*, 287 N.C. 264, 214 S.E.2d 437 (1975). This petitioners have failed to do.

This Court addressed the issue of undeveloped subdivisions in the context of the "use" test in *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973). In *Williams*, this Court held that where a map showing subdivision of an undeveloped tract in an area to be annexed had only been recorded with the tax collector and not in the office of the Register of Deeds, the town properly considered the property one tract since it did not have proper record notice of subdivision. No lots in *Williams* had been conveyed in the portion of the tract to be annexed. The opinion implied that if the subdivision plat of the undeveloped subdivision had been recorded with the Register of Deeds, the property could have been considered separate lots. In the instant case the subdivision was recorded with the Register of Deeds. Therefore, under *Williams*, the property may be considered as separate lots even though it remains undeveloped.

Petitioners argue, however, that the 1984 transfer without reference to the subdivision plat effectively withdrew the offer of dedication. They cite *Rowe v. Durham*, 235 N.C. 158, 69 S.E.2d 171 (1952), which held that a conveyance without reference to streets or lots withdrew the offer of dedication. We think that *Rowe* is factually distinguishable from the case at bar. In this case, the deed, although not specifically referring to the plat, did convey the property subject to a covenant which restricts the property's use to residential development similar to an adjacent subdivision. This language shows a lack of intent on the part of the grantor

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

to actually withdraw the subdivision plat sufficient in our judgment to justify the City's classification of the Owenby property as eighteen lots. It is also noteworthy that the present owner of the Owenby property indicated in her trial testimony that she received eighteen separate tax bills on the property up until the early fall of 1987 when she requested that the county tax office consolidate the lots for tax purposes. This request was made after adoption of the annexation ordinance by the City.

The method used by the City to determine subdivision was authorized by statute, and the court's findings will not be disturbed on appeal. This assignment is overruled.

(B) HEYWARD AND BALL PROPERTIES

[3] Second, petitioners contend that the City erred in counting as separate lots certain properties owned by the Heywards and the Balls. The Heywards own four contiguous lots, three of which are landlocked without access from the fourth. The Balls own two adjacent lots in which one lot requires access over the other. Both the Balls' and Heywards' lots are listed as separate lots for tax purposes. One of the Heyward lots has a residence on it and is in a subdivision and their other lots are not. Mr. Heyward testified that his property was acquired in separate conveyances in 1967, 1971, and 1975. The two Ball lots were acquired ten years apart.

G.S. sec. 160A-54(3) permits the use of county tax maps, as used here, to determine subdivision. A municipality is not bound to any one method of calculating the number of lots as long as it provides reasonably accurate results. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980); *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 293 S.E.2d 240, *disc. rev. denied*, 306 N.C. 559, 294 S.E.2d 371 (1982) (holding that a tract was properly classified as six lots even though one lot had a residence on it, another had landscaping, and the owner considered the tract as one entity where estimate was based on recorded plats, tax maps, deeds, an aerial photograph and personal observation). Petitioners in the instant case have failed to show that the City's classifications of their properties were not reasonably accurate. Therefore, we uphold them.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

IV

PROPERTY UNDER USE TEST

(A) WESTRIDGE PROPERTY

[4] We now turn to two parcels which petitioners urge were improperly classified as to use. The first, known as the Westridge property, consists of a 47-acre tract of which all but 19.75 acres has recently been developed as a commercial shopping center. The remaining 19.75 acres which are contiguous to the shopping center have been cleared and graded and easements have been acquired to serve it. The entire tract was acquired as two parcels, one of about six acres and the other over 41 acres. The present owners consolidated the two tracts for development and also for tax purposes. One of the owners testified that trash and stumps were dumped on the 19.75 acres during construction of the shopping center. A Southern Bell long distance line also runs through the property.

An area is improperly classified as in commercial use if there is no evidence that the land is being used either directly or indirectly for such purpose. *Southern Railway Co. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964). Property need not be actually under roof or pavement to be in commercial use for purposes of annexation. *Food Town Stores, Inc., supra*. Determining whether property has been correctly classified as to use turns on the particular facts of each case. *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 356 S.E.2d 599, *disc. rev. granted*, 320 N.C. 631, 360 S.E.2d 87 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988).

In the instant case, we hold that the entire Westridge property was properly classified as commercial. The 19.75 acres in question are contiguous to the rest of the property. Although it is unimproved except for clearing and grading, it has indirectly served the shopping center as a dumping ground. We also consider it important that, unlike the property in *Hook, supra*, such a high percentage of the 47-acre tract, approximately 58%, is in direct use for the shopping center. This assignment of error is overruled.

(B) "SCRATCH ANKLE" PROPERTY

[5] Next, petitioners urge that a tract of 5.92 acres owned by the local school board was improperly classified as being in institutional use. The trial court found that the property, known as

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

"Scratch Ankle," had been used through the summer of 1986 by an agricultural class at Enka High School for growing crops. Due to relocation of the high school which required that the agriculture instructor do certain specific work at the new school, crops were not grown in the summer of 1987. The property in question was not adjacent to Enka High School either before or after its relocation. There was testimony that the agriculture class had grown crops almost every summer since 1973 and was expected to do so again in the summer of 1988. Although the property was not in use at the time of trial, old cornstalks were still standing on the tract.

G.S. sec. 160A-48(c)(3) requires that a lot be in institutional use at the time of annexation in order to qualify as in institutional use. Also, actual use rather than ownership of the property is determinative. *Hook, supra*. We concede that the use classification of the property in the instant case is an extremely close question. The evidence tends to show that only because of the unusual circumstance that Enka High School was in the process of relocating, was Scratch Ankle not used for the agriculture class as it has been most summers since 1973. Because of the consistent use of the property for institutional purposes for about thirteen years prior to the trial, we are inclined to treat its present disuse as merely a brief hiatus which would not disqualify the property from being in urban use. In so holding, we are guided by the rule that the trial court's findings of fact are binding on this Court if supported by competent evidence, even if there is evidence to the contrary. *Huyck Corp., supra*.

V

EXTENSION OF POLICE PROTECTION SERVICES

[6] We now address the Tyndall petitioners' contention that the court erred in finding that the City's report of plans for the extension of police protection into the annexed area meets the requirements of G.S. sec. 160A-47. We disagree.

The City of Asheville provided the following information about police protection in its report on extension of municipal services:

Police Protection

On and after the effective date of annexation, the full range of police services will be provided to the area on the

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

same basis and manner as provided within the rest of the City. These services include a regular patrol division, criminal investigations, ordinance enforcement and traffic control.

Services will be provided with five (5) additional officers for the Patrol Division. Also, three (3) additional detectives and one (1) office assistant will be hired and assigned to the City's Criminal Investigations Bureau and the Juvenile Services Division. A total of five (5) vehicles will also be purchased to support the additional personnel. Total cost for the additional services which will be shared between the proposed South Buncombe annexation area and proposed West annexation area will be approximately \$274,156.

Funding for these services will be provided in the annual budget process.

G.S. sec. 160A-47(3) requires that a municipality's annexation report for extending major municipal services into the area to be annexed must provide for extending services, including police protection, "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." G.S. sec. 160A-47(3)(a).

We first note that petitioners bear the burden of showing by substantial competent evidence that the City has failed to comply with G.S. sec. 160A-47(3). *In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 284 S.E.2d 470 (1981). Further, it is presumed that public officials act impartially in the performance of their official duties. *Id.* Our Supreme Court has held that in order to meet this requirement, the municipality's report must provide sufficient information to allow the public and the courts to assess whether the municipality has committed itself to a nondiscriminatory level of service to the annexed area. *Cockrell v. City of Raleigh*, 306 N.C. 479, 293 S.E.2d 770 (1982). To do this, the Court in *Cockrell* held that a report must contain "(1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services." *Id.* at 484, 293 S.E.2d at 773, quoting *In re Annexation Ordinance (Charlotte)*, *supra* at 554-55, 284 S.E.2d at 474.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

Petitioners assert that the City has failed to provide sufficient detail as to the present level of services so that the public and the courts can determine whether service will be extended in a nondiscriminatory manner. In *In re Annexation Ordinance (Charlotte)*, *supra*, our Supreme Court upheld a police protection report which stated as to the present level of services that it provided 24 hour a day protection and gave immediate response to calls. The report also stated that the police provide a variety of services from traffic control to crime investigation and use the most modern equipment. Mention was made of services already provided to the annexed area. In upholding the report, the Court found sufficient detail to satisfy G.S. sec. 160A-47(3) especially in light of details provided on the scope of services available. *Id.* Interestingly, the petitioners in *In re Annexation Ordinance (Charlotte)*, *supra*, argued that the report was deficient for failing to specify the number of additional personnel and equipment which would be required. The Court denied this contention, stating that that degree of specificity was unnecessary in order to determine after the fact whether the city had provided the services promised. *Id.* *In re Annexation Ordinance (Charlotte)* also quoted with approval another plan for extension of services from *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E.2d 690 (1961), which stated that calls for aid were presently answered in 5.5 minutes and named the particular patrol which would be extended into the annexed area.

We believe that, in light of the flexibility shown by the Court in *In re Annexation Ordinance (Charlotte)*, *supra*, that the report in the instant case should be upheld. The City promises to provide the full range of police protection on the same basis and manner as in the present municipality. The report then outlines the specific services it currently provides to include a regular patrol division, criminal investigation, ordinance enforcement and traffic control. The City has shown good faith substantial compliance with G.S. sec. 160A-47(3) in its outline of present services. We are especially inclined to consider it adequate in light of the City's willingness to commit to specific new acquisitions of personnel and equipment. These particulars are generally not provided. Petitioners have made no effort to show that the increased acquisitions planned are insufficient.

The City has made a *prima facie* showing of substantial compliance with the requirements of G.S. sec. 160A-47(3). Petitioners

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

have not met their burden of proving by competent evidence that the City failed to comply. This assignment is overruled.

VI

ENKA-CANDLER WATER AND SEWER DISTRICT

[7] The Tyndall petitioners next contend that the court erred in holding that the City could lawfully annex part of the Enka-Candler water and sewer district. They base this argument on G.S. sec. 160A-48(b)(3) which states that “[n]o part of the area [to be annexed] shall be included within the boundary of another incorporated municipality.” These petitioners point out that they are organized as a water and sewer district under G.S. sec. 162A-88. This statute, entitled “District is a municipal corporation,” states in part that “[t]he inhabitants of a county water and sewer district . . . are a body corporate and politic” with certain corporate powers, including the right to acquire and hold real property. G.S. sec. 162A-88.

The question petitioners raise is whether a water and sewer district, which under Chapter 162A is termed a municipal corporation, is also a municipal corporation for purposes of annexation under Chapter 160A. To determine this, we first turn to the definition of “city” in Chapter 160A which states in relevant part the following:

“City” means a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. The term “city” does not include counties or municipal corporations organized for a special purpose.

G.S. sec. 160A-1(2).

We hold that a water and sewer district is a municipal corporation organized for a special purpose which does not qualify as a municipal corporation for purposes of Chapter 160A. Although a water and sewer district has certain powers, it is much more limited in its authority and responsibilities than a general municipal corporation which provides police and fire protection, street maintenance, and often a host of other services such as parks and recreation.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

We find support for our position that the district is not a municipality for purposes of Chapter 160A in *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958). In *Sanitary District* (decided under a prior annexation statute), our Supreme Court held that the word "municipality" does not "comprise sanitary districts or other quasi-municipal corporations." *Id.* at 100, 105 S.E.2d at 414. See also *Housing Authority v. Johnson Comr. of Revenue*, 261 N.C. 76, 134 S.E.2d 121 (1964). The Court in *Sanitary District*, went on to say that "the word was intended to mean cities and towns and is limited to that meaning." *Sanitary District, supra*. Petitioners argue that their corporation is not designated as "quasi-municipal" under G.S. sec. 162A-88, but as "municipal," and therefore is distinguishable from a sanitary district. We find this contention unpersuasive in light of the clear language of *Sanitary District* that only cities and towns constitute municipalities for annexation purposes, and conclude that the City of Asheville does not violate G.S. sec. 160A-48(b)(3) in annexing part of the Enka-Candler water and sewer district.

[8] Next, the Tyndall petitioners argue that the part of Enka-Candler water and sewer district in question should not be annexed because the district has issued bonds of \$1,500,000 to pay for sewer lines for which residents already pay an ad valorem tax on all property in the district. Petitioners contend there is no provision in the annexation ordinance to relieve them of this obligation upon annexation.

Our careful examination of the record reveals, however, that petitioners have overstated their case. The City Manager and other officials began trying to negotiate an equitable distribution of revenue with county staff prior to adoption of the annexation ordinance. No resolution has been reached, but the City introduced two letters at trial, one to the Chairman of the Buncombe County Board of Commissioners from the City Manager, and the other to the Planning Director and Finance Director of the County from the City Audit and Budget Director and the City Director of Water and Sewer Operations. Both letters, which apparently did not receive responses, outline proposals to provide sewer service and maintenance to the area and for an equitable distribution of costs and revenues associated with the sewer construction project.

Although the parties have not yet reached a final resolution, we are confident that in light of the proposals made by the City

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

to date, an equitable solution will be reached and this is not a bar to annexation of the area.

VII

BASF PROPERTY

[9] Next, corporate petitioner BASF argues that the trial court erred in concluding that certain statements made by the City in 1928 to BASF's predecessor in interest, American Enka Corporation, were *ultra vires*, and in concluding that the City is not as a result of the statements estopped from annexing the property of BASF Corporation. Petitioner refers to a statement made in a letter to American Enka in 1928 which the City formalized in a resolution later that year:

That owing to the distance of the proposed plant location from the City Limits of the City of Asheville, and the vast amount of vacant land lying between said location and said City Limits, that the incorporation of said plant and land adjoining the same into the City of Asheville is impractical, and said City of Asheville would oppose such a proposition.

This resolution was to apply also to American Enka's successors, subsidiaries or assigns. Both parties agree that in 1928 only the General Assembly had the power to annex. This situation gave rise to the language that the City "would oppose such a proposition."

Petitioner argues that this resolution was a valid exercise of the City's proprietary function since it was a promise made to induce American Enka to locate near the City. Respondent City of Asheville contends that the resolution was invalid as an attempt to bind the City in the exercise of its governmental discretionary powers. We agree with the City.

Our Supreme Court has authoritatively set forth the distinction between governmental and proprietary functions:

It is true, as a rule that where governmental discretionary powers are involved a board can make no contract which would bind its successors in office with respect to the exercise of the discretion. Amongst the powers generally conceded to be accompanied by such governmental discretion, and which cannot be suspended or controlled by contract, are usually classed the legislative powers of the governing body—the power to

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

make ordinances and decide upon public questions of a purely governmental character (and under this head must be classed most of the strictly governmental discretionary powers, since the body acts as a whole and usually by ordinance or resolution); the power to lay out and maintain streets, to build bridges and viaducts over which they lead, preserve civil order; to regulate rates (where power to do so is given in the charter); to levy taxes, make assessments, and the like. These are mentioned simply by way of illustration and only roughly indicate the quality of the power we are discussing. "A public function is one which is exercised by virtue of certain attributes of sovereignty delegated to a city for the health and protection of its inhabitants, or the public." *McLeod v. Duluth*, 174 Minn., 184, 218 N.W., 892.

. . . .

The line between powers classified as governmental and those classified as proprietary is none too sharply drawn, and is subject to a change of front as society advances and conceptions of the functions of government are modified under its insistent demands. . . .

. . . *The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.*

Plant Food Co. v. Charlotte, 214 N.C. 518, 519-20, 199 S.E. 712, 713 (1938) (emphasis added).

In *Improvement Co. v. Greensboro*, 247 N.C. 549, 101 S.E.2d 336 (1958), the Court stated that "[a] contract purporting to restrict the statutory discretion vested in the governing body of a municipality is *ultra vires* and to the extent of such limitation void and can of course furnish no right of action for noncompliance." *Id.* at 553, 101 S.E.2d at 339 (citations omitted).

In applying these principles to the instant case, we must determine whether enforcement of the 1928 resolution (assuming for this purpose that the City then had a valid power to annex) would deprive the City of a discretion which public policy demands should be left unimpaired. We conclude that the power to annex is such a discretionary power which must remain unfettered for the public good. The annexation power, like a municipality's power to lay out and maintain streets, to build bridges and to levy taxes, is

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

an exercise of a City's governmental discretion. It is a function which is exercised to promote the public good and cannot be performed by a private entity. Any attempt by the City to abridge this governmental power in 1928 was *ultra vires* and gives BASF no right of action for noncompliance.

We also find no merit in BASF's contention that the City should be equitably estopped from annexation. The doctrine of equitable estoppel should be applied to municipal corporations with caution and only in the rare case in which its application is required to prevent manifest injustice. 28 Am. Jur. 2d *Estoppel and Waiver* sec. 129 (1966). The doctrine is not to be applied to municipal corporations as freely as to private individuals or corporations, especially in matters entirely *ultra vires* to the municipality. Annot., 1 A.L.R.2d 338 (1948).

This is not a case in which manifest injustice will result from failure to apply equitable estoppel. There is no evidence that BASF had knowledge of the 1928 resolution or in any way relied on it when it purchased the facility in question in 1985. Further, the City's refusal to grant BASF what would in effect be a tax advantage over its neighbors does not work a manifest injustice requiring estoppel. See N.C. Constitution, Art. V, sec. 2(3).

[10] Next, BASF assigns as error the trial court's classification of two small portions of its 190-acre tract known as BASF West. BASF West is bisected by Hominy Creek. Petitioner contends that 17.7 acres along Hominy Creek should have been classified as vacant rather than as in industrial use. We disagree. The record supports the trial court's finding that a large part of the 17.7 acres consists of Hominy Creek and that BASF pumps water from the creek for industrial use and also discharges effluent into the creek. There are also pipes across the 17.7 acres which carry water from a reservoir outside the annexation area to the BASF plant. Another pipe transmits steam from the BASF plant area to its office area. These uses of the 17.7 acres are directly supportive of the plant's activity and the area was correctly classified as in industrial use. *Hook, supra.*

[11] Petitioner also excepts to the measurement and classification of a small area of BASF West found by the court to measure 3.85 acres and to be in industrial use. The court found that the area was leased to a farmer and under cultivation, but classified it as in industrial use. This was apparently based on the area's

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

small size in proportion to the 190 acres involved and the court's finding that the 3.85 acres is located between the BASF plant and Sand Hill Road which leads to the plant.

BASF first contends that according to its witness, an expert in land use planning, the area in question actually measures 6.2 acres. The City's expert, accepted by the court, was a registered land surveyor who testified that the area in cultivation was 3.7 acres. The two experts used essentially the same measurement technique, but petitioner's expert included a 2.5 acre buffer around the area actually cultivated. The court's finding of fact as to the size of the tract is supported by competent evidence. Therefore, it is binding on appeal even if there is some evidence to the contrary. *Huyck Corp., supra*. This finding is therefore upheld. It is therefore unnecessary for us to reach the question of use classification of this area. Even if the parcel should have been designated as vacant, rather than in industrial use, it would be of no help to petitioner since the tract would merely comprise another lot of five acres or less which under G.S. sec. 160A-48(c)(3) would actually improve the City's position.

VIII

USE OF NATURAL TOPOGRAPHIC FEATURES
AND STREETS AS BOUNDARIES

Lastly, petitioners contend that the court erred in concluding that the City used natural topographic features and streets as boundaries whenever practical as required by G.S. sec. 160A-48(e). They also argue that the court erred in concluding that the description for the west annexation area was by metes and bounds as required by G.S. sec. 160A-49(e)(1). We are convinced from our review of the record that the City substantially complied with both of these requirements and petitioners' arguments do not merit discussion.

IX

CONCLUSION

For all the foregoing reasons we hold that the trial court correctly found and concluded that the respondent City of Asheville complied with the relevant statutory requirements for annexation.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

While I agree with much in the majority opinion, nonetheless I disagree on several of what I consider to be dispositive issues.

I

Owenby Property

The Owenby Property (Property) is an 18.25 acre single tract of land which the City of Asheville (City) treated as subdivided into eighteen separate lots of five acres or less in size. Although the plat of the Property recorded in 1976 in the Buncombe County Register of Deeds Office showed a paper subdivision of eighteen lots, the entire 18.25 acre tract of property was last conveyed in 1984 with a metes and bounds description which did not refer to the recorded subdivision map. The record reveals that the Property had never been surveyed and divided on the ground, no lots had been sold, and no roads had been constructed and opened for traffic. The Buncombe County tax records showed the Property as eighteen separate lots.

The question presented is whether the City's classification of the Property is based on a method that is "calculated to provide reasonably accurate results." N.C.G.S. Sec. 160A-54 (1987). In my opinion, the City's classification of the Property as a 'subdivision' does not reflect the actual facts with reasonable accuracy and therefore is not 'calculated to provide reasonably accurate results.' Additionally, the Buncombe County Tax Office was not authorized by statute to appraise the Property as a 'subdivision' because the tract had not "been divided into lots that are located on streets laid out and open for travel and that [had] been sold or offered for sale as lots . . ." N.C.G.S. Sec. 105-287(b)(4) (1985); *cf.* N.C.G.S. Sec. 105-287(d) (Cum. Supp. 1988) ("A tract is considered subdivided into lots when the lots are located on streets laid out and open for travel and the lots have been sold or offered for sale as lots since the last appraisal of the property.").

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

Nonetheless, the City's classification of the Property, if based on a "reasonably reliable source" must be accepted by the reviewing court "unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more." N.C.G.S. Sec. 160A-54(3) (1987). I believe that petitioners made this showing.

At trial, the City submitted that 64.9% of the "total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes," consisted of subdivided "lots and tracts five acres or less in size." The City maintained that this percentage included 441.8 acres consisting of "lots and tracts five acres or less in size" and a total of 680.4 acres "not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes." The trial court determined that the City made several errors in classification of the properties and that these errors required an adjustment to reduce the percentage to 62.257%, including 434.66 acres consisting of "lots and tracts five acres or less in size" and a total of 698.17 acres "not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes." The City does not now contest the trial court's property reclassifications and percentage reductions. Assuming, *arguendo*, that the Owenby Property was misclassified as subdivided property, subtraction of its 18.25 acres from the "lots and tracts five acres or less in size" decreases the relevant percentage to 59.643, just as it reduces to 416.41 the acreage in "lots and tracts five acres or less in size" of the 698.17 total acreage which the City submits is ripe for annexation. The new percentage of 59.643% represents a reduction in excess of five percent from the City's original calculations of 64.9%, and the City no longer complies with the 60% 'subdivision' requirement of Section 160A-48(c)(3).

II

Enka-Candler Water and Sewer District

A portion of the annexed area is in the Enka-Candler Water and Sewer District (District). The property owners in the District pay an increased ad valorem tax as a result of a one and a half million dollar (\$1,500,000) bonded indebtedness which they incurred for the purposes of installing sewer lines in the District. At the time of the annexation, a large sum of the bonded indebtedness remained unpaid.

THRASH v. CITY OF ASHEVILLE

[95 N.C. App. 457 (1989)]

The petitioners argue that since the annexation ordinance provided no adjustment for the ad valorem taxes, the property owners in the District will be required to pay not only the same taxes as the property owners in the preexisting City limits but also the taxes assessed by the District. The City argues that tax relief will be provided to the property owners in the District consistent with N.C.G.S. Sec. 160A-49(f) (1987). "[P]roperty which is part of a *sanitary district* . . . shall not be subject to that part of the municipal taxes levied for debt service for the first five years after the effective date of the annexation." *Id.* (emphasis added). Section 160A-49(f) requires the municipality to provide certain tax relief to property owners in a "sanitary district" which the municipality annexes, but the statute is silent as to "water and sewer" districts. *Id.* The City contends that "sanitary" districts should be read to include "water and sewer" districts. I disagree. While Section 160A-49(f) does not define a "sanitary district," N.C.G.S. Sec. 130A-47 et seq. (1986) comprises its characteristics. Likewise, N.C.G.S. Sec. 162A-86 et seq. (1987) delineates a "water and sewer district." The statutory chapter and subpart authorizing the creation of the 'water and sewer' and 'sanitary' districts respectively empower these discrete districts with different authorities and denote methods of creation and operation that are substantially different. Through its legislative action, the General Assembly drew very clear distinctions between those terms. Accordingly, this court does not have the authority to substitute the term 'water and sewer' for the word 'sanitary' in Section 160A-49(f), as the City has suggested.

Because the General Assembly has not provided any statutory form of tax relief to the property owners in this 'water and sewer' District, the City is precluded from annexing this property unless it first adjusts the annexation ordinance. The annexation statutes provide that property of an annexed area "shall be entitled to the same privileges and benefits as other parts of such municipality[.]" Section 160A-49(f), and the property "in the newly annexed territory [shall be] subject to municipal taxes on the same basis as is the preexisting territory of the municipality." N.C.G.S. Sec. 160A-58.10(c) (1987). As the property owners in this District are subject to additional ad valorem taxes, the 'benefits' they receive from the City are not the 'same' as the 'benefits' received by property owners in the 'other parts of such municipality.' Furthermore, the taxes paid by the property owners in the District are not 'on the same basis as is the preexisting territory of the municipi-

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

pality.' Consequently, the annexation of the properties in this District is inconsistent with these statutes and must fail. The fact that the City is currently negotiating with officials of the District regarding these taxes is immaterial to these proceedings in my opinion, since those negotiations should have been completed prior to the adoption of the annexation ordinance language.

III

Accordingly, I would reverse the order of the superior court approving the annexation ordinance and remand to the superior court for subsequent remand to the City for further proceedings.

RONALD T. WILSON AND MARILYN WILSON, INDIVIDUALLY, AND RONALD T. WILSON AS GUARDIAN AD LITEM FOR WARREN CRAIG WILSON, CHRISTOPHER THOMAS WILSON, AND MATTHEW REID WILSON, MINOR CHILDREN, AND WENDELL SCOTT WILSON; GUY HILL AND MARIE HILL, INDIVIDUALLY, AND GUY HILL AS GUARDIAN AD LITEM FOR EMILY GWEN HILL, MINOR CHILD, AND CRAIG FREDERICK HILL, AND C. N. WHITE, PLAINTIFFS, AND WALTER PAGURA, SHEILA PAGURA, AND BEVERLEY C. PAGURA, INDIVIDUALLY, AND SHEILA PAGURA AS GUARDIAN AD LITEM FOR BENTLY PAGURA, MINOR CHILD, INTERVENOR-PLAINTIFFS v. McLEOD OIL COMPANY, INC., A NORTH CAROLINA CORPORATION, LOREN A. TOMPKINS, ADRIAN SIMMONS, GEORGE RIGGAN, AMOCO OIL COMPANY, A MARYLAND CORPORATION, DEFENDANTS v. ALAMANCE OIL COMPANY, INC., A NORTH CAROLINA CORPORATION, AND HILDA M. BAXTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR CLIFTON E. BAXTER, DECEASED; WILLIAM THOMAS WARREN, CLYDE H. WARREN, ROBERT C. WARREN, JAMES PAUL WARREN, ODIS H. WARREN, OTIS A. WARREN AND WIFE, GLENDA FAYE WARREN, THIRD-PARTY DEFENDANTS

No. 8815SC684

(Filed 19 September 1989)

1. Limitation of Actions § 5; Waters and Watercourses § 3.2—gasoline contamination of well water—applicable statute of limitations

The three-year statute of limitations of N.C.G.S. § 1-52 applies to an action to recover damages for gasoline contamination of plaintiffs' well water allegedly caused by leakage from defendants' underground storage tanks. N.C.G.S. § 1-52(2), (3) and (5).

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

2. Limitation of Actions § 5; Waters and Watercourses § 3.2— gasoline contamination of well water—statute of limitations

Claims by two families for contamination of their well water from leaking underground storage tanks accrued when they were informed in June 1984 that their wells were contaminated, and their actions instituted in July 1986 were not time-barred. The claims of a third family were not time-barred where they moved to intervene in the action against defendants within three years after they were informed by NRCD that their well water was contaminated.

3. Trespass § 3; Waters and Watercourses § 3.2— gasoline contamination of well water—statute of limitations

The presence of gasoline in plaintiffs' well water from leaking storage tanks was a continuing trespass, and one plaintiff's claim was barred by the statute of limitations where plaintiff learned in 1979 that a test showed the presence of gasoline in her well water, but she did not institute her action until 1986.

4. Nuisance § 4; Trespass § 9; Waters and Watercourses § 3.2— gasoline contamination of well water—strict liability—nuisance—trespass—negligence—sufficient forecast of evidence

Plaintiffs' forecast of evidence in an action to recover damages for contamination of their well water by gasoline leakage from underground storage tanks owned or serviced by defendants was sufficient to present genuine issues of material fact as to defendants' liability based on strict liability under N.C.G.S. § 143-215.93, nuisance, trespass and negligence.

5. Rules of Civil Procedure § 15.1— motion to amend complaint—denial not abuse of discretion

The trial court did not abuse its discretion in denying plaintiffs' motion filed 22 March 1988 to amend their complaint to institute direct claims against third-party defendants for gasoline contamination of their well water where plaintiffs contended that they did not become fully aware until January 1988 that an NRCD study showed involvement in the contamination by third-party defendants, but the NRCD report was dated 9 July 1987.

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

6. Limitation of Actions § 5; Waters and Watercourses § 3.2—gasoline contamination of well water—last acts more than ten years before action—statute of limitations

Claims against the third-party defendants based on gasoline contamination of plaintiffs' well water were barred by the statute of limitations where the last acts of the third-party defendants giving rise to the claims occurred more than ten years from the time the action was ultimately brought. N.C.G.S. § 1-52(16).

Judge WELLS dissenting in part and concurring in part.

APPEAL by plaintiffs and intervenor plaintiffs (hereinafter plaintiffs) and defendants McLeod Oil Company, Inc., Loren Tompkins its president, Adrian Simmons and Estate of George Riggan from *Allen, J. B., Jr., Judge*. All orders entered in Superior Court, ALAMANCE County. Heard in the Court of Appeals 25 January 1989.

Orders entered 11 April 1988 denying plaintiffs' motion for partial summary judgment, and 12 April 1988 denying their motion to amend their complaint. Orders also entered 8 April 1988 granting summary judgment in favor of defendant Adrian Simmons and third-party defendant Alamance Oil Company. Orders entered 11 April 1988 granting summary judgment for defendant Loren A. Tompkins, 12 April 1988 for the Warren third-party defendants, and 14 April 1988 for the estate of George Riggan. Order entered 12 April 1988 granting summary judgment for Hilda Baxter individually and as personal representative for Clifton E. Baxter.

Claims against defendant Amoco Oil Co. were voluntarily dismissed by plaintiffs. Plaintiffs also dismissed claims against McLeod Oil Co., when they discovered that Midway Oil Company, a sister corporation, and not McLeod owned the underground storage tanks at the Mini Mart and had supplied gasoline to them. They then instituted a separate action against Midway Oil Co.

The original plaintiffs, the Wilson, Hill, and White families, instituted this action to recover damages suffered as a result of having their well water contaminated by gasoline. They commenced this action against several defendants who either presently supply or who have supplied in the past gasoline to two convenience stores and gasoline stations located near their homes, as well as against present and former owners of the two stores. They filed their complaint in July 1986, after tests conducted on the water by the

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

North Carolina Department of Natural Resources and Community Development (NRCD) in 1984 revealed the contamination. A fourth family, the Paguras, discovered contamination of their well in 1985. They filed a motion to intervene in this lawsuit in December 1987 which was granted on 22 February 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Bryan E. Lessley, for plaintiff and intervenor plaintiff-appellants.

Hatch, Little & Bunn, by David H. Permar and Josephine L. Holland, for defendant-appellants and appellees McLeod Oil Company, Inc. and Loren A. Tompkins.

Patrice Solberg for defendant-appellant and appellee Estate of George Riggan.

Mark E. Fogel for defendant-appellant and appellee Adrian Simmons.

Carruthers & Roth, P.A., by Kenneth R. Keller and Grady L. Shields, for third-party defendant-appellees Otis A. Warren and Glenda Faye Warren.

Frederick J. Sternberg for third-party defendant-appellee Hilda M. Baxter, individually and as personal representative for Clifton E. Baxter.

Henson Henson Bayliss & Coates, by Jack B. Bayliss, Jr., for third-party defendant-appellee Alamance Oil Co.

JOHNSON, Judge.

I

Factual Background

Plaintiffs, Wilson, Hill, White and intervenor-plaintiffs Pagura, are four families who reside in the Hopedale community in Alamance County. Their homes are located at or near the intersection of Sandy Cross and Hopedale-Haw River Roads. One corner of this intersection is a building which once housed a convenience store and gas station (hereinafter Mini Mart). The gasoline which was sold from this location was stored in underground storage tanks.

By their complaint, plaintiffs allege that they all share an aquifer with the Mini Mart property and that it is their sole source of fresh water for household use. They tap the aquifer with their

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

ordinary wells and pumps. Plaintiffs further allege that in 1978 a large quantity of gasoline seeped from one or more of the underground storage tanks into the ground. As a result, the gasoline flowed into the groundwater aquifer from which they obtained their water supply, and spread from the contamination site into the groundwater underneath their properties. They also allege that the migration continues, and that they have been exposed to the gasoline by (1) getting contaminated water, (2) inhaling gasoline vapor buildup in their homes, and (3) bathing with contaminated water. Plaintiffs based their claims upon theories of strict liability pursuant to G.S. sec. 143-215.93, negligence, nuisance, and trespass.

The evidence indicates that the tests which revealed the contamination were conducted in 1984, two years prior to the initiation of this suit. Of the four families of plaintiffs, only C. N. White (B. K. White) discovered the contamination as early as 1979 or 1980. Two of the remaining families, the Wilsons and Hills, were assured by state and local environmentalists that their water supply was untainted until June 1984. The Pagura family discovered the gasoline in their water in 1985, two years prior to intervening in the lawsuit.

The defendants who plaintiffs sued are identified as follows: McLeod Oil Company, Inc., the company which they originally believed had supplied gasoline to the Mini Mart during the years in question and also owned the tanks into which the gasoline was placed (note that the suit against McLeod has been voluntarily dismissed); Loren A. Tompkins, the president of McLeod Oil as well as Midway Oil who arranged for the supplying of gasoline to the underground tanks; Adrian Simmons, owner of the Mini Mart property between 1976 and 1981, and operator of the Simmons Mini Mart and gas station between 1976 and 1979; George Riggan, owner of the Mini Mart property from 1981 until his death in 1988 (his estate currently owns the property, but the convenience store operations have ceased and no gasoline has been sold there since around 1986); and Amoco Oil Company which plaintiffs have also voluntarily dismissed.

McLeod Oil Co. and its president Loren Tompkins instituted third-party claims against the following third-party defendants: Hilda M. Baxter, individually and as personal representative for Clifton E. Baxter, who owned the Mini Mart property from 1965 until 1976, who did not use the underground tanks at the subject of

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

this dispute; Alamance Oil Co., which delivered gas to the Baxters' tanks while they operated the Mini Mart (the tanks were removed in 1986 by the owner George Riggan); and the Warren defendants, who purchased a small store and gasoline station located diagonally across the street from the Mini Mart in 1971. Alamance Oil Co. supplied gas to the underground storage tanks on the Warren property at various times between 1972 and 1973 while members of the Warren family operated or leased the store. These tanks were removed in 1987 and contained water and gasoline at the time of their removal. The vent pipes were broken and the soil and groundwater around these tanks were contaminated.

The evidence introduced at the hearings on defendants' motions for summary judgment included the deposition of Brenda Joyce Smith. Ms. Smith is a hydrogeological regional supervisor with the North Carolina Department of Natural Resources and Community Development (NRCD) in the Winston-Salem regional office. She explained in her deposition that the duties of her position included a combination of supervisory management and technical functions. She also explained that she is responsible for the groundwater section work which is done in her region. In her capacity as hydrogeological supervisor, Ms. Smith was responsible for overseeing the investigations of the Hopedale area, including supervising the drilling of the test wells and other kinds of geologic work to assess the extent and nature of the contamination.

In March 1987, the test wells were installed in the area of the contamination. The decision concerning where to place the wells was based upon the locations of the potential contamination sources, the affected wells, and the topography of the area. The general objective was to locate monitor wells which were downhill or down gradient from the potential sources. She identified the potential contamination sources as the underground storage tanks which had been in place at the Mini Mart and the underground storage tanks which had been located at the abandoned gas station on the Warren property. They were considered potential sources because they had stored the contamination product which had been identified—gasoline. The test wells were dug on 31 March 1987, 1 and 2 April 1987, and 6 and 7 April 1987.

As a result of this investigation, a report dated 9 July 1987 was compiled, under the direction of Ms. Brenda Smith. The results of this investigation appear in part as follows:

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

Groundwater Monitor Wells

A total BTX (Benzene, Toluene, Xylene) concentration of 5,230 ug/1 (ppb) was present in monitor well B7, located in front of the abandoned store on the O. A. Warren property. A total BTX concentration of 65,600 ug/1 was present in monitor well B10, located on the Mini-Mart property at the site of the McLeod Oil Company USTs. No BTX was detected in the other monitor wells. Slight concentrations of petroleum hydrocarbons were detected in monitor well B2, located behind the Mini-Mart; monitor well B3, located on the Wilson property; monitor well B11, located on the Long property and intended to be the upgradient monitor well; and monitor well B13, located in the front yard of the Hill home. No volatile organic compounds were detected in monitor well B5, located on the Long property near the intersection of SR 1735 and SR 1737; monitor well B4, located in front of the Mini-Mart; and monitor well B12, located on the Mini-Mart property at the site of the excavated Alamance Oil Company USTs.

. . . .

Water Supply Wells

Fluctuating concentrations of varying gasoline constituents were detected in VOA samples collected from the White, Wilson, and Hill water supply wells in February 1985, June 1986, and April 1987. The concentration of volatile organic compounds in these samples varied from 0.06 ppb to 490 ppb in the White well, from 0.14 ppb to 580 ppb in the Wilson well, and from 0.11 ppb to 14 ppb in the Hill well. Specific compounds identified and concentrations detected are summarized in Table 1.

CONCLUSIONS

The results of this investigation indicate multiple contamination sources for this incident:

1. USTs [underground storage tanks] at the abandoned store on the O. A. Warren property, evidenced by 5,230 ppb [parts per billion] BTX [benzene, toluene, and xylene] in MW [monitor well]-B7;
2. McLeod Oil Company USTs at Simmons Mini-Mart, evidenced by 65,600 ppb BTX in MW-B10;

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

3. Alamance Oil Company USTs at Simmons Mini-Mart, evidenced by 1,670 ppb BTX in HA-3 and 5,700 ppb BTX in HA-4.

Based upon this evidence as well as the affidavits of the parties in support of their motions for summary judgment, the trial court entered summary judgment on behalf of all remaining defendants and third-party defendants.

From the order entering summary judgment for defendants Tompkins, Simmons, Estate of Riggan and third-party defendants Alamance Oil Co., Otis A. Warren and Glenda Warren, plaintiffs appealed. From the orders entering summary judgment for third-party defendants Alamance Oil Co., Hilda Baxter, and Otis and Glenda Warren, defendants McLeod Oil Co., and Loren Tompkins appealed. Defendant Adrian Simmons appealed from the order entering summary judgment for third-party defendants Alamance Oil Co. and Hilda Baxter. Defendant Estate of George Riggan appealed from the order entering summary judgment in favor of defendants Loren Tompkins, Adrian Simmons and the Warren third-party defendants. The Estate of Riggan has since withdrawn its appeal as to all Warren third-party defendants except Otis and Glenda Warren, present owners of the Warren property. We shall consider each appeal in turn.

II

Plaintiffs' Appeal

By their appeal, plaintiffs present five questions for this Court's review which can be reduced to two basic issues: (1) whether the trial court erred by entering summary judgment on behalf of defendants and third-party defendants because plaintiffs presented genuine issues of material fact on the questions of violations of G.S. sec. 143-215.93 and regarding noncompliance with North Carolina common law, and because defendants failed to show that plaintiffs' claims were time-barred; and (2) whether the trial court abused its discretion in denying plaintiffs' motion to amend their complaint. Because the expiration of the statute of limitations or repose prior to institution of suit would render all other issues moot and would operate to affirm the court's entries of summary judgment, *Brantley v. Dunston*, 10 N.C. App. 706, 179 S.E.2d 878 (1971), we first consider this part of plaintiffs' appeal.

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

A*Statute of Limitations and Repose*

In response to plaintiffs' allegations, defendants against whom plaintiffs brought this appeal, Tompkins, Simmons, and Estate of Riggan, all asserted defenses of statute of limitations and repose, based upon G.S. secs. 1-15, 1-50, 1-52 and 1-56. It is well settled that the statute of limitations does not begin to run until the aggrieved party becomes entitled to maintain an action. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). In addition, the classification of a cause of action for determining the applicable statute of limitations depends upon the substantive nature of the case. The right asserted is determinative, as opposed to the relief sought. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

[1] We find several provisions of G.S. sec. 1-52 to be the applicable statute of limitations based upon the substantive nature of the case *sub judice*. They appear as follows:

Sec. 1-52. Three years.

Within three years an action—

. . . .

- (2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.
- (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

. . . .

- (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

. . . .

[2] According to the evidence before us, plaintiffs Hill and Wilson were assured until May 1984 by state and local officials that no contamination was present in their wells. They were informed in June 1984 that their wells were contaminated. We believe that their cause of action accrued at this time. Prior to June 1984, they

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

were not entitled to maintain an action against anyone. *Raftery, supra*. Because they instituted this civil action in July 1986, within three years from the time their cause of action accrued, G.S. sec. 1-52, we hold that their claims were not time-barred.

The Pagura family alleged that they did not notice any possible contamination until 1985. The earliest reports by the NRCDC which indicated that their water contained nonorganic substances were compiled in 1985. They moved to intervene in the case in December 1987, well before the three-year limitations period had expired.

[3] Insofar as this appeal concerns plaintiff White, we must hold that her claims are time-barred. Tests were performed on plaintiff White's water on 18 September 1979, 14 February 1980, 29 and 31 July 1980 and on 21 August 1980. The earliest tests performed indicated that the water contained "gasoline-like" hydrocarbons. Employees of the NRCDC discussed the problem of contamination with plaintiff White on 13 November 1980. She testified in her deposition that the 1979 test showed the presence of gas and that she was told that fact at that time.

It is clear to us that B. K. White's (C. N. White incorrectly appears on all the documents) cause of action accrued in 1979. Her failure to commence legal recourse before 1986 results in its bar. The presence of the gasoline in her water has been a continuing trespass since that time within the meaning of *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967), patently and without interruption, as opposed to a recurring trespass as defined in *Galloway v. Pace Oil Co.*, 62 N.C. App. 213, 302 S.E.2d 472 (1983), and *Oakley v. Texas Co.*, 236 N.C. 751, 73 S.E.2d 898 (1953). We therefore affirm the court's entry of summary judgment with respect to plaintiff White only.

B*Statutory and Common Law Claims*

[4] Plaintiffs premise liability upon violations of G.S. sec. 143-215.93, negligence in the operation, maintenance, storage and/or marketing of gasoline, nuisance and trespass. Defendants' and third-party defendants' motions for summary judgment were granted.

A motion for summary judgment is properly allowed when the pleadings, affidavits and other materials before the court establish that there is no genuine issue of material fact to be de-

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

cided and that the movant is entitled to judgment as a matter of law. *Cashion v. Texas Gulf, Inc.*, 79 N.C. App. 632, 339 S.E.2d 797 (1986). Summary judgment is also appropriate where a fatal defect in the claim or defense is shown, such as the inability to establish every element of a particular claim, or expiration of the statute of limitations. *Thompson v. Insurance Co.*, 44 N.C. App. 668, 262 S.E.2d 397 (1980).

Plaintiff introduced evidence at the summary judgment hearing which tends to show that the Mini Mart property was a potential source of contamination of the plaintiffs' wells. Simmons owned the property from January 1976 until June 1981, at which time he sold it to Riggan. Prior to selling the property, Simmons operated a gas station at the site until 1979. Simmons had an agreement with Midway Oil Company under which Midway provided several tanks and gasoline for tanks at that site. Tompkins, as an officer of Midway, signed the contracts to provide gasoline to the Simmons site; generally oversaw the conducting of business there by Midway which serviced the tanks and equipment and performed repairs; Tompkins was also responsible for maintaining and servicing the accounts and dealing with any loss of product and the supplying of gasoline to the site. A forecast of the evidence further tends to show that the flow of contaminant into the aquifer began before 1981 and continued seeping into the aquifer after the Mini Mart property was acquired by Riggan from Simmons in 1981. The NRCDC began an investigation into the matter, and based upon its discoveries, issued a notice of violations of the Oil Pollution and Hazardous Substances Control Act to Adrian Simmons, George Riggan and Loren Tompkins in 1985.

On 9 July 1987, after more extensive drilling and scientific study of the plaintiffs' wells, the NRCDC issued a report which identified three possible contamination sources: underground storage tanks on the Warren property, and underground storage tanks at the Mini Mart, some owned by McLeod Oil Co. and others owned by Alamance Oil Co. (These sources are described in greater depth, *infra*.)

G.S. sec. 143-215.93 provides the following:

Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

by such entry, subject to the exceptions enumerated in G.S. 143-215.83(b).

The private right of action for violation of this section is set forth in G.S. sec. 143-215.94 as follows:

In order to provide maximum protection for the public interest, any actions brought pursuant to G.S. 143-215.88 through 143-215.91(a), 143-215.93 or any other section of this Article, for recovery of cleanup costs or for civil penalties or for damages, may be brought against any one or more of the persons having control over the oil or other hazardous substances or causing or contributing to the discharge of oil or other hazardous substances. All said persons shall be jointly and severally liable, but ultimate liability as between the parties may be determined by common-law principles.

In *Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 331 S.E.2d 717 (1985), this Court recognized plaintiff's private right of action for common law nuisance and trespass based upon a violation of G.S. sec. 143-215.93 notwithstanding the statutory enactment of the Clean Water Act. The Court stated that

[b]ased on the trial court's order, plaintiff's only remedy would be to report any NPDES [National Pollutant Discharge Elimination System] violation by defendant to NRCDC without legal recourse for the alleged damages to his property. We cannot conceive that the General Assembly intended any such result in adopting the Clean Water Act. We agree with defendant that the General Assembly has provided a comprehensive statutory scheme for remedial correction of water pollution as well as other forms of industrial and private pollution. Preservation of the common law actions of nuisance and trespass to land for industrial discharges in violation of the laws of this state is consistent with the General Assembly's enactments rather than inconsistent with them as argued by defendant. By retaining the common law civil actions of nuisance and trespass to land, the legislative intent to maintain the waters of this state in a clean and wholesome state for present and future generations is strengthened.

Biddix at 40, 331 S.E.2d at 724. Quoting *Springer v. Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975), the *Biddix* Court also stated that North Carolina

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

[i]s firmly committed to the proposition that the 'violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable.' . . . The statute or ordinance, serving as a legislative declaration of a standard of care, creates a private right not to be harmed by its violation.

Biddix at 41, 331 S.E.2d at 724.

Based upon these principles, the allegations of plaintiffs' complaint, and the forecast of evidence which the trial court used to make its ruling, we conclude that plaintiffs presented sufficient evidence to withstand defendants' motions for summary judgment. They produced evidence sufficient to proceed on the theories of G.S. sec. 143-215.93, nuisance, trespass, and negligence. The trial court's entries of summary judgment as to defendants Tompkins, Adrian Simmons, and Estate of George Riggan were improvidently granted. There exists questions of material fact yet to be decided as to these defendants. (The orders entering summary judgment for the third-party defendants shall be considered *infra*.)

C*Motion to Amend Complaint*

[5] On 22 March 1988 plaintiffs filed a motion to amend their complaint, alleging that they did not become fully aware that the NRC study identified an additional source of the contamination, i.e., the Warren property until January 1988. They sought to institute direct claims against third-party defendants Warren and Alamance Oil Co. In an order entered 12 April 1988, the court denied plaintiffs' motion finding that granting it would result in "delay, additional expense and prejudice to the defendants and third-party defendants and was not timely filed."

A motion to amend is addressed to the sound discretion of the trial court and should be reversed only upon a finding of abuse of discretion. *Carolina Garage Co., Inc. v. Holston*, 40 N.C. App. 400, 253 S.E.2d 7 (1979). The report of the NRC is dated 9 July 1987 although plaintiffs assert that they did not become aware of the nature and extent of the defendants Warren and Alamance Oil Co.'s involvement until January 1988. Based upon this information, we find no reason to reverse the judge's order denying plaintiffs' motion to amend. The trial court committed no abuse of discretion.

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

III

McLeod Co. and Loren Tompkins' Appeal

[6] By their appeal McLeod and Tompkins present an alternative argument to the one advanced in their appellees' brief. In short, if this Court rejected their contention that the trial court committed no error in entering summary judgment in Tompkins' favor (which we did) then they alternatively argue that the trial court should reverse its entries of summary judgment in favor of third-party defendants Hilda Baxter, Alamance Oil, and the Warren defendants. We believe that the trial court properly entered summary judgment in favor of each of these third-party defendants.

The recurring argument that plaintiffs' claims are time-barred is applicable to these three defendants. Although plaintiffs have attempted to retract their original argument that a major loss of oil which occurred in 1978 at the Mini Mart site was the beginning point of their well contamination, we are inclined to accept their original argument. It is primarily due to this allegation that we have become convinced that the claims against these three sets of defendants must fail.

Hilda Baxter and her husband owned the Mini Mart property between January 1962 and January 1976. Until 1974, they sold gasoline from that site. They had discontinued the sale of gasoline nearly four years before the major spill occurred. Also, the contamination of the remaining plaintiffs' (Wilson, Hill and Pagura) waters was not confirmed until 1984 and 1985.

Alamance Oil Co. last delivered gasoline to the Mini Mart in 1974. Alamance Oil Co. purchased the Warren property on 25 January 1968 and sold it on 21 September 1971 to J. R. Warren. Alamance Oil Co. supplied gasoline to the Warren tenant from 6 October 1972 to 30 March 1973.

Insofar as this argument concerns the Warren defendants, we have no evidence before us which would indicate that any of the Warren defendants ever had or exercised control over oil or hazardous substances within the meaning of G.S. sec. 143-215.93. Their tenant, not the Warrens themselves, operated the selling of gasoline. Because of this fact plaintiffs cannot show the required causal connection between the Warrens' conduct and the contamination of which they complain. *See Dedham Water Co. v. Cumberland Farm, Inc.*, 689 F.Supp. 1233 (D. Mass. 1989).

WILSON v. McLEOD OIL CO.

[95 N.C. App. 479 (1989)]

In addition, G.S. sec. 1-52(16) provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." This cap places an outer limit before which an action may be brought. In the case of each of these three defendants, their last acts, if any acts exist, occurred over ten years from the time this action was ultimately brought. Therefore, plaintiffs' claims against them are time-barred. The trial court therefore correctly entered summary judgment in favor of these three sets of defendants.

IV

Adrian Simmons' Appeal

Because we have disposed of the identical issues defendant Simmons raises in his appeal in our discussion of McLeod Oil Co. and Tompkins' appeal, *supra*, i.e., the propriety of the entry of summary judgment for third-party defendants Alamance Oil Co. and Baxter, we find it unnecessary to consider this appeal. (Refer to Section III of this opinion.)

V

Estate of George Riggan's Appeal

Because we have previously resolved all the questions raised by this appeal we find it unnecessary to review them again. (Refer to Section II for a discussion of the statute of limitations, and the denial of plaintiffs' motion to amend their complaint. Refer to Section III for a discussion of the entry of summary judgment for the third-party defendants.)

VI

Conclusions

Therefore, we hold that the trial court correctly entered summary judgment for the third-party defendants, and for all defendants against the claims of B. K. White. The trial court incorrectly entered summary judgment for defendants Tompkins, Simmons, and Estate of Riggan.

Reversed in part; affirmed in part.

Judge BECTON concurs.

Judge WELLS concurs in part and dissents in part.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

Judge WELLS dissenting in part and concurring in part.

From my review of the forecast of evidence in this immensely complicated case, I do not agree that summary judgment was not properly entered for defendant Loren A. Tompkins nor that summary judgment was properly entered for the third-party defendants Warren, as to the claims other than those of B. K. White.

In otherwise concurring, I wish to emphasize my position that (1) there remain issues of fact as to the identity of the actors in the alleged escape or leakage of oil or gasoline, and (2) that only those actors responsible for escape or leakage may be liable under the theories advanced in this case. I do not accept the possible inference that a subsequent owner of facilities from which a *previous* escape or leakage has occurred may be liable for continued seepage resulting from the previous escape or leakage over which he had no control.

STATE OF NORTH CAROLINA v. RENA G. SANDERS

No. 8812SC1040

(Filed 19 September 1989)

1. Constitutional Law § 60; Jury § 7.14—peremptory challenges of black jurors on basis of race—discrimination not shown

Defendant's right to equal protection under the Fourteenth Amendment was not violated by the State's peremptory challenges of black jurors when there were five black venire members, one of whom served on the jury, one of whom was excused for cause, and three of whom were removed through the State's peremptory challenges; the first black was excused because he had held three jobs in the preceding ten months; the second was excused because she claimed never to have participated in court proceedings when in fact she had an extensive criminal record; the third was deemed undesirable by the prosecutor because of her headstrong and overbearing personality; the trial court properly determined that these proffered reasons rebutted the *prima facie* case of discrimination; the record contained no discriminatory comments by the prosecutor; and defendant did not otherwise prove a case of racial discrimination.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

2. Constitutional Law § 62— racial discrimination in jury selection process—no objection at time of empanelling jury—defendant not estopped from pursuing issue of discrimination

The State could not claim that defendant was estopped from pursuing the issue of racial discrimination in the jury selection process, though a party's silence at the jury's empanelling normally estops the party from later objection, since the trial judge stated on record, albeit near mid-trial, that he had recognized a prima facie case of discrimination during voir dire and that he should have made an inquiry earlier; and he then acted properly within his discretion and made such an inquiry.

3. Forgery § 2.2— uttering forged checks—intent—sufficiency of evidence

In a prosecution for uttering forged checks, the trial court properly overruled defendant's motion to dismiss on the ground of insufficiency of evidence of intent where defendant gave conflicting stories to police and the jury regarding the checks' origins, and defendant, when negotiating each check, lied to the recipient about the check's origin.

4. Criminal Law § 141— habitual felon—separate indictment

There was no merit to defendant's contention that the trial court was without jurisdiction to try her as an habitual felon because indictments for the underlying felonies did not charge her with being an habitual felon, since the principal felony indictment need not refer to defendant's alleged status as an habitual offender and defendant received adequate notice by separate indictment of the State's intent to prosecute her as an habitual felon.

APPEAL by defendant from *Herring (D. B., Jr.)*, Judge. Judgment entered 22 April 1988 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 May 1989.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.

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

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

GREENE, Judge.

Defendant Rena G. Sanders was found guilty of two counts of uttering a forged check under N.C.G.S. Sec. 14-120 (1986), and sentenced as an habitual felon under N.C.G.S. Sec. 14-7.1 *et seq.* (1986). Upon a consolidated judgment, the trial court sentenced defendant to fifteen years imprisonment. Defendant appeals.

The State's evidence showed the defendant negotiated one check and attempted to negotiate another, each belonging to Willie F. Tillman. Each check was drawn to the order of the defendant, but neither check had been signed by Mr. Tillman or his representative.

On the evening of 17 March 1987, Mr. Tillman noticed that two checks were missing from a desk drawer in the rear office of his business, the Bragg Motel on Bragg Boulevard in Fayetteville. The next morning, 18 March 1987, Mr. Tillman notified Peoples Bank and Trust Company of the loss.

On 18 March 1987, the defendant negotiated one of these checks to Sam Pefly, owner of Sam's Supermarket, in exchange for groceries and cash. The defendant told him that she worked at the Bragg Motel, and the check was for her wages. The defendant has never worked for Bragg Motel.

On 19 March 1987, the defendant attempted to negotiate the second check at the Peoples Bank and Trust Company in Fayetteville, telling the cashier that it was "her payroll check." A bank representative called the police who promptly arrested the defendant. The defendant told the police that she had received the check in payment of a debt from someone named Tim who had in turn received it from a third person.

On 7 May 1987, the defendant told a police investigator that, prior to the above incidents, she was visited by her friend Carol Woods, also known as India, and a man named Timmy who arrived with two checks. While the defendant was in the bathroom, India and Timmy made the checks out to her, so that the defendant could cash them and split the proceeds with her two guests.

That day they went to Sam's Grocery Store where the defendant bought some groceries and gave the change to India. On another day India drove the defendant to a downtown bank where the defendant was arrested attempting to negotiate the second check.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

According to the defendant, India told her the checks were from Tim who supposedly worked at a motel. The defendant had signed the checks because India owed her money, but the defendant never received any money, just groceries.

At trial, the defendant testified that Tim Johnson, who owed her money, offered to repay her with the proceeds from cigarettes and other merchandise he hoped to sell at Bragg Motel. The defendant waited outside the motel while Mr. Johnson conducted business inside. Eventually he returned with a check payable to the defendant. The defendant negotiated this check at Sam's Supermarket. The next day Mr. Johnson brought the defendant a second check which she attempted to cash at Peoples Bank and Trust Company. The defendant testified that she "figured" someone at Bragg Motel had given Tim Johnson both checks since Johnson seemed to be transacting some business there.

During jury *voir dire*, the State challenged one black venire member for cause and peremptorily challenged three other black venire members. One black served on the jury panel. The defendant is black. During trial the judge asked the prosecutor what motivated the State's peremptory challenges. After discussing the proffered reasons, the trial judge held that although a *prima facie* case of racial discrimination had been established, the State sufficiently rebutted it.

At the time she negotiated the checks, the defendant had three previous felony convictions: possession of heroin, forging a United States Treasury check, and sale and delivery of marijuana.

She was indicted on 31 March 1987 for the two counts of uttering forged checks, the conviction of which she now appeals. On the same date the defendant, by separate Special Indictment, was notified that the State would seek to sentence her as an habitual felon.

The issues presented are: I) whether the State's exercise of peremptory challenges violated the defendant's constitutional rights; II) whether the trial court erred in denying defendant's motion to dismiss for lack of substantial evidence of intent to utter a forged instrument; and III) whether the trial court possessed jurisdiction to try the defendant as an habitual felon.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

I

[1] The trial court determined the defendant's right to equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution was not violated by the State's alleged discriminatory exclusion of members of her race from her petit jury. The defendant claims error.

Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 (1986), guides our inquiry. Under *Batson*, the defendant has the burden of proving the existence of purposeful discrimination. 476 U.S. at 93. The defendant may establish a *prima facie* case of discrimination by showing that she is a member of a cognizable racial group whose members the State peremptorily excised from the venire under circumstances which raise an inference of racist motivation. 476 U.S. at 96. Upon such showing, the burden shifts to the prosecution who "must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, --- U.S. ---, 104 L.Ed.2d 1027, 109 S.Ct. 3165 (1989) (citing *Batson*, 476 U.S. 79, 90 L.Ed.2d 69). "The prosecution's explanation need not rise to the level of justifying a challenge for cause." *Id.* "The trial court will then have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98.

[2] At this point we note the State argues the defendant either waived the *Batson* issue by failing to timely object to the State's actions, or the defendant, by failing to provide a transcript of the *voir dire*, has not provided a sufficient record for this court to review the issue. Normally, a party's silence at the jury's empanelling estops that party from later objection. *See State v. Clay*, 85 N.C. App. 477, 480, 355 S.E.2d 510, 512, *disc. rev. denied*, 320 N.C. 634, 360 S.E.2d 96 (1987). Here the trial judge stated on record, albeit near mid-trial, that he had recognized a *prima facie* case of discrimination during *voir dire*, and that he should have made a *Batson* inquiry earlier. Acting properly within his discretion, the trial judge then made such an inquiry. *Cf. State v. Kirkman*, 293 N.C. 447, 453-54, 238 S.E.2d 456, 460 (1977) (after jury has been empanelled, further challenge of juror is allowable within judge's discretion). In this situation the State cannot now claim the defendant is estopped from pursuing the issue.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

The record before us, however, only marginally suffices for review. As a rule of practice, when challenging the jury's composition, the burden is on the defendant to provide a transcript of the jury *voir dire* as well as any other relevant portions of the record. See *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 364 S.E.2d 416 (1988) (failure to provide relevant portions of transcript may prevent review of alleged impropriety in jury selection). The lack of a *voir dire* transcript detracts from our ability to review the substance of the proffered reasons, just as it inhibits review of the State's credibility. Ordinarily we would examine the questions or lack of questions to the venire members as well as their responses to determine whether the State's proffered reasons had any basis in fact. Here our review is possible because the record does contain the barest essentials: the racial composition of the jury, the number of black jurors excused, and the State's proffered reasons for their exclusion. The record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions.

Given the defendant is black and four of five black venire members were struck, we are unable, from the record before us, to say the trial court erred in determining that a *prima facie* case of discrimination existed. The record is unclear as to when or if the defendant raised the *Batson* issue, or whether the trial court made the observation and determination *sua sponte*. However, this questionably relevant distinction becomes irrelevant if the State rebutted any inference of discrimination.

The trial court, in determining whether the reasons proffered by the prosecution rebut the *prima facie* case of discrimination should:

satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges

People v. Hall, 35 Cal.3d 161, 197 Cal. Rptr. 71, 672 P.2d 854, 858 (1983).

In reviewing both the substantive validity of the State's proffered reasons and the prosecutor's credibility in so offering them,

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

the trial judge should take great care to assure that these reasons are bona fide and not simply "sham excuses belatedly contrived to avoid admitting acts of group discrimination . . ." *Jackson*, 322 N.C. at 260, 368 S.E.2d at 843 (Justice Frye, concurring) (quoting *People v. Hall*, 35 Cal.3d 161, 167, 197 Cal. Rptr. 71, 75, 672 P.2d 854, 858 (1983)). As noted above, these reasons must be reasonably specific and relate to legitimate criteria. The North Carolina Supreme Court has approved the following general criteria for the State's choice of a jury: "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." *Jackson*, 322 N.C. at 257, 368 S.E.2d at 841.

Our review of the trial court's determination is guided by *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988). The Court there held "since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference." *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840 (citing *Batson*, 476 U.S. 98, n.21, 90 L.Ed.2d 89, n.21). See also *Jackson*, 322 N.C. at 260, 368 S.E.2d at 843 (Justice Frye concurring) (the appellate court should "review with a scrupulous eye such proffered reasons . . .").

In determining whether unconstitutional discrimination occurred in the composition of the jury, the trial judge should make specific findings of fact, which are conclusive on appeal provided they are supported in evidence. See *State v. Perry*, 250 N.C. 119, 124, 108 S.E.2d 447, 451, cert. denied, 361 U.S. 833, 4 L.Ed.2d 74 (1959) (specific findings made where composition of jury was challenged); see also *State v. Greene*, 324 N.C. 238, 376 S.E.2d 727 (1989) (case remanded for findings of fact and conclusions of law from a *Batson* hearing). Here, the trial judge's findings were conclusory. He stated:

Upon the showing made, the court finds that the jurors excused were not excused because of their race. Like you say, Mr. Weeks (defense attorney), I agree. It is a close case. It is a close call, but nevertheless, on the matters presented here, I do not find that race was a basis for the jurors being excused, although it certainly began to appear that way.

This inadequacy of the court's finding would normally require remand for further findings. *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E.2d 78, 84 (1982). However, the failure of a trial court to

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

find facts is not prejudicial where there is no “*material* conflict in the evidence on *voir dire*.” *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976) (emphasis in original) (*voir dire* conducted on admissibility of an in-custody confession).

Here, we are forced to assume that no material difference in fact existed since the defendant failed her duty to assure the availability of a jury *voir dire* transcript for our review. Thus, the trial judge’s failure to make adequate factual findings does not constitute reversible error. Further, the defendant’s failure to secure a *voir dire* transcript makes remand for further findings by the trial judge pointless. Without such transcript, we still would be unable to determine whether the trial judge’s findings had a basis in fact.

Our review of the trial judge’s conclusory finding is thus relatively superficial since we have only the information adduced at the *Batson* inquiry. From that inquiry we note that of the five black venire members, one served on the jury, one was excused for cause, and the three remaining were removed through the State’s peremptory challenges. The State listed the following reasons, among others, for excusing the latter three venire members. Mr. Stiehl, Assistant District Attorney for the State, explained that he excused the first black because that venire member had held three jobs in the preceding ten months. Mr. Stiehl stated that he peremptorily challenged the next black member because she claimed to have never participated in court proceedings. According to Mr. Stiehl this member in fact had an extensive criminal record. Mr. Stiehl explains that he deemed the last member undesirable as a juror because of her headstrong and overbearing personality. The trial court determined that these proffered reasons rebutted the *prima facie* case of discrimination. We agree that each of the reasons, on its face, rebuts the *prima facie* case.

On its face, the fact that one venire member apparently jumped from job to job reasonably relates to the legitimate government criteria of maturity and stability set forth in *Jackson*. See *Jackson*, 322 N.C. at 255-57, 368 S.E.2d at 840-41 (employment history a valid consideration in the State’s challenge of a venire member).

The State contends another venire member’s mendacity or criminality reasonably relates to the government’s juror criteria approved in *Jackson*. The defendant raises the issue of whether the State’s assertion of this member’s criminal record was well

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

based in fact. Certainly this question would be worthy of our review. However, given the lack of a jury *voir dire* transcript, we simply find the proffered reason acceptable on its face.

Similarly, we also find acceptable, on its face, the State's proffer that the third venire member was peremptorily challenged because of her overbearing and headstrong personality. Although we do not relate this reason to the government juror criteria listed in *Jackson*, we find this reason is superficially acceptable as a matter of trial strategy.

While on this record we accept the State's proffered reasons as rebutting the *prima facie* case of discrimination, we do not hold that any of the asserted reasons are sufficient *per se*. In every case, the trial judge, when presented with similar reasons, must consider the reasons within the context of information elicited during the *voir dire* of the jury, of which we had no benefit in this case, and any evidence offered by the defendant, of which we also have none in this case. A reason which meets the *Batson/Jackson* test in one case may totally fail to rebut the inference in another case.

Here, reviewing the facial validity of the proffered reasons, we affirm the trial court's determination that these reasons rebutted the *prima facie* case of discrimination. In affirming the trial court, we take into account the facts that one black juror did serve on the panel and that the record contains no discriminatory comments by the State's attorney. See *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840. Further, we find defendant did not otherwise prove a case of racial discrimination in the composition of her jury.

The proffered reasons found acceptable here may be compared to some found illegitimate in other jurisdictions. In *People v. Turner*, 42 Cal.3d 711, 230 Cal. Rptr. 656, 726 P.2d 102 (1986), the Supreme Court of California found unacceptable the State's assertion that "something in her work" would "not be good for the People's case." 726 P.2d at 110. The Court found that "the prosecutor's only knowledge of Ms. Buchanan's work was her statement to the court that she was employed as a 'supervising hospital unit coordinator' at the Los Angeles County-USC Medical Center . . ." *Id.* The defendant in *Turner* had been convicted of a murder which in no way related to the Medical Center.

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

Also in *Turner*, another venireman was peremptorily challenged because he was a truck driver who had difficulty in understanding *voir dire* questions. The California Court noted that truck drivers as a class cannot be considered incompetent as jurors and that other jurors, not challenged, also had difficulty responding to the State's stilted questions. *Turner*, 726 P.2d at 108-09.

Gamble v. State, 257 Ga. 325, 357 S.E.2d 792, 795 (1987), provides another example of illegitimate peremptory challenges where the State in one case excused a venireman because he knew the prosecutor, was uncooperative in response to questions, had spent six years in the Army, and was similar to the defendant in age and in appearance. The Georgia Supreme Court dismissed all these reasons as insubstantial. In fact, the venireman only knew of the prosecutor's identity as the local "D.A." The venireman had not been forthcoming with additional information only because the State had not asked him more questions, and the State's belief that a six-year Army term was somehow an unworthy deviation from the supposed normal four-year term was purely speculative. Lastly, the Court stated that the similar age excuse could not rebut the *prima facie* case since other unchallenged jurors were apparently also about the same age. *Id.*

A comparison of the illegitimate reasons seen above to the reasons proffered in the case at hand reinforces our deference to the trial court's determination that the reasons proffered here adequately rebut the *prima facie* case of discrimination.

II

[3] The defendant also argued her conviction for uttering a check with a forged endorsement must be reversed because the evidence was insufficient, as a matter of law, to allow a reasonable jury to find that the defendant had the requisite knowledge that the endorsement was forged. We disagree.

The trial court overruled defendant's motion to dismiss on the ground of insufficiency of evidence of intent. Dismissal may be avoided only if substantial direct or *circumstantial* evidence exists as to each element of the offense. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 208-09 (1978). "The substantial evidence test requires that the evidence must be existing and real, not just seeming and imaginary." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983) (quoting *State v. Irwin*, 304 N.C. 93,

STATE v. SANDERS

[95 N.C. App. 494 (1989)]

97-98, 282 S.E.2d 439, 443 (1981)). "[T]he trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." *Id.* Further, "the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence." *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63 (citations omitted).

"Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud." *State v. Greenlee*, 272 N.C. 651, 657, 159 S.E.2d 22, 26 (1968). A defendant's intent to defraud in a forgery case may be proved by circumstantial evidence. 36 Am. Jur. 2d *Forgery* Sec. 46 (1968); Annot. "Possession or Uttering of Forged Paper," 164 A.L.R. 621, 668 (1946).

In the case at hand, the State presented substantial circumstantial evidence that the defendant knew she possessed and uttered forged instruments. Central to the State's case are the conflicting stories which the defendant presented regarding the checks' origins. The explanations given to the police differed substantially from her testimony at trial. If a jury were to view these changes as evidence of prefabrication, it could infer that the defendant knew the checks were forged. Additionally, the State showed the defendant, when negotiating each check, lied to the recipient about the check's origin. From this the jury could infer that the defendant doubted the legitimacy of these transactions.

The defendant does not now dispute either that she uttered the checks or that the checks were forged. She claims only that she had no knowledge of the forgery. We find the jury had before it substantial circumstantial evidence of defendant's knowledge of the forgery.

III

[4] The defendant finally argues the trial court was without jurisdiction to try the defendant as an habitual felon because the indictments for the underlying felonies did not charge the defendant with being an habitual felon. It is well established precedent that the principal felony indictment need not refer to the defendant's alleged status as an habitual offender. Since the defendant received adequate notice by separate indictment of the State's intent to

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

prosecute her as an habitual felon, the defendant is not prejudiced. *State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985); *State v. Allen*, 292 N.C. 431, 433, 233 S.E.2d 585, 587 (1977); *State v. Keyes*, 56 N.C. App. 75, 78, 286 S.E.2d 861, 863 (1982).

No error.

Judge COZORT concurs.

Judge JOHNSON concurs in the result.

MAMIE G. DOUGLAS v. EUGENE M. DOUB AND KELLY S. DOUB

No. 8821SC1112

(Filed 19 September 1989)

1. Rules of Civil Procedure § 56.7— summary judgment— appeal after verdict— not reviewed

The denial of defendant wife's motion for summary judgment in an unfair and deceptive trade practice action arising from the sale of a condominium was not reviewed because a verdict had been reached by a jury after the presentation of all the evidence and final judgment had been entered.

2. Fraud § 12.1— sale of condominium— directed verdict for defendant denied— no error

The trial court did not err in an action for fraud arising from the sale of a condominium by denying defendant husband's motion for a directed verdict where the defendant husband represented to the plaintiff that recent repairs had been made to the condominium because there had been "some problems with a bursted [sic] water pipe"; there was no evidence in the record that recent repairs had been made to the condominium because of a "bursted [sic] water pipe"; and there was ample evidence from which a jury could conclude that defendant husband knew the foundation had been cracked for some reason other than a broken water pipe. The evidence supports the plaintiff's proposition that she relied upon the defendant husband's statement, purchased the condominium, and sustained damages by virtue of subsequent sinkage of

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

the condominium because defendant husband was aware of the condominium's two previous sinkings and elected not to inform the plaintiff, but instead, misrepresented the facts and it is immaterial that defendant husband may have thought the problem with the foundation had been corrected. Defendant's argument that plaintiff had had every opportunity to make independent inquiries was rejected because one to whom a positive and definite representation has been made is entitled to rely on such representation, defendant husband had peculiar knowledge of the facts, whether plaintiff's reliance on the representations was reasonable was a question properly submitted to the jury, and the alleged fraud was of a type reasonably calculated to induce the purchaser to forego investigation.

3. Fraud § 12.1; Unfair Competition § 1— defendant wife—husband acting as agent—directed verdict denied

The trial court did not err in an action for unfair trade practices and fraud arising from the sale of a condominium by denying defendant wife's motion for directed verdict, even though there was no evidence that defendant wife made any representations to the plaintiff regarding the condominium, where defendant wife received a benefit when plaintiff assumed a note and deed of trust which defendants had executed, relieving the defendant wife from a \$39,950 obligation. The evidence relating to a loan assumption is a factual circumstance from which a jury could infer that defendant husband was authorized to act for defendant wife.

4. Unfair Competition § 1— sale of condominium—submission of issue to jury—no prejudicial error

The trial court did not commit prejudicial error in an action for fraud and unfair competition arising from the sale of a condominium by submitting to the jury an issue concerning whether the purchase was in commerce or affected commerce where the trial court made findings independent of the jury verdict and the undisputed evidence supported the findings.

5. Rules of Civil Procedure § 59— sale of condominium—fraud and unfair and deceptive trade practice—motion for a new trial for excessive damages—denied

The trial court did not err in an action for fraud and unfair and deceptive trade practices arising from the sale of a condominium by denying defendant's motion for a new trial

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

under N.C.G.S. § 1A-1, Rule 59, based on an allegedly excessive jury verdict. Although the trier of fact should consider any benefits which plaintiff received while in possession of the condominium, that issue was before the jury and a person who has been subjected to an unfair or deceptive trade practice or act who does not retain the property is entitled to be restored to his original condition.

APPEAL by defendants from *Gudger (Lamar), Judge*. Judgment entered 12 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 May 1989.

David B. Hough for plaintiff-appellee.

Burns and Price, by Robert E. Price, Jr., for defendant-appellants.

GREENE, Judge.

In this civil action, plaintiff claims defendants committed fraud and unfair or deceptive trade practices in their sale of a condominium to the plaintiff. The jury found for the plaintiff, and the trial court entered judgment accordingly. Defendants appeal.

The evidence tends to show Heather Hills Executive Golf Village, Inc. (Heather Hills) constructed, in the late 1970's, several condominiums, in particular one located at 3693 Heathrow Drive (condominium). After selling the condominium, portions of the foundation sank into the ground in 1981, causing cracks in the foundation, which were repaired by Heather Hills. Before making these repairs, Heather Hills obtained the services of a soil inspector who advised that the foundation problem was not "related to soft soil." Sometime later, and after the repairs, the cracks reappeared, and the owners sued Heather Hills. In settlement of that lawsuit, Heather Hills repurchased the condominium, made additional repairs to the foundation and reoffered the property for sale. All of the repairs were done under the supervision of Eugene M. Doub (defendant husband). Prior to making the repairs the second time, Heather Hills again employed a soil engineer to ascertain the problem, and he determined that water was "running down the side of the foundation and washing out the dirt that the footings [were] sitting on."

In December 1983, plaintiff as a prospective purchaser of the condominium in question testified:

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

A. I asked him [Eugene M. Doub] why were there stucco—new stucco, new sidewalks out front.

Q. And what, if anything, did Mr. Doub say in response to that question?

A. He said that it had been cold that winter and there were some problems with a bursted [sic] waterpipe.

The defendant husband testified that in response to the plaintiff's inquiry:

I told her that the downspout had been shooting water down the corner and had caused that area to settle, but it was in the process of being repaired.

On 14 January 1984, plaintiff and defendant husband, shown on the contract as the "seller," entered into a written "Offer to Purchase and Contract" on the condominium. The agreed purchase price was \$47,500, and the plaintiff paid a \$500 deposit to plaintiff's real estate agent who was to hold the property in escrow pending completion of the sale. The contract was contingent on plaintiff obtaining a loan by 17 February 1984, which she was not successful in securing. On 3 March 1984, the parties entered into a second "Offer to Purchase and Contract," and again the contract listed defendant husband as the seller. The purchase price reflected in the second agreement was \$47,980, and plaintiff paid \$7,082 as a cash deposit "to be held in escrow by Eugene M. Doub" pending the completion of the sale. Apparently the second contract was entered into after defendant husband had agreed pursuant to a suggestion of the plaintiff's real estate agent to secure a loan commitment in his own name and to transfer the property to the plaintiff. After receiving a loan commitment from the Pfefferkorn Company and with the proceeds from that loan, on 16 March 1984 defendant husband and his wife, Kelly S. Doub (defendant wife) purchased, as tenants by the entirety, the condominium from Heather Hills. The corporate deed was executed by defendant husband as president and defendant wife as secretary. The loan from the Pfefferkorn Company was in the amount of \$39,950. The note to the Pfefferkorn Company was executed by the defendants in their individual names, and the loan was secured by a deed of trust on the condominium. On 12 April 1984, the defendants conveyed the property to the plaintiff, with the plaintiff assuming the note and deed of trust placed on the property by the defendants. On the

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

same date, the plaintiff executed a note payable to defendant husband in the amount of \$998, which note was also secured by a deed of trust on the condominium property. The note to defendant husband was paid in full on 7 June 1984.

In early 1985, after the plaintiff moved into the condominium, she noticed the foundation had certain cracks and that the sidewalk and a portion of the parking lot in front of the condominium were sinking into the ground. She further specifically testified:

The kitchen floor started breaking away from the baseboard and a hole appeared in the corner between the walls and the refrigerator. There were cracks along side of—of the overhead over the—over the cabinets and along side the doors. The door frame began coming apart from the—the door began to come apart from the door frame.

A geotechnical engineer testified for the plaintiff. In December 1987, he conducted tests, boring around the perimeter of the condominium, and he determined the condominium had been constructed approximately thirty feet from the center of an area, located in front of the condominium, containing underground organic fill and that over time as the organic fill decomposed, the ground would sink away, causing the sidewalk, parking area and foundation itself to sink into the ground. A civil engineer, accepted as an expert in the area of soil concentration, testified for the defendant. He visited the property in November 1987 and observed the cracks in the foundation and the depressions in the pavement and sidewalk in front of the condominium. He concluded that the pavement and the "parking lot settled possibly due to a sink hole" which "caused the foundation to settle" under the condominium. Defendant husband testified he never "found any landfills" on the building site.

The trial court submitted the following issues to the jury which were answered as indicated:

1. Was Mamie G. Douglas induced to purchase 3693 Heathrow Drive, a townhouse, by the fraudulent representations of the Defendant Eugene M. Doub?

ANSWER: Yes.

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

2. Did the conduct of the Defendant Eugene M. Doub which induced the purchase of said property constitute an unfair or deceptive act or practice in or affecting commerce?

ANSWER: Yes.

3. Was Eugene M. Doub the agent of the Defendant Kelly S. Doub at the time of said purchase?

ANSWER: Yes.

4. What amount, if any, is the Plaintiff entitled to recover?

ANSWER: \$33,074.30.

Pursuant to the jury verdict, the trial court entered a judgment which in pertinent part is as follows:

1. The damages of the Plaintiff be, and hereby are, trebled to Ninety-Nine Thousand Two Hundred Twenty-Two Dollars and Ninety Cents (\$99,222.90) pursuant to NCGS Section 75-16.

2. The Plaintiff have and recover of the Defendants, jointly and severally, the sum of Ninety-Nine Thousand Two Hundred Twenty-Two Dollars and Ninety Cents (\$99,222.90)

3. The Plaintiff shall convey all her interest in the improved real property located at 3693 Heathrow Drive, Winston-Salem, North Carolina to the Defendants within thirty (30) days from the execution of this Judgment. This conveyance shall be made subject to the outstanding indebtedness to the Pfefferkorn Company; which indebtedness the Defendants incurred and are obligated to pay. In the event that an appeal is made from this Judgment, the requirement that the Plaintiff shall convey her interest in the said real property to the Defendants shall be stayed until a final disposition is made of the said appeal.

Prior to trial, the defendant wife moved for summary judgment, which motion was denied. The trial court likewise denied the defendants' motions for directed verdict made at the end of the plaintiff's case and at the end of all the evidence. After the return of the jury verdicts, the trial court denied the defendants' motion for a judgment notwithstanding the verdict and denied defendants' motion for a new trial on the grounds that the award of damages by the jury was excessive.

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

The issues presented are: I) whether the trial court erred in denying the defendant wife's motion for summary judgment; II) whether the trial court erred in denying defendant husband's motion for directed verdict; III) whether the trial court erred in denying defendant wife's motion for directed verdict; IV) whether the trial court erred in allowing the jury to determine if conduct of the defendant husband constituted "an unfair or deceptive act or practice in or affecting commerce?"; and V) whether the trial court erred in denying defendants' motion for a new trial on the grounds that the damages awarded by the jury were excessive.

I

[1] The trial court's denial of defendant wife's motion for summary judgment is an "interlocutory order and is not appealable." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Furthermore, "denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Id.* Accordingly, we do not review the trial court's denial of defendant wife's motion for summary judgment as a verdict has been reached by a jury after the presentation of all the evidence and final judgment has been entered.

II

[2] The defendant husband argues the trial court erred in denying his motion for directed verdict. We disagree.

The purpose of a motion for directed verdict is to "test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs; that in determining such a motion the evidence should be considered in the light most favorable to plaintiffs, and the plaintiffs should be given the benefit of all reasonable inferences; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiffs' *prima facie* case in all its constituent elements." *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982).

The elements of fraud, which constitutes the basic claim of the plaintiff are: "(1) that the defendant made a false representation as to an existing or past fact which was material to the transaction involved; (2) that defendant either knew the representation was false when it was made or made it recklessly without knowing whether it was true or not; (3) the representation was made with the intention that plaintiff should rely on it; (4) plaintiff did reason-

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

ably rely upon it; and (5) was damaged thereby." *Harbach v. Lain and Keonig, Inc.*, 73 N.C. App. 374, 379-80, 326 S.E.2d 115, 118-19, *disc. rev. denied*, 313 N.C. 600, 332 S.E.2d 179 (1985).

In the light most favorable to the plaintiff, the defendant husband represented to the plaintiff that recent repairs had been made to the condominium because there had been "some problems with a bursted [sic] water pipe." We find no evidence in the record to support that recent repairs had been made to the condominium because of "a bursted [sic] water pipe." There is ample evidence from which a jury could conclude that defendant husband knew the foundation had cracked for some reason other than a busted water pipe. Consequently, we believe the jury could determine that defendant husband intended for the plaintiff to rely upon his representation and to act upon it in purchasing the property. The evidence likewise supports the plaintiff's proposition that she relied upon the defendant husband's statement, purchased the condominium, and sustained damages by virtue of subsequent sinkage of the condominium. Defendant husband was aware of the condominium's two previous sinkings, and for whatever reason, he elected not to inform the plaintiff, but instead, in the light most favorable to the plaintiff, misrepresented the facts. The fact plaintiff was deceived by defendant husband's failure to disclose true facts "may be reasonably inferred from [her] purchase of the house." *Carver v. Roberts*, 78 N.C. App. 511, 513-14, 337 S.E.2d 126, 128 (1985). It is immaterial that defendant husband may have thought the problem with the foundation had been corrected with the installation of a gutter drain line leading from the gutter downspout.

We also reject defendants' argument that the plaintiff had every opportunity to make independent inquiries as to why the recent repairs had been made to the condominium and that the failure to do so bars her recovery. "One to whom a *positive* and *definite* representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon." *North Carolina National Bank v. Carter*, 71 N.C. App. 118, 123, 322 S.E.2d 180, 184 (1984) (emphasis added). The defendant husband's representation was "positive and definite," and he had peculiar knowledge of the facts. See *Libbey Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983) (vague statements of persons without peculiar knowledge of the facts are not action-

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

able); *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885 (1957) (where buyer and seller do not have equal access to the information about which the representation is made, one has the right to rely on the representations as to the conditions of real property). Whether plaintiff's reliance on the representations was reasonable "was a question properly submitted to the jury." *NCNB*, 71 N.C. App. at 123-24, 322 S.E.2d at 184. Furthermore, the alleged fraud was of a type reasonably calculated to induce the purchaser to forego investigation or "to forbear inquiries which [the purchaser] would otherwise have made . . ." *Harding v. Southern Lawn and Insurance Co.*, 218 N.C. 129, 134-35, 10 S.E.2d 599, 602 (1940); *Bolick v. Townsend Co.*, 94 N.C. App. 650, 656, 381 S.E.2d 175, 178 (1989).

Accordingly, we conclude the trial court correctly denied the defendant husband's motion for directed verdict.

III

[3] The defendant wife argues directed verdict for her was appropriate because no evidence existed she made any representations to the plaintiff. There is no evidence that defendant wife made any representations to the plaintiff regarding the condominium, and she can be liable only if defendant husband was acting, at the time he made the misrepresentations, as agent for the defendant wife.

A marital relationship alone is not sufficient to establish agency between spouses. However, agency of the husband for his wife may be "shown by evidence of facts and circumstances which authorize a reasonable inference that he was authorized to act for her." *Passmore v. Woodard*, 37 N.C. App. 535, 540, 246 S.E.2d 795, 800 (1978). "The wife's retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to such an inference." *Id.* The fact that the "principal did not know or authorize the commission of the fraudulent acts" is immaterial. *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964).

The plaintiff argues, and we agree that defendant wife received a benefit when plaintiff assumed the note and deed of trust which defendants had executed to the Pfefferkorn Company. The assumption of the loan by the plaintiff relieved the defendant wife from a \$39,950 obligation. While there is no evidence defendant wife ever

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

received any money from the sale of the condominium to the plaintiff, the evidence relating to the loan assumption is a factual circumstance from which a jury could infer that defendant husband was authorized to act for defendant wife.

Accordingly, the trial court did not err in denying the defendant wife's motion for directed verdict.

IV

[4] The defendants next argue the trial court erred in submitting Issue No. 2 to the jury. We agree, although we do not find the error to be prejudicial.

"In unfair trade practices cases, the jury need only find whether the defendant committed the acts alleged; it is then for the court to determine as a matter of law whether these acts constitute unfair or deceptive practices in or affecting commerce." *Lee v. Keck*, 68 N.C. App. 320, 330, 315 S.E.2d 323, 330, *disc. rev. denied*, 311 N.C. 401, 319 S.E.2d 271 (1984); *but see Mapp v. Toyota World Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300 (1986) (court approves of trial court's submission of following issue to jury: Was the making of such representation by the defendant conduct in commerce or did it affect commerce?). While the trial court erred in submitting Issue No. 2 to the jury, it was harmless error as the trial court made findings independent of the jury verdict.

2. The conduct, including the said fraudulent representations, of Defendant Eugene Doub which induced the said purchase was in commerce or did affect commerce.

. . . .

5. The fraud of the Defendants which induced the said purchase by the Plaintiff constitutes an unfair and deceptive trade practice in violation of NCGS Section 75-1.1.

See Lee, 68 N.C. App. at 330, 315 S.E.2d at 330 (harmless error to charge on unfair or deceptive trade practice as instructions were unnecessary as issue was one of law); *Chastain v. Wall*, 78 N.C. App. 350, 357, 337 S.E.2d 150, 154 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986) (harmless error to submit issue to jury as to whether defendant's conduct was "in commerce or did it affect commerce," where trial court made independent determination that defendant's conduct violated N.C.G.S. Sec. 75-1.1); *Medina v. Town & Country Ford*, 85 N.C. App. 650, 658-59, 355

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

S.E.2d 831, 836 (1987), *aff'd*, 321 N.C. 591, 364 S.E.2d 141 (1988) (the trial court's submission to jury of issue of whether defendant's conduct constituted "unfair and deceptive facts or practices in commerce" was harmless error where trial court made "independent determination that defendant's acts constituted unfair and deceptive trade practices").

The jury's determination that defendant husband committed a fraudulent act in inducing the plaintiff to purchase the condominium was sufficient to support the trial court's finding and subsequent conclusion that the defendants "engaged in unfair and deceptive trade practices in violation of N.C.G.S. Sec. 75-1.1." In order to qualify as a violation of N.C.G.S. Sec. 75-1.1, the act must both be unfair or deceptive and in the conduct of trade or commerce. Proof of fraud necessarily constitutes an unfair and deceptive act. *Winston Realty Co. v. G.H.G. Inc.*, 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985). The sale of residential housing by those engaged in the business of selling real estate is trade or commerce within the meaning of N.C.G.S. Sec. 75-1.1. *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979); *cf. Blackwell v. Dorosko*, 93 N.C. App. 310, 314, 377 S.E.2d 814, 818 (1989) (*private vendor of realty not subject to N.C.G.S. Sec. 75-1.1*). The evidence is undisputed that Heather Hills and its president, defendant husband, were in the business of contracting and selling condominiums, and this undisputed evidence supports the findings of the trial court that the acts complained of were "in commerce or did affect commerce."

V

[5] The defendants finally argue the trial court erred in denying their Rule 59 motion for a new trial. N.C.G.S. Sec. 1A-1, Rule 59 (1983). Specifically, defendants assert the jury verdict of \$33,074.30 was excessive and that it was not supported by the evidence.

A new trial may be granted in the discretion of the trial judge, for "(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice"; and "(7) Insufficiency of the evidence to justify the verdict . . ." N.C.G.S. Sec. 1A-1, Rule 59(a)(6) & (7); *See Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (trial court's grant or denial of motion to set aside a verdict and order a new trial is discretionary).

DOUGLAS v. DOUB

[95 N.C. App. 505 (1989)]

The record shows the plaintiff introduced evidence that she expended, in purchasing and while she owned the condominium, the following amounts: Earnest money deposit of \$500, down payment of \$7,032, payment on note to defendant husband in the amount of \$998, closing costs in the amount of \$109.81, moving expenses in the amount of \$350, monthly payments to the Pfefferkorn Company in the amount of \$23,490, and improvements to the condominium in the amount of \$620. These expenditures total \$33,099.81. The defendants argue nonetheless that the defendants "should be entitled to a credit on damages" awarded to the plaintiff for the plaintiff's use of the property during the time which she lived in the condominium. While we agree with the defendants that in determining the damages to which the plaintiff is entitled, that the trier of fact should consider any benefits which plaintiff received while in possession of the condominium, this issue was in fact before the jury, and the trial court instructed the jury as to the defendants' contentions in this regard.

In assessing damages for a party who has been subjected to an unfair or deceptive practice or act, when that person does not retain the property, the party is entitled to be restored to his original condition. *Morris v. Bailey*, 86 N.C. App. 378, 385-86, 358 S.E.2d 120, 125 (1987) ("give back to him that which was lost as far as may be done by compensation in money"). Here, the plaintiff, by virtue of the judgment of the trial court, and with the consent of the parties, was required to relinquish her interest in the condominium. Accordingly, as the award of damages essentially restored plaintiff to her condition prior to the sale, the award was not excessive, and the trial court did not abuse its discretion in refusing to set aside the award and declare a new trial.

No error.

Judges JOHNSON and COZORT concur.

STATE v. PAKULSKI
[95 N.C. App. 517 (1989)]

STATE OF NORTH CAROLINA v. MITCHELL JOHN PAKULSKI AND ELLIOTT
CLIFFORD ROWE, III

No. 8830SC1155

(Filed 19 September 1989)

**Criminal Law § 127— arrest of judgment on underlying felony of
felony murder—murder conviction reversed—sentencing on
arrested judgment**

Two consecutive ten-year sentences for breaking or entering and larceny were reversed where defendants were originally convicted of breaking or entering, larceny, and felony murder, among other things; Judge Fountain arrested judgment on the breaking or entering and larceny convictions, apparently to avoid violation of defendants' double jeopardy rights; the murder conviction was reversed; a new murder trial ended in a mistrial; and Judge Freeman imposed sentence on the prior arrested judgments for breaking or entering and larceny. The case law in North Carolina holds without qualification that the legal effect of arrest of judgment is to vacate the verdict and judgment below; thus, subsequent correction of the fatal defect leading to arrest of judgment does not permit imposition of the sentence based on the original verdict. Moreover, even if Judge Fountain's arrest of judgment was for some reason erroneous, Judge Freeman had no jurisdiction to correct that error since a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous. Arrest of judgment does not operate as an acquittal and the State may use evidence of defendants' armed robbery to prove felony murder in a re prosecution on charges of felony murder.

Judge LEWIS dissenting.

APPEAL by defendants from *Freeman (William)*, Judge. Judgments entered 31 March 1988 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 11 May 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart and Assistant Attorney General John H. Watters, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant Pakulski, and McLean & Dixon, P.A., by Russell McLean, III, for defendant-appellant Rowe.

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

GREENE, Judge.

This appeal arises from Judge Freeman's imposition of two consecutive ten-year sentences based on defendants' earlier convictions of breaking or entering and larceny, respectively. Judge Fountain had arrested judgment on those convictions in a case in which defendants were also convicted of, among other things, felony murder, and which resulted in the appeal to our Supreme Court styled *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987). The facts leading to defendants' convictions for breaking or entering and larceny are summarized in *Pakulski. Id.* at 565-67, 356 S.E.2d at 321-22. However, it is not entirely clear from the opinion what errors were assigned by defendants. Although the Court stated that "defendants bring forward assignments of error relating only to the convictions of felony murder," the Court concluded without discussion or explanation that "we find no error in defendants' convictions for larceny of a motor vehicle, felonious breaking or entering, robbery with a dangerous weapon, and conspiracy to commit breaking or entering." *Id.* at 564, 576, 356 S.E.2d at 321, 327. However, defendants apparently contended in *Pakulski* that two earlier mistrials on all defendants' charges had been improperly entered and therefore double jeopardy prevented any subsequent retrial. See *Pakulski*, 319 N.C. at 568, 356 S.E.2d at 323 (noting defendants' double jeopardy arguments based on the prior mistrial). The *Pakulski* Court rejected defendants' assignment of error based on double jeopardy and held there was "no error" in those convictions. *Id.* at 571, 356 S.E.2d at 325 (holding no violation of double jeopardy arising from prior mistrials). Defendants also contended the trial court's failure to submit certain jury instructions concerning the impeachment of the State's key witness entitled them to a new trial, apparently of all charges. However, the *Pakulski* Court rejected that argument as well. *Id.* at 575, 356 S.E.2d at 327. In this context, the *Pakulski* Court's statement that there was "no error" in defendants' convictions (apart from felony murder) refers only to the errors actually assigned by defendants.

However, the *Pakulski* Court nevertheless ordered a new trial of defendants' remaining charge of felony murder due to lack of evidence defendants had used a deadly weapon in the commission of the breaking or entering alleged as the underlying felony. *Id.* at 573, 356 S.E.2d at 326. Since the Court held felonious breaking or entering should not have been submitted as an underlying felony for felony murder, the *Pakulski* Court remanded the case for a

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

new trial of the first-degree murder charges which could be based on the underlying felony of armed robbery alleged by the State. *Id.* at 571-72, 356 S.E.2d at 325-26.

Defendants' subsequent retrial on the first-degree murder charges also ended in another mistrial. The State moved that Judge Freeman nevertheless enter judgments on the breaking or entering and larceny charges which had been arrested by Judge Fountain. Judge Freeman granted the State's motion and imposed sentence. Defendants appeal.

The dispositive issue is the legal effect of Judge Fountain's prior arrest of judgment concerning the verdicts on which Judge Freeman imposed sentence. Although Judge Fountain's judgment does not state any reasons for his arrest of judgment, the State notes our Supreme Court stated in *Pakulski* that the "trial court arrested judgments on the armed robbery and felonious breaking or entering verdicts, *as these were submitted as predicate felonies to the felony murder.*" *Pakulski*, 319 N.C. at 567, 356 S.E.2d at 323 (emphasis added). The State asserts Judge Fountain arrested defendants' convictions because he believed his submission of the felonious breaking or entering charges as a felony underlying the felony murder charges violated defendants' rights against double jeopardy. When the *Pakulski* Court granted defendants a new trial of the first-degree murder charges, the State asserts the Court "removed the legal impediment which made it necessary and proper for Judge Fountain to arrest judgment in these cases. That intervening change of circumstances put the State of North Carolina in a position to be able to move for judgment on the valid verdicts before a Superior Court Judge."

Defendants first reply that this Court cannot determine whether the reasons for Judge Fountain's arrest of judgment have been mooted since Judge Fountain's reasons cannot be absolutely determined from the face of the record. Defendants argue the characterization of Judge Fountain's arrest of judgment by the *Pakulski* Court is non-binding dicta. This argument is of no avail since defendants have the burden to produce an appellate record showing Judge Freeman's judgment was based on improper speculation about the reasons underlying Judge Fountain's arrest of judgment. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983). As defendants have failed to include the record or transcript of the proceedings before Judge Fountain in the record on this appeal, we

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

are unable to determine that Judge Freeman's sentence was based on improper speculation about the earlier proceeding. *See Alston*, 307 N.C. at 341, 298 S.E.2d at 645 (appellate court will not assume or speculate there was prejudicial error when none appeared in appellate record).

However, we nevertheless reverse the judgments imposing sentence since we agree with defendants that Judge Freeman was precluded as a matter of law from imposing a sentence based on the judgments which Judge Fountain arrested. As stated by our Supreme Court in *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982):

A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

The State asserts Judge Fountain's arrest of judgment on the underlying felonies of felonious breaking or entering and larceny was based on Judge Fountain's correct determination that defendants' convictions of both felony murder and the underlying felonies resulted in double jeopardy. *See State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987); *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986); *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986). Under *Dudley*, *Belton*, and similar cases, arrest of judgment is the appropriate remedy to prevent a defendant's subjection to double jeopardy.

However, the State analogizes an "arrest of judgment" to a "prayer for judgment continued" and argues our Supreme Court's decision in *Pakulski* removed the "legal impediment" on which Judge Fountain's arrest of judgment was based and therefore Judge Freeman was free to impose sentence based on the jury's original verdict that defendants were guilty of felonious breaking or entering and larceny. It is true that the State may move at any time after verdict for appropriate relief for "the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted." N.C.G.S. Sec. 15A-1416(b)(1) (1988). However, a judgment that prayer for judgment be continued is not "equivalent to the allowance of a motion in arrest of judgment." *State v. McCollum*, 216 N.C. 737, 739, 6 S.E.2d 503, 504

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

(1940). Case law in this state holds without qualification that, "the legal effect of arrest of judgment is to *vacate the verdict* and judgment below . . ." *State v. Covington*, 267 N.C. 292, 296, 148 S.E.2d 138, 142 (1966) (emphasis added); *accord State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418-420 (1966); *State v. Benton*, 275 N.C. 378, 382, 167 S.E.2d 775, 778 (1969); *see also 4 Strong's North Carolina Index 3d*, Criminal Law Sec. 127 (1976); 21 Am. Jur. 2d *Criminal Law* Sec. 524 (1981). The arrest of judgment "places the defendant in the same situation in which he was before the prosecution was begun." 21 Am. Jur. 2d at 525. Thus, subsequent correction of the fatal defect leading to the arrest of judgment does not permit imposition of sentence based on the original verdict: the trial court's arrest of judgment merely means the State may commence another prosecution of the original offense which does not suffer the fatal defect which led to the court's arrest of judgment. *E.g., Benton*, 275 N.C. at 382, 167 S.E.2d at 778 (State could proceed against defendant upon new indictment); *accord Fowler*, 266 N.C. at 531, 146 S.E.2d at 420; *Covington*, 267 N.C. at 295, 148 S.E.2d at 141 (defendants could be retried when charged in court having proper jurisdiction).

The State asserts that an arrest of judgment only "stays" the judgment when the arrest is based on a ground other than a fatal defect in the charging instruments or the trial court's jurisdiction. However, the authorities cited by the State for this proposition do not support such a blanket exception to the general rule. In *State v. Hall*, 183 N.C. 807, 112 S.E. 431 (1922), the State appealed the trial court's arrest of judgment as permitted under former Section 15-179(4). The *Hall* Court agreed that the trial court's arrest of judgment must be set aside since it was "based upon the mistaken idea that judgment could not be imposed . . ." *Id.* at 813, 112 S.E. at 436. The *Hall* Court then held, "the case stands upon a verdict of guilty with no sentence imposed, and . . . the case will be remanded to the Superior Court that sentence shall be imposed by the presiding judge upon the verdict entered upon the record that there may not be a default of justice . . ." *Id.* The trial court's verdict in *Hall* was left "untouched" pending the State's appeal and remained untouched because the *Hall* Court vacated the trial court's arrest of judgment. *Id.* The State does not contend Judge Fountain's arrest of judgment was erroneous. In fact, the State contends it was precluded under current law from appealing Judge Fountain's arrest of judgment in any event.

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

Compare N.C.G.S. Sec. 15-179(4) (1975) (State may appeal arrest of judgment) with N.C.G.S. Sec. 15A-1445 (1988) (no longer specifically listing "arrest of judgment" as ground on which State may appeal). We need not address that contention since the State did not attempt to appeal Judge Fountain's arrest of judgment.

However, we do conclude the *Pakulski* Court's finding "no error" in defendants' convictions of felonious breaking or entering only referred to defendants' assignments of error discussed earlier. The *Pakulski* opinion nowhere states, much less implies, that Judge Fountain's arrest of the breaking or entering and larceny convictions was erroneous and should be vacated. Even if Judge Fountain's arrest was for some reason erroneous, Judge Freeman had no jurisdiction to correct that error since "the power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous." *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Thus, the State's other authorities are also inapposite since they are based on our Supreme Court's exercise of its general supervisory control over the proceedings of the inferior courts of this State. *E.g.*, *State v. Davis*, 290 N.C. 511, 548-49, 227 S.E.2d 97, 120 (1976) (Supreme Court arrested judgment in death penalty cases and remanded with direction that trial court enter life sentences upon original convictions); *Dudley*, 319 N.C. at 660, 356 S.E.2d at 364 (ordering trial court to enter verdict on second-degree kidnapping if it arrested judgment on first-degree kidnapping conviction).

Although Judge Fountain's arrest of judgment also vacated the jury's verdict that defendants were guilty of armed robbery as well as breaking or entering and larceny, that arrest does not preclude the State from proving defendants committed murder in the course of an armed robbery in connection with its reprosecuting defendants on charges of felony murder. Arrest of judgment does not operate as an acquittal. 21 Am. Jur. 2d Sec. 524; *cf. State v. Edwards*, 310 N.C. 142, 144-46, 310 S.E.2d 610, 612-13 (1984) (under appropriate circumstances, State may introduce evidence tending to show defendant committed crime of which he was earlier acquitted in second prosecution for different crime); 2 W. LaFave and J. Israel, *Criminal Procedure* Sec. 17.4(a) at 384-85 (1984) (notwithstanding prior acquittal of certain crime, evidence of that crime may be received in later prosecution under exception to "other

STATE v. PAKULSKI

[95 N.C. App. 517 (1989)]

crimes" rule). The *Pakulski* Court's reasoning clearly contemplates the State may use evidence of defendants' armed robbery to prove felony murder, despite Judge Fountain's arrest of the armed robbery verdict. However, we must reverse Judge Freeman's imposition of sentence based on the judgments Judge Fountain arrested for the reasons discussed above.

Reversed.

Judge JOHNSON concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I dissent.

The majority vacates defendants' sentence holding that Judge Fountain's arrest of judgment irreversibly voided defendants' convictions for breaking or entering and larceny. I disagree. It is clear that the arrest of judgment of the lesser felony was entered subsequent to the conviction for felony murder in order to avoid double jeopardy. *State v. Pakulski*, 319 N.C. 562, 567, 356 S.E.2d 319, 323 (1987). Whereas the majority finds that an arrest of judgment is in all cases terminal, equivalent to dismissal, my review of the case law indicates that an arrest of judgment entered on the lesser felonies in a felony murder conviction is predicated on the fact of the felony-murder conviction. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

The Supreme Court first holds in *State v. Thompson* that conviction for the predicate felony, in a felony murder conviction, "affords no basis for an additional punishment." *State v. Thompson*, 280 N.C. 202, 216, 185 S.E.2d 666, 675 (1972). Without reference to the term "arrest of judgment" the court provides the rationale that the imposition of such a sentence would be tantamount to double jeopardy. *Id.* Nine years later in *State v. Silhan*, the Supreme Court uses nearly identical language:

When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this later conviction provides no basis for an additional sentence. It merges into the

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

murder conviction, and any judgment imposed on the underlying felony must be arrested.

Silhan, supra, 302 N.C. 261-262, 275 S.E.2d 477.

The emergence of the rule that arrest of judgment must be so entered is clearly the *result* of the rationale that the defendant would otherwise be sentenced twice for the same crime. Logic dictates that when conviction on the felony murder is overturned, an arrest of judgment predicated entirely on that conviction is necessarily lifted. Upon overturning the felony-murder conviction, the reason for the arrest of judgment ceases and the defendant's status reverts back to the time immediately prior to the merger of the convictions. At that point defendant stands convicted of breaking or entering and larceny. Those convictions were upheld. *Pakulski*, 319 N.C. at 564, 576, 356 S.E.2d at 327.

An "arrest of judgment must be based on defects appearing on the face of the record." *State v. Kimball*, 261 N.C. 582, 135 S.E.2d 568 (1964). In the case before us the defect was that upon the felony-murder conviction, the defendants would otherwise have been sentenced twice for the same crimes: the felonies underlying the felony-murder conviction. When the felony murder conviction was overturned that defect was removed.

The result of the decision of the majority is that defendants who were indicted, tried by a jury and found guilty and in whose trials the Supreme Court found "no error," go free because the judgment was "arrested."

Injustice is done no less when the innocent are wrongly punished as when the guilty go unpunished.

STATE OF NORTH CAROLINA v. WILLIAM HENRY BULLOCK

No. 8818SC1222

(Filed 19 September 1989)

1. Criminal Law § 73.1— hearsay evidence—notice to defendant of State's intent to introduce—defendant not prejudiced

There was no merit to defendant's contention that he received inadequate notice of the State's intention to offer hear-

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

say evidence, since the prosecutor notified defendant on the second day of trial during the morning recess of his intention to offer the hearsay evidence; following the recess the State moved the court to allow the evidence, and the motion was granted following a voir dire; almost two months before trial, in compliance with a request for discovery, the State disclosed the substance of the statements to defendant; defendant conceded that he knew the State intended to call the particular witness involved and knew the expected content of his testimony; and defendant was neither surprised by the hearsay statements nor deprived of a fair opportunity to meet them. N.C.G.S. § 8C-1, Rule 804(b)(5).

2. Criminal Law § 73.1— hearsay evidence— witness unavailable— trustworthiness of statements

There was no merit to defendant's suggestion that the trial court did not consider the reason for a witness's unavailability to be a factor bearing on the trustworthiness of his statements or that the trial court failed to accord this factor sufficient weight.

3. Criminal Law § 34.5— evidence of defendant's guilt of other offense— admissibility to show identity and common plan or scheme

In a prosecution of defendant for felonious larceny of a dump truck and garden tractors with mower attachments, the trial court did not err in admitting evidence that defendant had stolen riding lawn mowers from a farm implement dealer in another county, since the evidence was admissible to prove the identity of defendant and to show a common plan or scheme. N.C.G.S. § 8C-1, Rule 404(b).

Judge BECTON concurring in the result.

APPEAL by defendant from Judgment of *Judge Preston Cornelius* entered 8 June 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 22 August 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Debra C. Graves, for the State.

Paul L. Biggs for defendant-appellant.

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

COZORT, Judge.

Defendant was convicted of two counts of felonious larceny and sentenced to ten years in prison. On appeal the defendant contends primarily that the trial court erred on two evidentiary questions. First, he argues that the court admitted hearsay evidence, the statements of a State's witness who refused to comply with a subpoena, in violation of N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). Secondly, he maintains that the court admitted evidence of "other crimes, wrongs, or acts" in violation of N.C. Gen. Stat. § 8C-1, Rule 404(b). We find no error.

The State offered evidence tending to show that on 26 May 1986 Hodgin Construction Company (Hodgin) in Greensboro reported the theft of a 1982 Ford dump truck. On the same day, Brockman Ford Tractor Sales (Brockman), also of Greensboro, reported that two garden tractors with mower attachments had been stolen from its inventory.

The defendant stored and repaired vehicles on land in Spartanburg County, South Carolina, owned by Doug Ingle. On that property officers of the Spartanburg County Sheriff's Department discovered the dump truck stolen from Hodgin. Near the dump truck was a trailer in which, according to Ingle's testimony, the defendant occasionally slept. A search of the trailer disclosed, among other items, photographs "taken from inside the trailer" depicting the defendant and his wife, a garden tractor key, and a booklet describing the type of garden tractors stolen from Brockman. After searching the vehicles on Ingle's property, police detectives searched the defendant's home near Chesnee, South Carolina. In a trash can in the back yard, they discovered a key chain tag bearing the inscription "Brockman Ford Tractor Sales . . . Greensboro, North Carolina." In the trunk of a Chevrolet Caprice, sold to the defendant on 27 May 1986 and parked by his house on the day of the search, the detectives discovered a pouch stamped with the name and address of Hodgin Construction Company and the vehicle identification number of the stolen truck. The pouch contained a registration card, inspection receipt, and other papers pertaining to the stolen truck.

In June 1986, the defendant offered to sell Joe Eubanks a garden tractor, and one was delivered to his garage in Spartanburg. Joe Eubanks also acted as intermediary in the defendant's sale of another tractor to Eubanks' brother Larry. The defendant brought

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

the second tractor to Joe Eubanks, who briefly inspected it and directed the defendant to deliver it to Larry Eubanks in Winston-Salem, North Carolina. Larry Eubanks subsequently relinquished this tractor to the Greensboro Police Department. The tractor's front axle was bent. This same tractor was subsequently identified by Brockman's employees as one of the two stolen from their lot.

Over defendant's objection the trial court permitted the State to put in evidence statements made by Dennis Sexton on 2 February 1987 and 11 April 1988 to Detective J. F. Whitt. These statements, differing slightly in detail, averred that in the early summer of 1986 the defendant had twice brought garden tractors to Joe Eubanks' garage; that on the second occasion, while the defendant was unloading two tractors from a dump truck, he dropped one, bending the front axle; and that the defendant had "attempted to straighten it using some tools at Mr. Eubanks' garage."

Over the defendant's objection the trial court permitted Officers W. L. Roe and Richard Johnson of the Wake County Sheriff's Department to testify that on 15 October 1986 they detained the defendant to investigate a U-Haul truck he was driving. They determined that he had rented the truck under a false name and with a false driver's license. Searching the truck with defendant's consent, they discovered "three fairly large John Deere riding lawn mowers," which were identified as having been stolen from a farm implement dealer the previous night. Officer Johnson testified further that the defendant fled from the truck on foot and, based on this episode, subsequently pled guilty to breaking and entering and larceny.

The defendant offered no evidence.

The defendant raises two issues regarding Dennis Sexton's hearsay statements to Officer J. F. Whitt. First, the defendant contends that he received inadequate notice of the State's intention to offer the hearsay evidence. Second, he appears to challenge the circumstantial guarantees of trustworthiness attributable to Sexton's statements. Specifically, the defendant contends that the reason for Sexton's unavailability at trial, his willful disobedience of a subpoena, indicated that his statements were unreliable and should not be admitted.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) provides that, if the declarant is unavailable as a witness, the following is admissible:

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The notice requirement of Rule 804(b)(5) does not mandate a fixed period of time and "most courts have interpreted the notice requirement somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence." *State v. Triplett*, 316 N.C. 1, 12-13, 340 S.E.2d 736, 743 (1986).

[1] In the case below, on the second day of trial, during the morning recess, the prosecutor notified the defendant of his intention to offer hearsay evidence. Following the recess, the State moved the court to allow Sexton's hearsay statements to J. F. Whitt pursuant to Rule 804(b)(5). Voir dire testimony from various witnesses indicated that Sexton had been served with a subpoena, that he intended to ignore it, that a South Carolina court had ordered Sexton's arrest to assist the trial court, and that he could not be located by police officers. The trial court then granted the State's motion.

The State acknowledged that formal notice to the defendant was quite short. The State contended, however, that on 11 April 1988, almost two months before trial, in compliance with a request for discovery, it disclosed the substance of Sexton's statements. The trial court found as fact that the defendant "had the essence of [these] statement[s] pursuant to discovery several weeks in advance of trial." Moreover, the defendant conceded that he knew the State intended to call Sexton as a witness and, in general, the expected content of his testimony. Given this record, the defendant was neither surprised by the hearsay statements, nor deprived of a fair opportunity to meet them.

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

[2] Regarding the trustworthiness of Sexton's hearsay statements, defendant contends that "Dennis Sexton was under court order to appear and testify and the fact that he refused should have been weighed by the trial court against admitting his statement[s]." Defendant seems to imply either that the trial court did not consider the reason for Sexton's unavailability to be a factor bearing on the trustworthiness of his statements, or that the trial court failed to accord this factor sufficient weight.

To qualify for admission under Rule 804(b)(5), a "hearsay statement must possess 'guarantees of trustworthiness' that are equivalent to the other exceptions contained in Rule 804(b)." *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 104 (1986). In determining that a hearsay statement has sufficient indicia of trustworthiness, a trial court should consider, among other factors, "(1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988). In *Nichols* the court noted further that "if the declarant is unavailable under Rule 804(a)(2) because he [p]ersists in refusing to testify concerning the subject matter of his statement despite a court order to do so' the court *might* weigh this as a factor against admitting declarant's statement." *Nichols*, 321 N.C. at 625 n.2, 365 S.E.2d at 567 (emphasis added).

In the present case, after voir dire testimony and arguments from counsel, the trial court found that

Dennis Sexton was subpoenaed . . . that he failed to appear . . . that officers of the Spartanburg County Sheriff's Department made numerous attempts to locate Mr. Sexton . . . that Dennis Sexton is a material witness in the case . . . [t]hat [his] statements relate to the conduct of the defendant . . . that these statements are similar, even though a period of almost a year . . . elapsed [between them]; that the statements are further corroborated by testimony of [Joe] Eubanks . . . that there is [sic] physical evidence and statements by other individuals who were present that could corroborate certain aspects of Mr. Dennis Sexton's statement, and that there is a circumstantial guarantee of trustworthiness.

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

In reaching the last conclusion, the trial court clearly took into account the reason for the declarant's unavailability. We find no error in admitting the statement.

[3] The defendant next contends that the trial court violated Rule 404(b) by admitting evidence that he stole riding lawn mowers from a farm implement dealer in Wake County. In his brief defendant relies on *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), and *State v. Streath*, 73 N.C. App. 546, 327 S.E.2d 240, *disc. rev. denied*, 313 N.C. 513, 329 S.E.2d 402 (1985).

Rule 404(b) provides that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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.

In *State v. McClain* our Supreme Court held that "in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." 240 N.C. at 173, 81 S.E.2d at 365. Among other exceptions to that rule, *McClain* recognized that

[w]here the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. *Id.* at 175, 81 S.E.2d at 366.

The defendant argues on appeal that the identity exception does not apply. To support the proposition that evidence of other crimes is permissible only as rebuttal evidence, he emphasizes the following statement by this Court in *Streath*: "[U]nless the defendant presents alibi evidence, evidence of other crimes to show identity, either directly or indirectly (common plan), should not be admitted under *McClain*." *State v. Streath*, 73 N.C. App. 546, 550, 327 S.E.2d 240, 242, *disc. rev. denied*, 313 N.C. 513, 329 S.E.2d 402 (1985).

Defendant has failed to read *Streath* in its entirety and has overlooked the significance of his not guilty plea. His "plea of not guilty put in issue every material element of the State's charges

STATE v. BULLOCK

[95 N.C. App. 524 (1989)]

against him." *State v. Perry*, 275 N.C. 565, 570, 169 S.E.2d 839, 842 (1969). His identity was in issue. Thus, evidence of other crimes may properly be admitted even if the defendant, as here, presents no evidence. *Streath*, 73 N.C. App. at 550, 327 S.E.2d at 243. We do not disagree with the *Streath* court's opinion that the "liberal application of the *McClain* exceptions tends to undermine the policy and usefulness of the general rule and cast a heavy burden on the defense." *Id.* Nevertheless, the State may properly present "evidence of other misconduct in its case in chief if it fit[s] the *McClain* exceptions." *Id.* at 551, 327 S.E.2d at 243.

Under the *McClain* exceptions, evidence of other crimes is also admissible

when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

McClain, 240 N.C. at 176, 81 S.E.2d at 367 (citations omitted). As the court in *Streath* observed, "the practical difference between the identity and common plan exceptions is small, such that they are frequently used almost interchangeably." *Streath*, 73 N.C. App. at 549, 327 S.E.2d at 242.

In its motion to present the evidence in question, the State noted that both offenses involved the theft of new riding lawn mowers from dealers, the use of a truck obtained by illegal means, and a truck capable of concealing the lawn mowers while they were being transported. The State alleged that the similarities between the offenses made "evidence of the second offense relevant to show the identity of the perpetrator of the first offense" The trial court appropriately charged the jury that in regard to the

offense that occurred in Wake County . . . evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was, in fact, committed, or, that there existed in the mind of the defendant a plan or scheme or system or design involving the crime charged in this case.

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

We conclude that evidence of the offense in Wake County was admissible both to show identity and under the common plan exception. Defendant's remaining assignments of error have been examined and found to be without merit.

No error.

Judge ARNOLD concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Absent special circumstances, notice *during trial* of the intent to offer hearsay evidence pursuant to Rule 804(b)(5) should generally be deemed insufficient to provide the adverse party with a fair opportunity to defend against the statement. Special circumstances exist in this case. The trial court found that "Dennis Sexton was subpoenaed . . . that he failed to appear . . . that officers of the Spartanburg County Sheriff's Department made numerous attempts to locate Mr. Sexton . . . [and that the defendant] had the essence of [the hearsay statements] pursuant to discovery several weeks in advance of trial." Further, defendant conceded that he knew the State intended to call Sexton as a witness. More importantly, the other evidence in this case—both direct and corroborative—was so strong that any error in the admission of the challenged evidence was harmless. I, therefore, concur in the result.

EDWARD THORNHILL, III, ADMINISTRATOR, C.T.A. OF THE ESTATE OF ALFRED RICHARD RIEGG v. BETTY ELLIOTT RIEGG, SUSAN RIEGG HOYLE, RICHARD ELLIOTT RIEGG AND FIRST UNION NATIONAL BANK AS TRUSTEE AND FORMER EXECUTOR UNDER THE WILL OF ALFRED RICHARD RIEGG

No. 8830SC1256

(Filed 19 September 1989)

1. Wills § 41— rule against perpetuities—trust provisions—no violation

The rule against perpetuities was not violated by provisions of a trust which set out the res, appointed a trustee,

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

created a present income interest in the testator's wife, set forth the powers and obligations of the trustee in regard to distributing the principal of the trust, and set forth the factors to be considered by the trustee in making a discretionary distribution of the trust income and principal.

2. Wills § 41— rule against perpetuities—construction of descendants—no violation

A trust provision in which the testator's desire was not clear was construed so that the trust would terminate as to Richard or Susan, the testator's children, if either was alive at his spouse Betty's death if he predeceased her or at his death if she predeceased him; if only one of testator's two children was alive at his wife's death, the trust would divide into two equal shares and terminate as to the living child. The share of the deceased child would remain in trust and be distributed to the "descendants then living of the deceased child," with "descendants" construed to mean "children," so that the great-grandchildren are not reached and the rule against perpetuities is avoided.

3. Wills § 41— rule against perpetuities—descendants of child deceased—limited to grandchildren

A provision in a will setting forth the procedure for "descendants of a child deceased" to receive their shares of a trust was construed to refer to the testator's children's children, and not to the testator's great-grandchildren. Although the children will not receive gifts until age twenty-five, there is no rule against perpetuities problem because the gift is vested with only the time of enjoyment postponed.

4. Wills § 41— rule against perpetuities—descendants of a child deceased—grandchildren

There was no rule against perpetuities problem in a will provision which enabled a trustee in his discretion to distribute trust principal to "descendants of a child deceased" in order to provide for support and aid "such child" in specific endeavors where the references to the "descendants of a child deceased" and "such child" were construed from the context to mean grandchildren.

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

5. Wills § 41— rule against perpetuities—gift to great-grandchildren—measuring lives—rule violated

A trust provision in a will which provided for the great-grandchildren of the testator in case one of the grandchildren died before reaching age twenty-five, the age at which benefits would be received, violated the rule against perpetuities where the record indicated that the testator's children were alive at the testator's death but did not reveal whether there were any grandchildren alive at testator's death. The children were therefore the measuring lives for gifts to the grandchildren and the great-grandchildren.

6. Wills § 41— rule against perpetuities—residuary clause—no violation

A provision in a will providing for the residue of a trust to be distributed by intestate succession if circumstances prevented distribution in accordance with the other provisions of the trust did not violate the rule against perpetuities.

7. Wills § 41— rule against perpetuities—one trust provision void—remainder valid

A provision in a will providing for distribution of a trust to the testator's great-grandchildren in certain circumstances was void because it violated the rule against perpetuities; the other provisions of the trust created valid interests and the trustee should give effect to those provisions.

APPEAL by defendants from *Hyatt (J. Marlene)*, Judge. Judgment entered 6 September 1988 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 16 May 1989.

Edward Thornhill, III, Administrator C.T.A. of the Will of Alfred Richard Riegg.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Robert H. Haggard and Michelle Rippon, for defendant-appellant First Union National Bank.

Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for defendant-appellants Betty Elliott Riegg and Richard Elliott Riegg.

Alley, Hylar, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers, for defendant-appellee Susan Riegg Hoyle.

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

GREENE, Judge.

Administrator brought this declaratory judgment action pursuant to N.C.G.S. Sec. 1-253 *et seq.* (1983) for construction of the trust provisions included in the will of Alfred Richard Riegg. On 6 September 1988, judgment was entered in the Superior Court of Haywood County declaring the trust created under the will to be void *ab initio* because it violated the rule against perpetuities. The trustee and certain named beneficiaries of the trust appeal.

The testator, Alfred Richard Riegg, died in 1981. He left a will which was duly probated in Haywood County, North Carolina. Testator appointed the Northwestern Bank and his wife, Betty Elliott Riegg, as co-executors of his will and appointed the Northwestern Bank as trustee. First Union National Bank, successor in interest to the Northwestern Bank, served as co-executor of the estate and as trustee. First Union National Bank was removed by the court as executor of the estate although it continues to serve as trustee under the will. On 20 January 1986, plaintiff, Edward Thornhill, III, was appointed administrator C.T.A. of the estate. Plaintiff brought this declaratory judgment action on 25 February 1988 requesting the court to construe the language of the will, declare the rights of the beneficiaries, and determine the validity of the trust provisions. The testator's surviving spouse, Betty Elliott Riegg, and two surviving children, Susan Riegg Hoyle and Richard Elliott Riegg, who are all named beneficiaries of the trust were made defendants in this action along with First Union National Bank, the trustee.

The issue presented for review is whether the trial court erred in concluding that the provisions of the testamentary trust established in the last will and testament of Alfred Richard Riegg violate the rule against perpetuities.

The rule against perpetuities provides that: "[n]o devise or grant of a future interest in property is valid unless the title thereto must vest in interest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the creation of the interest." *Joyner v. Duncan*, 299 N.C. 565, 568, 264 S.E.2d 76, 81 (1980). In the case of a will, the interest is created and the period of time prescribed by the rule begins to run from the date of the testator's death. 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 287, at 143

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

(2d ed. 1983); *Joyner*, 299 N.C. at 569, 264 S.E.2d at 81. The rule does not apply to vested future interests in North Carolina. 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 287, at 142. A future interest is vested "when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment." *Joyner*, 299 N.C. at 569, 264 S.E.2d at 82. A future interest is contingent when it is "either subject to a condition precedent (in addition to the natural expiration of prior estates), or owned by unascertainable persons, or both." *Rawls v. Early*, 94 N.C. App. 677, 381 S.E.2d 166, 168 (1989) (quoting T. Bergin & P. Haskell, *Preface to Estates in Land and Future Interests* at 73 (1984) (emphasis in original)).

The testamentary trust which was declared void *ab initio* by the trial court is set forth in Item IV of the testator's will. Many of the provisions of the trust are unclear and are subject to more than one construction. In such a situation, before the rule against perpetuities violations may be considered, it is the duty of the court to construe the provisions of the will so as to discover and give effect to the testator's intent "if it is not in contravention of some established rule of law or public policy." *Joyner*, 299 N.C. at 576, 264 S.E.2d at 86. The testator's intent is to "be determined by an examination of the will, in its entirety, and in light of all surrounding facts and circumstances known to testator." *Id.* The court should utilize established rules of construction of wills when interpreting ambiguous provisions of wills. *Joyner*, 299 N.C. at 576, 264 S.E.2d at 86; 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 133, at 228.

[1] Item IV of the trust contains nine provisions and we address them as follows:

Paragraph (a)

All of the rest, residue and remainder of my property of every kind and description and wherever located including any lapsed or void devise (but not including any property over which I may have a power of appointment), I devise to THE NORTHWESTERN BANK, as Trustee, upon the uses and trusts hereinafter set out.

There is no rule against perpetuities problem in this paragraph as it sets out the res of the trust and appoints a trustee. See 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 292, at 151 (the property of a trust is known as "res").

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

Paragraph (b)

The Trustee shall pay over to my wife, BETTY ELLIOTT RIEGG, all of the income from the trust, or use the same for her benefit, in quarterly or more frequent installments, from the time of my death until her death. Any income not paid out or used currently shall be accumulated and added to trust principal.

There is no rule against perpetuities problem with this devise as it creates a vested interest. More specifically, this devise is a present life income interest in the testator's wife. See T. Bergin & P. Haskell, *Preface to Estates in Land in Future Interests* at 184.

Paragraph (c)

The Trustee shall be authorized to distribute such part of the principal of this trust at any time and from time to time in such amounts as the Trustee may deem best in its discretion to provide for the support of my wife.

Paragraph (d)

In making discretionary distributions of trust income and principal as provided above, the Trustee shall take into consideration any other means of support my wife may have to the knowledge of the Trustee.

My primary desire is that my wife be supported in reasonable comfort during her life rather than that the principal of this trust be preserved until the division of this trust into separate shares, and I wish my Trustee to be guided by this desire in making any such discretionary distributions.

These paragraphs set forth the powers and obligations of the trustee in regard to distributing the principal of the trust. They also set forth the factors to be considered by the trustee in making discretionary distributions of trust income and principal. Paragraph (c) also indicates that the testator's primary intent in creating the trust was that his wife be supported comfortably during her lifetime. Since these paragraphs relate to acts of the trustee during the wife's lifetime, there is no rule against perpetuities violation.

[2]

Paragraph (e)

After the death of my wife, BETTY ELLIOTT RIEGG, or after my death if my wife predeceases me, the Trustee shall

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

divide the property of this trust into two equal shares for my two children, RICHARD ELLIOTT RIEGG and SUSAN R. GREEN. Should either or both of my said children not be living, the Trustee shall set apart for the descendants of a deceased child of mine *per stirpes* among such descendants then living.

It is unclear from this provision whether the testator's desire was for the trust property to be divided into two separate shares and distributed to his children sometime in the future, or whether testator intended for Susan and Richard, his children, each to take one-half if they are alive at Betty's death if he predeceases her or at his death if she predeceases him. Therefore, we must examine the will in its entirety to ascertain the intent of the testator. *Joyner*, 299 N.C. at 577, 264 S.E.2d at 86. As there is no provision for distribution of the trust property to Richard or Susan at any other point in the trust and because the testator only made provisions for testator's grandchildren in the case Richard or Susan are not alive, we conclude the testator intended for the trust to terminate as to Richard or Susan if either is alive at Betty's death if he predeceases her or at his death if she predeceases him. If only one of testator's two children is alive at his wife's death, we conclude the testator intended for the trust to be divided into two equal shares and that the trust terminate as to the share of the then living child. The share of the deceased child would remain in trust and be distributed to the "descendants" then living of the deceased child in accordance with Paragraphs (f) and (g) of Item IV. We construe the word "descendants" used by the testator in creating the trust to mean "children." See 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 134, at 240 (if the intent of testator was that the technical word "descendants" be construed to mean children, such intent will be given effect by the court). This construction is based on the context in which the testator uses the words in Paragraphs (e) and (f). In Paragraph (e), the testator uses the words "descendants of a deceased child of mine." Had the testator intended to reach his great-grandchildren he would have more likely used the language "descendants of mine." As this construction of testator's use of the word "descendants" avoids the rule against perpetuities problem in Paragraphs (e) and (f), we adopt it. See 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 133, at 232 (if will is capable of one legal construction and one illegal construction, it will be presumed the testator intended to comply with the law).

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

[3]

Paragraph (f)

After the division of the original trust into two separate shares, descendants of a child deceased at my death shall receive their share of the trust when and as they attain the age of twenty-five (25) years.

This paragraph sets forth the procedure for the grandchildren of the testator to receive their shares in case one of his two children is deceased prior to his or his wife's death. Once again he uses language "descendants of a child deceased" which indicates he is only referring to his child's children and not his descendants which would include great-grandchildren. The interests created in the testator's grandchildren are vested because they are "subject to no condition precedent save the determination of the preceding estate." *Wachovia Bank and Trust Co. v. Taylor*, 255 N.C. 122, 127, 120 S.E.2d 588, 592 (1961). Here, the grandchildren's interests vest at the death of the testator or his wife, if the parent of the grandchild is not living at the testator's or his wife's death. Although the children will not actually receive the gifts until they reach age twenty-five, there is no rule against perpetuities problem because the gift is vested with only the time of enjoyment postponed. *Id.*

[4]

Paragraph (g)

The Trustee shall be authorized at any time and from time to time to distribute such part or all of the principal of the trust to descendants of a child deceased in such amounts as it may deem best in its discretion to provide for the support and education of such child. The Trustee shall also be authorized in its discretion to distribute trust principal to enable a child to marry, to purchase a home, or to enter into a trade, profession, business, or for similar purposes. It is my wish that the Trustee shall take into consideration any other means of support such child may have to the knowledge of the Trustee.

This paragraph enables the trustee in his discretion to distribute trust principal to "descendants of a child deceased" in order to provide for support and aid "such child" in specific endeavors. Reference to the "descendants of a child deceased" and "such child" is contained in this paragraph and in Paragraph (h). From the context of its use in Paragraphs (g) and (h), we construe the word "child" to mean his grandchildren, i.e., children of a deceased child of his. *See Joyner*, 299 N.C. at 577, 264 S.E.2d at 86 (testator's

THORNHILL v. RIEGG

[95 N.C. App. 532 (1989)]

intent is to be determined by examination of the will in its entirety). There is no rule against perpetuities violation.

[5]

Paragraph (h)

Should any child die after the division of the original trust into separate shares but before such child has become entitled to receive all of the property in his or her trust, then the property in the trust of such child shall be distributed per stirpes among the descendants then living of such child, if any, and if none, shall be added equally to the shares originally set apart for my other children or their descendants and be held and distributed in all respects as if it had originally been a part of such other shares.

This paragraph provides for *great-grandchildren* of the testator in case one of his grandchildren dies before reaching age twenty-five. In such a situation the great-grandchild would also not receive benefits until reaching the age of twenty-five. This provision could therefore violate the rule against perpetuities as the gift to the great-grandchild might not vest until after a period of twenty-one years plus a life in being at the time the interest was created. A life in being at the testator's death is often referred to as the measuring life for the interest in question. *Joyner*, 299 N.C. at 570, 264 S.E.2d at 82. "Frequently the measuring life or lives will be the beneficiary or beneficiaries of an interest in the trust or will that precedes the interest in question." *Id.* The record indicates that Susan and Richard, the testator's children, were alive at testator's death. The record does not reveal whether there were any grandchildren alive at testator's death. As we are bound by the record, we determine that Susan and Richard are the measuring lives for the gifts to the grandchildren and great-grandchildren. *Id.* at 572, 264 S.E.2d at 83.

[6] Paragraph (i) of the trust creates no rule against perpetuities problem as it provides for the residue to be distributed by the intestate succession law if circumstances prevent distribution in accordance with the other provisions of the trust.

[7] Accordingly, we hold that Paragraph (h) of Item IV of the testator's will is void because it violates the rule against perpetuities. The other provisions of the trust, Paragraphs (a)-(g), and (i) create valid interests, and the trustee should therefore give effect to these provisions in accordance with this opinion so as to carry

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

out the testator's intent. See T. Bergin and P. Haskell, *Preface to Estates in Land and Future Interests* at 208-09 (only the invalid provision of a trust is stricken, the trust is not invalid *ab initio*).

Reversed in part, affirmed in part.

Judges JOHNSON and COZORT concur.

JOSEPH TATE, JR., PLAINTIFF v. ACTION MOVING & STORAGE, INC., AND
MAYFLOWER TRANSIT CO., INC., D/B/A AERO MAYFLOWER TRANSIT
CO., INC., DEFENDANTS

No. 8826SC1038

(Filed 19 September 1989)

1. Pleadings § 37— defendant bound by allegation in answer

Defendant was bound by the factual allegation in its answer that it agreed to store plaintiff's property, and defendant's denial of a storage agreement by its president in his deposition was of no import.

2. Uniform Commercial Code § 37— "Household Goods Description Inventory"—warehouse receipt—defendant responsible as warehouseman

The "Household Goods Descriptive Inventory" which was given to plaintiff when his goods were loaded was intended by defendant to serve as a warehouse receipt and defendant was responsible under N.C.G.S. § 25-7-201 for its actions as a warehouseman where the document issued by defendant listed each item picked up, its condition, the owner's name, the origin loading address, and was signed and dated by defendant's authorized agent and driver.

3. Warehousemen § 1.1— failure of warehouseman to comply with statutes—conversion of plaintiff's goods

Defendant warehouseman failed to comply with the requirements of N.C.G.S. § 25-7-210(3) and was properly held liable for conversion of plaintiff's goods where plaintiff sent defendant a check, instructed defendant to deduct more than enough to cover plaintiff's charges, and informed defendant

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

that plaintiff would arrange to have a different carrier pick up his goods from defendant; defendant admitted receiving plaintiff's letter; defendant refused to accept payment by plaintiff but instead continued to hold the goods, mounting up storage fees; and defendant subsequently sold the goods at auction where it was the only bidder.

4. Damages § 7— plaintiff's forfeiture of property left with defendant more than six months— no liquidated damages clause— unenforceable penalty clause

The agreement in this case which stated that, if plaintiff left his property with defendant for more than six months, it would become defendant's property was a penalty clause, not a liquidated damages clause, and as such was unenforceable, since the clause stated no fixed sum and there was no showing that the value of plaintiff's belongings was in any way related to any genuine pre-estimate of what defendant's damages would be in case of a breach by plaintiff.

APPEAL by defendant Action Moving & Storage, Inc. from *Snepp, Frank W., Jr., Judge*. Order entered 28 June 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1989.

Defendant Action Moving & Storage, Inc. (Action) appeals from entry of partial summary judgment against it which held that Action wrongfully converted plaintiff's personal property by selling plaintiff's belongings which were in Action's possession pursuant to an agreement between plaintiff and Action to transport the property to Liberia.

Karro, Sellers & Langson, by Seth H. Langson, for plaintiff-appellee.

Hartsell, Hartsell & Mills, P.A., by Fletcher L. Hartsell, Jr., for defendant-appellant Action Moving & Storage, Inc.

JOHNSON, Judge.

On 30 July 1987, plaintiff instituted this action against defendant Action, the local moving company, and defendant Mayflower Transit Company (Mayflower), the long distance mover, alleging breach of contract, unfair or deceptive trade practices, and conversion. Defendant Action's answer alleged affirmatively that plain-

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

tiff abandoned his belongings by express contractual provision and his subsequent refusal to pay storage and handling charges. Defendant Mayflower's answer denied personal knowledge of many of the events alleged by plaintiff to have occurred.

On 3 May 1988, plaintiff moved for partial summary judgment against both defendants as to the conversion charge based on its pleadings, depositions and other documents produced through discovery. On 27 June, in an order designated a "final judgment on the issues determined" entered because there was "no just reason for delay," the trial court granted plaintiff's motion as to defendant Action only. The order also held that defendant Action did not have actual authority to act on behalf of defendant Mayflower in selling plaintiff's goods and held there was a genuine issue of material fact as to whether Action had apparent authority. From the order finding it liable for conversion, defendant Action appealed in apt time.

In the following statement of facts we refer to the defendant local moving company as "Action" for the sake of brevity even though during the pertinent time period Action's full title on correspondence was "Action-Mayflower." This is only for convenience and expresses no opinion on the question of whether defendant Action had apparent authority to act on behalf of defendant Mayflower.

Viewing the evidence in the light most favorable to the non-moving party, defendant Action, the evidence tends to show the following: On 23 March 1984, plaintiff contacted defendant Action to ship his household belongings from Charlotte, North Carolina to Monrovia, Liberia. An employee of Action inspected the items for shipping and gave plaintiff a document entitled "Estimated Cost of Services" which quoted plaintiff an all-inclusive price \$4,281.60 calculated on the basis that the items would require only three shipping crates. The parties agreed that plaintiff would pay \$1,000.00 as a down payment and the balance before the goods were shipped. They also agreed that if the items were left in Action's possession for more than six months, they would become Action's property. The next day plaintiff requested Action to ship his goods. On 26 March 1984, Action loaded plaintiff's belongings, prepared a detailed inventory of them, and received plaintiff's check for \$1,000.00.

Plaintiff then left Charlotte for Monrovia on or about 29 March 1984. Action stored plaintiff's belongings in its warehouse because

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

it had not received the balance to be paid before shipping. Plaintiff sent Action a letter from Monrovia dated 26 September 1984 which stated that he had been waiting to be advised of the final weight of his shipment. Plaintiff enclosed a check for \$3,800.00 and requested information on the expected arrival of his belongings. On 24 October 1984, plaintiff sent Action another letter which stated in part the following:

In reference to our telephone conversation on October 23, 1984, and my letter to your Company dated September 26, 1984, I like [sic] to make the following suggestion so as to eliminate further storage charges etc.:

.....

If you cannot ship my personal effects as I requested above, please deduct from the Four Thousand Eight Hundred (\$4,800.00[)] Dollars that I have sent you Two Thousand Seven Hundred Eight (\$2,708.20) Dollars and Twenty Cents which should cover your charges etc. and send me the balance of Two Thousand One Hundred Eight (\$2,108.00) Dollars and I will make other arrangements to have my shipment picked up from your warehouse following confirmation.

I do hope that you would be able to work along with me so as to resolve this matter soon and to eliminate other charges.

Action continued to hold the \$4,800.00 without deducting for charges incurred as requested by plaintiff. Instead, Action wrote plaintiff on 29 October 1984 that the total charge for shipping his goods would be \$8,452.24, leaving a balance due of \$3,652.24 before Action would allow the goods to be shipped. The cost was itemized to include \$709.80 for storage, \$6,441.54 for shipping, and \$1,300.90 for origin charges which include labor and materials for packing. Plaintiff apparently refused to pay the \$8,452.24 amount. In a letter dated 27 February 1985, Action returned plaintiff's check for \$3,800.00 and again asserted its claim for storage charges. Plaintiff continued to have numerous communications with both defendant Action and defendant Mayflower during 1985 concerning his belongings. On 17 May 1985, Action wrote plaintiff that it understood plaintiff wished to ship with a different carrier and it would release plaintiff's property to such carrier upon receipt of \$1,350.96 balance due. Action later sent plaintiff two letters dated 9 and 11 October 1985. Both letters advised plaintiff that if

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

Action did not hear from plaintiff regarding the balance due by 31 October 1985, that Action would sell the personal property. On 20 and 27 December 1985, having received no payment from plaintiff, Action published a notice of the proposed public sale in a local newspaper. Plaintiff's belongings were sold at a public sale on an unspecified date in 1986 at which Action was the only bidder. Action's president, Jack Taylor, testified that he thought his company probably bid one dollar for plaintiff's goods and later resold some of the items in Action's used furniture store for about \$140.00. Mr. Taylor, however, did not have any documentation of the sale to prove either figure.

Before addressing the merits of defendant's appeal, we first note that defendant has failed to make reference to its assignments of error immediately following each question as required by Rule 28(b)(5) of the N.C. Rules of Appellate Procedure. We, however, deem it appropriate to consider this appeal on its merits pursuant to Rule 2 of the N.C. Rules of Appellate Procedure.

By his second Assignment of Error, defendant argues that the trial court erred in concluding as a matter of law that defendant did not have the right to dispose of plaintiff's property without complying with G.S., Chapter 44A as it pertains to possessory liens on personal property, or G.S. sec. 25-7-201, *et seq.*, the Uniform Commercial Code provision for warehousemen's liens. We believe any right defendant may have had in plaintiff's property is properly analyzed as a warehouseman's lien under Article Seven of the U.C.C. Although we disagree somewhat with the findings of fact and conclusions of law made by the trial court, we agree with the result reached and therefore affirm.

[1] We first note that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). In the instant case, Action stated in its fourth defense and counterclaim (which claim was not pursued on appeal) that "defendant agreed to handle and store the Personal Property of plaintiff for no more than six (6) months and to transport the Personal Property to a location in Monrovia, Liberia." Therefore, Action is bound by the factual allegation in its answer that it agreed to store plaintiff's property, and Action's denial of a storage

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

agreement by Jack Taylor, president of Action, in his deposition, is of no import.

[2] It is well settled that “[a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt.” G.S. sec. 25-7-209(1). The trial court found as fact that Action never issued a warehouse receipt or any document which it intended to serve as one. Action excepted to this finding. We conclude that this finding is unsupported by the evidence.

We first note that a warehouse receipt is defined by the U.C.C. as simply “a receipt issued by a person engaged in the business of storing goods for hire.” G.S. sec. 25-1-201(45). Further, “[a] warehouse receipt need not be in any particular form.” G.S. sec. 25-7-201. Action’s admission in its answer that it agreed to store plaintiff’s goods for up to six months supports the contention that the “Household Goods Descriptive Inventory” which was given to plaintiff when his goods were loaded was intended by Action to serve as a warehouse receipt. We also believe it was sufficient to constitute a warehouse receipt for purposes of holding Action responsible under Article Seven for its actions as a warehouseman. This document issued by Action listed each item picked up, its condition, the owner’s name, the origin loading address, and was signed and dated by Action’s authorized agent and driver. Although we find no North Carolina case directly on point as to whether an irregular document not formally denominated a warehouse receipt may serve as one for purposes of invoking a warehouseman’s duties under Article Seven, we find support for our position in *Kearns v. McNeill Bros. Moving & Storage Co.*, 509 A.2d 1132, 1 U.C.C. Rep. Serv.2d 856 (D.C. App. 1986), which held that a “Household Goods Descriptive Inventory” was a sufficient warehouse receipt under similar circumstances.

We find it unnecessary to undertake an analysis of the “Household Goods Descriptive Inventory” in the instant case. Even though the document is probably irregular as a warehouse receipt, this will not relieve defendant of his duties as a warehouseman under Article Seven. G.S. sec. 25-7-401, entitled “Irregularities in issue of receipt or bill or conduct of issuer” states, in pertinent part, the following: “The obligations imposed by this article on an issuer apply to a document of title regardless of the fact that (a) the document may not comply with the requirements of this article or of any other law or regulation regarding its issue, form

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

or content. . . ." (We note that G.S. sec. 25-1-201(15) defines "document of title" to include warehouse receipts.) White and Summers, in construing this provision, have stated that "so-called 'irregularities of issue' do not limit the scope of Article Seven so far as the obligations of an issuer are concerned, even though a specified key definition, such as 'document' or 'warehouseman,' is not satisfied." J. White & R. Summers, Uniform Commercial Code sec. 20-2 at 784 (2d ed. 1980) (emphasis in original).

[3] Therefore, even in the case of an irregular warehouse receipt, defendant had the obligation to act as a reasonably careful person in relation to plaintiff's goods. G.S. sec. 25-7-204(1). Also, in enforcing any lien against plaintiff, defendant had the duty to comply with G.S. sec. 25-7-210, "Enforcement of warehouseman's lien." G.S. sec. 25-7-210(3) provides the following:

Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this article.

The record shows, as quoted above, that on 24 October 1984 plaintiff wrote a letter to defendant instructing defendant to deduct from the \$4,800.00 which defendant was holding, \$2,708.20 to cover defendant's charges to date, and that plaintiff would arrange to have a different carrier pick up his goods from defendant. Defendant admitted receiving this letter. In its letter of 29 October 1984, defendant stated that the charges incurred thus far for storage and origin charges amounted to \$2,010.70 (\$709.80 storage plus \$1,300.90 origin charges). Therefore, plaintiff's offer of \$2,708.20 was far more than adequate to cover the amount owed to defendant.

Defendant's president, Jack Taylor, was questioned in his deposition about plaintiff's letter of 24 October 1984:

Q. But you remember getting this letter? And I'll represent to you that I've been furnished with a copy from your attorney, so it was in your file.

A. I don't remember when I got it. I remember reading it, but, yes, I remember reading it. I don't remember when I got it.

TATE v. ACTION MOVING & STORAGE

[95 N.C. App. 541 (1989)]

Q. And it contains the language that I just read to you?

A. Yes.

Q. And you still refused to do that at that time?

A. We didn't ship his goods.

Q. You didn't deduct the amount that he said you could and release his goods so he could make other arrangements for shipment, did you?

A. Huh-uh (no), I did not. We returned the entire amount of money to him.

Q. Months later?

A. (Witness nods head affirmatively.)

Defendant's admission by Jack Taylor that he refused to accept payment by plaintiff, but instead continued to hold the goods, mounting up storage fees, was a clear violation of G.S. sec. 25-7-210(3). Plaintiff effectively satisfied the lien on his goods by giving defendant \$4,800.00 and instructing him to take out of that amount even more than defendant needed to satisfy the debt. After this payment, defendant then had no right to sell the goods.

G.S. sec. 25-7-210(9) states that "[t]he warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion." We believe defendant's failure to comply with the requirements of G.S. sec. 25-7-210(3) as stated above, constituted a willful violation of the requirements for sale and that the defendant was properly held liable for conversion of plaintiff's goods.

[4] Lastly, we find no merit to Action's contentions that plaintiff abandoned his goods after six months through his contractual provision with Action, and that the clause should be viewed as a liquidated damages provision. The trial court found that the six month provision was a forfeiture clause that was void and against public policy. We agree with the court.

Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally re-

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

coverable or retainable . . . if the breach occurs. A *penalty* is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a *punishment*, the threat of which is designed to prevent the breach, or as *security* . . . to insure that the person injured shall collect his actual damages.

Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (emphasis in original) (1966), quoting McCormick, Damages sec. 146 (1935). Penalty clauses are unenforceable, while liquidated damages may be collected. *Id.*

The agreement in the instant case which stated that if plaintiff left his property with Action for more than six months it would become Action's property is a penalty clause, not a liquidated damages clause, and as such, is unenforceable. The clause states no fixed sum and there is no showing that the value of plaintiff's belongings was in any way related to any genuine pre-estimate of what Action's damages would be in case of a breach by plaintiff. The provision is in the nature of security for actual damages and cannot be enforced.

We find defendant's remaining arguments to be without merit and therefore we do not address them.

Affirmed.

Judges BECTON and ORR concur.

STEVEN R. LOVE AND WIFE, BONNIE B. LOVE v. E. HAROLD KEITH AND WIFE, JOYCE G. KEITH

No. 8810SC1277

(Filed 19 September 1989)

1. Evidence § 32; Unfair Competition § 1— sale of house—unfair and deceptive trade practice alleged—parol evidence rule not ignored

In an action for unfair and deceptive trade practices in the sale of a house, the trial court did not erroneously ignore the parol evidence rule in admitting testimony about the Home-

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

owners Warranty Program, since the evidence was submitted, not to vary, add to, or contradict the contract, but to prove an unfair or deceptive practice.

2. Unfair Competition § 1— unfair and deceptive trade practice— repairs needed to place house in HOW program— representations by defendant builder

The trial court did not err in concluding as a matter of law that defendants' conduct was an unfair and deceptive trade practice where the jury found that defendants breached an implied warranty of workmanlike quality to the plaintiffs in the construction of a house; defendants' misrepresentations to plaintiffs regarding coverage of the house under the Homeowners Warranty Program proximately caused damages to plaintiffs; the male defendant's statement that he was a HOW builder had the capacity to deceive since all HOW builders are required by HOW to place their houses in the HOW program; the male defendant's statement that the house was or would be insured had the capacity of deceiving plaintiffs into believing that they would be covered regardless of whether defendants effected the required repairs to the house; and defendants acted in an unfair manner by attempting to coerce the release of funds which plaintiffs had placed in escrow by wrongfully refusing to finish placing the house in the HOW program.

3. Unfair Competition § 1— unfair and deceptive trade practice—defects in house—sufficiency of evidence of damages

In an action for unfair and deceptive trade practices in the construction and sale of a home by defendant who represented himself to be a HOW builder, plaintiffs presented sufficient evidence of damages for the case to go to the jury where plaintiffs' evidence showed what coverage would be provided by the HOW program, including which defects were specifically covered and which would be covered according to accepted industry practice; plaintiffs presented evidence of local industry standards in home construction; plaintiffs' expert testified about several major defects in the plaintiffs' home which amounted to defective workmanship deviating from industry standards; and plaintiffs presented evidence as to the total cost of repairs and as to the cost of individual defects in workmanship.

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

4. Attorneys at Law § 7.5— unfair trade practices claim— attorney fees properly awarded

The trial court did not err in awarding plaintiffs attorney fees based upon defendant's willful engagement in an action of unfairness when he failed to enroll the house he built and sold to plaintiffs in HOW because he wanted to pressure plaintiffs into releasing funds which they had placed in escrow to cover the cost of necessary repairs; furthermore, defendants' settlement offer to enroll plaintiffs' house in the HOW program upon plaintiffs' release of the escrow funds amounted to an unwarranted refusal to fully resolve the matter. N.C.G.S. § 75-16.1.

5. Unfair Competition § 1— interest imposed on trebled damages— error

In an action for unfair and deceptive trade practices, the trial judge erred in imposing interest on the amount of trebled damages rather than on the amount of compensatory damages only. N.C.G.S. § 24-5(b).

APPEAL by defendants from *Brannon (Anthony M.)*, Judge. Judgments entered 5 April 1988 and 25 April 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1989.

Gary S. Lawrence for plaintiff-appellees.

Hafer, Day & Wilson, P.A., by Eugene Hafer, and Law Offices of Brenton D. Adams, by Brenton D. Adams and Jane R. Ward, for defendant-appellants.

GREENE, Judge.

The plaintiffs, Steven R. and Bonnie B. Love, received a jury verdict against defendants E. Harold and Joyce G. Keith in an action under the Unfair and Deceptive Trade Practices Act, N.C.G.S. Sec. 75-1 *et seq.* (1988). Defendants appeal.

This action arose from a housing transaction. The evidence tends to show the defendants built a house, and the plaintiffs contracted to purchase it. In this contract the defendants agreed, among other things, "to correct water leakage around the front door sill and replace several water damaged boards of the hardwood floor in foyer."

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

Prior to closing, the defendant E. Harold Keith doubted his ability to affect these repairs to plaintiffs' satisfaction. Harold Keith expressed to the plaintiffs a desire to void the contract. The plaintiffs testified that they did not void the contract because the defendant, Harold Keith, was a Homeowners Warranty (HOW) Program builder. The HOW Program insures homeowners against certain construction defects. Homes constructed by a HOW builder can be placed under the HOW Program. The defendant Harold Keith had assured the plaintiffs that their house was or would be covered under the program, and thus the plaintiffs felt confident the necessary repairs would be covered even if the defendants failed to complete them.

At closing the defendants had not yet completed the repairs. The parties then entered an agreement by which \$3,000 of the proceeds of the sale would be placed in escrow pending certain repairs by the defendants. If the defendants had not affected the repairs within thirty days, the escrow agreement provided the plaintiffs could hire someone to complete the work, paying them from the escrow account. According to the plaintiffs' evidence, the plaintiffs completed the repairs at their own expense since the defendants failed to do so.

The defendants claimed the escrow funds were wrongfully withheld since they had substantially completed the repairs. Further, the defendants purposely declined to complete enrollment of the house in HOW until the plaintiffs had released the escrow fund.

The jury found as follows:

1. Did the defendants represent to the plaintiffs that the house would be covered under the Homeowners Warranty (HOW) Program, and then fail to have the house registered under the HOW Program?

ANSWER: Yes

2. Was the plaintiff injured or damaged as a proximate result of the defendants' conduct?

ANSWER: Yes

3. By what amount, if any, has the plaintiff been injured or damaged?

ANSWER: \$3,400

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

Upon this verdict, the trial court concluded "as a matter of law that the Defendants' actions in constructing the house . . . and thereafter selling said house and lot to the Plaintiffs was conduct in commerce and affecting commerce and that the actions of the Defendants were unfair and deceptive practices . . ." The trial judge then trebled damages, which then totaled \$10,200, and later awarded plaintiffs attorney fees.

The issues presented are: I) whether evidence of the HOW Program should have been barred by the parol evidence rule; II) whether, as a matter of law, the defendants' actions constituted an unfair or deceptive trade practice; III) whether the plaintiffs presented sufficient evidence of damages; IV) whether the evidence supported an award of attorney fees to the plaintiffs; V) whether the trial judge failed to formally find sufficient facts predicated an award of attorney fees; and VI) whether the trial judge improperly imposed interest on a noncompensatory portion of the award.

I

[1] The defendants argue the trial judge erroneously ignored the parol evidence rule in admitting testimony about the HOW Program. We disagree.

"When a contract is reduced to writing, parol evidence cannot be admitted, to vary, add to, or contradict the same." *Hoots v. Calaway*, 282 N.C. 477, 486, 193 S.E.2d 709, 715 (1973) (quoting *Stern v. Benbow*, 151 N.C. 460, 463, 66 S.E. 445, 446 (1909)). However, the case at hand is not governed by common law contract principles or the particularized evidentiary rules which attend them. See *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984) (action for unfair or deceptive acts is neither tortious nor contractual). Where, as here, the evidence was submitted not to vary, add to, or contradict the contract, but rather to prove an unfair or deceptive practice, the parol evidence rule will not bar its admission. See *Weitzel v. Barnes*, 691 S.W.2d 598, 599-600 (Tex. 1985); cf. *Marshall v. Keaveny*, 38 N.C. App. 644, 647, 248 S.E.2d 750, 753 (1978) (since fraudulent misrepresentation actions are in tort, the parol evidence rule does not apply).

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

II

[2] The defendants next argue the trial judge erred in concluding, as a matter of law, that defendants' conduct was an unfair and deceptive trade practice. We disagree. "[I]t is a question for the jury as to whether the defendants committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988).

The jury found the defendants breached an implied warranty of workmanlike quality to the plaintiffs regarding construction of the house. The jury also determined the defendants' misrepresentations to the plaintiffs regarding coverage of the house under the Homeowners Warranty Program proximately caused damages to the plaintiffs in the amount of \$3,400. The judge then found the defendants' acts were in commerce, unfair and deceptive. The defendants do not dispute the trial judge's finding the acts were in commerce.

Our inquiry is thus limited to whether the trial judge erred in finding the defendants' acts were unfair and deceptive.

Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. 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 [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required [T]he consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception

Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Neither the actor's intent nor good faith are relevant. *Id.*

The plaintiffs offered evidence to prove the existence of a purchase contract with the defendants requiring the defendants to repair certain parts of the subject house. Prior to closing the defendants expressed doubt as to their ability to fulfill this repair clause and offered the plaintiffs the opportunity to void the contract. The plaintiffs chose to hold the defendants to the contract, relying on defendant Harold Keith's representation of being a HOW

LOVE v. KEITH

[95 N.C. App. 549. (1989)]

builder. Mr. Keith also told the plaintiffs the house was or would be insured under HOW. After closing, the defendants allegedly having failed to affect the required repairs, the plaintiffs refused to allow the release of the \$3,000 escrow funds set aside pending defendants' repairs. Harold Keith testified he then refused to place the plaintiffs' house in the HOW Program until the plaintiffs allowed release of the escrow funds. Indeed, the jury found the defendants represented they would place the house under HOW, and they failed to do so.

From these facts and the findings of the jury the trial judge had sufficient evidence from which to determine the defendants acted in an unfair or deceptive manner. Defendant Harold Keith's statement that he was a HOW builder has the capacity to deceive since all HOW builders are required, by HOW, to place their houses in the HOW Program. Further, the defendant's statement that the house was or would be insured had the capacity of deceiving the plaintiffs into believing that they would be covered regardless of whether the defendants affected the required repairs. Lastly, the defendants acted in an unfair manner by attempting to coerce the release of the escrow funds by wrongfully refusing to finish placing the house in the HOW Program. *See Wilder v. Squires*, 68 N.C. App. 310, 315, 315 S.E.2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984) ("coercive tactics are within the definition of unfair practices").

III

[3] The defendants also argue the plaintiffs failed to present sufficient evidence of damages for the case to go to the jury. Although the defendants relied heavily on *Olivetti Corp. v. Ames Business Systems Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586-87, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987), we find that case useful only for the basic "principle of law that proof of damages must be made with reasonable certainty." 319 N.C. at 546, 356 S.E.2d at 585.

Before determining whether the amount of damages was proven with reasonable certainty in the case at hand, we note in passing that the facts detailed in the last section sufficiently demonstrate the defendants' actions proximately caused some damage to the plaintiffs. The plaintiffs testified they would have voided the contract in the absence of the defendants' representations regarding HOW. Further, had the defendants properly enrolled the plain-

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

tiffs' house in HOW, the plaintiffs' expenditures on repairs in excess of the escrow amount could have been reimbursed by HOW.

The defendants assert the plaintiffs' proof of damages falls short since they failed to provide evidence of whether the HOW insurance would have indeed paid for the repairs. However, the plaintiffs' evidence shows that the HOW Program, in the first year of coverage, provides an insurance or warranty policy covering defective workmanship and materials, major systems, and major or structural defects. The policy specifically lists certain defects as covered, and others may be covered according to accepted industry practice. The plaintiffs presented evidence of local industry standards in home construction. Further, the plaintiffs' expert testified about several major defects in the plaintiffs' home which amounted to defective workmanship deviating from industry standards. The plaintiffs also presented evidence as to the total cost of repairs and as to the cost of individual defects in workmanship. From this evidence the jury could deduce, with reasonable certainty, the extent of coverage HOW could have provided. Hence, evidence existed providing reasonable certainty as to damages.

IV

[4] The defendants contend the trial judge erred in awarding plaintiffs attorney fees since no evidence existed meeting statutory criteria for such an award.

A party prevailing in its unfair or deceptive practice claim may be awarded a reasonable attorney fee upon the presiding judge's determination that the "party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constituted the basis of such suit" N.C.G.S. Sec. 75-16.1 (1988). Award or denial of attorney fees under this section is within the sole discretion of the trial judge. *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987).

The defendant, Harold Keith, admitted his motivation for failing to enroll the house in HOW was to pressure the plaintiffs into releasing the escrow funds. This is direct evidence of willful engagement in an act of unfairness. Further, from this fact the trial judge could have validly inferred the defendants' willful engagement in earlier deceptive statements regarding the HOW enrollment. The defendants argue, regardless of their willfulness, they

LOVE v. KEITH

[95 N.C. App. 549 (1989)]

offered to settle the matter by belatedly enrolling the house in HOW, and then affecting whatever repairs are required under HOW. This excuse fails because the defendants had placed the escrow pre-condition on the HOW enrollment. The defendants have not guided this court to any authority justifying their act of self-help in holding the HOW enrollment hostage over what amounted to a separate contract dispute with the plaintiffs. Thus, we conclude that the defendants' settlement offer to enroll the plaintiffs' house in the HOW Program upon plaintiffs' release of the escrow funds amounted to an unwarranted refusal to fully resolve the matter.

V

The defendants next argue the trial judge erred by finding insufficient facts upon which to base his legal conclusion awarding attorney fees. Assuming a factual basis for the award, the defendants do not challenge the amount of the award though. The trial judge found:

2. That the conduct of the defendants in representing to the plaintiffs that the house would be covered under the Homeowners Warranty Program and then failing to have the house registered under the Homeowners Warranty Program, as determined by the jury, was willful.
3. There was an unwarranted refusal by the defendants to fully resolve the matter which constitutes the basis of plaintiffs' suit under Chapter 75.

These findings of fact are sufficient and are supported by competent evidence. *See Morris*, 86 N.C. App. at 387, 358 S.E.2d at 125.

VI

[5] The defendants finally argue the trial judge erred in imposing interest on the portion of the judgment in excess of \$3,400. We agree. Since the defendants' conduct violated N.C.G.S. Sec. 75-1.1 *et seq.*, the trial judge properly trebled the jury's \$3,400 verdict. N.C.G.S. Sec. 75-16. The trial judge then ordered interest on the full \$10,200. In this the trial judge erred since N.C.G.S. Sec. 24-5(b) (1986) only provides for interest on compensatory damages as designated by the fact finder. The fact finder here, the jury, specified compensatory damages of only \$3,400. The plaintiffs may receive interest only on \$3,400, calculated as specified in N.C.G.S. Sec.

STATE v. GREEN

[95 N.C. App. 558 (1989)]

24-5(b). To the extent the trial court judgment differs, it should be and hereby is vacated.

Affirmed in part, vacated in part and remanded.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. LEOPOLD LINCOLN GREEN

No. 887SC1376

(Filed 19 September 1989)

1. Witnesses § 1.2— competency of child to testify

The trial court did not abuse its discretion in finding that a seven-year-old victim was competent to testify in a rape trial where the child testified that she knew what it meant to tell the truth and the difference between right and wrong, notwithstanding the child also testified that her mother decided what the truth was and that she did not know what it meant to break a promise or what an oath was. N.C.G.S. § 8C-1, Rules 601(a) and (b).

2. Rape and Allied Offenses § 5— rape of child—sufficient evidence of vaginal intercourse

There was sufficient evidence of vaginal intercourse to support defendant's conviction of first degree rape of a child where the child testified that defendant pulled down her pajamas and laid her on the floor; the child answered affirmatively when asked whether defendant put his private parts in her private parts; the transcript reveals that the child knew where private parts are located; a doctor who examined the child a month after the alleged incident testified that, although he found no bruises, scrapes, healing abrasions or other signs of trauma, the child's vaginal opening was approximately two centimeters in diameter and there was evidence of tearing and subsequent healing of the hymenal ring; and the doctor was of the opinion that these physical findings were compatible with penile penetration.

STATE v. GREEN

[95 N.C. App. 558 (1989)]

3. Rape and Allied Offenses § 6.1— rape case—instruction on attempted rape not required

The trial court in a prosecution for first degree rape of a child did not err in failing to instruct the jury on attempted first degree rape where all of the State's evidence tended to show that defendant penetrated the victim, and defendant denied having any sexual contact with the victim.

4. Criminal Law § 128.2— failure of jury to agree—mistrial not required

The jury was not deadlocked so as to require the trial court to grant defendant's motion for a mistrial after the jury deliberated from 4:07 p.m. until 5:36 p.m., went to dinner, deliberated further from 6:55 until 9:37, and announced that it was divided ten-two and that no progress had been made since dinner, where the jury resumed deliberations after being instructed by the court, returned to the courtroom at 10:49 p.m. and reported that a verdict could possibly be reached the following day, and reached a guilty verdict after having deliberated for two hours the following day.

5. Criminal Law § 122.2— trial court's statement to jurors—verdict not coerced

The trial court did not coerce a verdict by instructing the jurors prior to their second day of deliberations that "[y]ou all may retire to the Jury room and make up your verdict."

APPEAL by defendant from *Griffin, Judge*. Judgment entered 11 August 1988 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 25 August 1989.

Defendant was charged with the first degree rape of his seven-year-old daughter. The incident allegedly occurred on the night of 12 March 1988 when the child was spending the night at her paternal grandmother's house. The trial court allowed the child to testify after a *voir dire* hearing to determine her competency. The evidence for the State tended to show that defendant entered the bedroom that the child and her grandmother shared, picked up the child and carried her into the living room. On direct examination the child answered affirmatively when asked whether defendant had "put his private parts in [her] private parts." The child also answered affirmatively when asked whether defendant had "put his private parts in [her] mouth" and whether defendant

STATE v. GREEN

[95 N.C. App. 558 (1989)]

"lick[ed her] private parts." The State presented corroborative evidence from the child's mother, a detective with the Rocky Mount Police Department, and the doctor who examined the child. At the close of the State's evidence the trial court denied defendant's motion to dismiss.

For the defense, defendant's mother testified that she was a light sleeper and she heard nothing on the night of the alleged incident. Defendant testified and denied that any of the acts had occurred. Character witnesses testified on defendant's behalf. At the close of the evidence defendant renewed his motion to dismiss which was denied. The court denied defendant's request for a jury instruction on attempted rape. The issue submitted to the jury was whether defendant was guilty or not guilty of first degree rape.

The jury retired to deliberate at 4:07 p.m. At approximately 11:00 p.m. the jurors were instructed to discontinue their deliberations and return the following day to continue. Defendant's motion for mistrial was denied.

The following day the court instructed the jurors "[y]ou all may retire to the Jury room and make up your verdict." Approximately two hours later the jury returned and reported that their unanimous verdict was that defendant was guilty of first degree rape. The defendant made a motion to dismiss for insufficiency of the evidence. The trial court denied defendant's motion. From judgment entered on the verdict, defendant appeals.

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

Robert Dale Pitt for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in five respects. Defendant's first argument is that the court erred in finding the child competent to testify. Defendant also argues that the court committed reversible error in denying his motion to dismiss for insufficiency of the evidence. Third, defendant argues the trial court erred in refusing to submit to the jury the issue of attempted rape. Defendant also argues that the court erred in failing to declare a mistrial. Finally, defendant argues that the trial court instructed the jury in such a way as to coerce a verdict. After careful review of the record, we find no error.

STATE v. GREEN

[95 N.C. App. 558 (1989)]

I

[1] Defendant first argues that the court abused its discretion in finding the alleged victim competent to testify and thereafter allowing her testimony into evidence. Defendant argues that the seven-year-old child demonstrated on *voir dire* that she did not fully understand the nature of an oath and the duty to tell the truth. Defendant relies in particular on the child's testimony that her mother decided what the truth was. On this record we find no merit in defendant's arguments.

G.S. 8C-1, Rule 601(a) provides that "[e]very person is competent to be a witness except as otherwise provided" in the Rules of Evidence. G.S. 8C-1, Rule 601(b) provides that a person is disqualified when the court determines that the person is "incapable of understanding the duty of a witness to tell the truth." The determination of the competency of a witness rests in the sound discretion of the trial court. Absent a showing that the court's ruling could not have been the result of a reasoned decision, the ruling will not be disturbed on appeal. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

The transcript reveals the following exchange between the court and the child:

Q: You mean if you don't tell the truth, you'll get punished, is that what you mean?

A: Yes.

Q: So you know what it means to tell the truth, is that right?

A: Yes.

* * *

Q: You understand it is important to tell the truth?

A: Yes.

Q: And you are going to promise to us that you are going to tell the truth?

A: Yes.

Q: You're going to keep your promise?

A: Yes.

STATE v. GREEN

[95 N.C. App. 558 (1989)]

Q: You know how important it is to do that, is that right?

A: Yes.

Defendant points out that the child also answered that she did not know what it means to break a promise and did not know what an oath was. As noted by our Supreme Court, the testimony of a witness of tender years is oftentimes "somewhat vague and self-contradictory." *State v. McNeely*, 314 N.C. 451, 457, 333 S.E.2d 738, 742 (1985). Notwithstanding the testimony relied upon by defendant, the child did testify that she knew what it meant to tell the truth and she knew the difference between right and wrong. On this record we find no abuse of discretion by the trial court.

II

[2] Defendant's second argument is that the court erred in denying his motion to dismiss for insufficiency of the evidence. Defendant asserts that the testimony of the child regarding vaginal intercourse was "equivocal and vague." Defendant argues that "[n]othing in her testimony indicated that 'private parts' meant her vagina or that the defendant had vaginal intercourse with her." Defendant also argues that the medical evidence was inconsistent with vaginal intercourse having occurred on the date alleged. We disagree.

For a charge of first degree rape to withstand a motion to dismiss for insufficient evidence, there must be evidence, among other things, that defendant engaged in vaginal intercourse with the victim. G.S. 14-27.2. In ruling on a motion to dismiss for insufficient evidence the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). There must be substantial evidence of each essential element of the offense charged, together with evidence that defendant was the perpetrator of the offense. *State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E.2d 591, 605 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232, 84 L.Ed.2d 369 (1985).

At trial the child testified that defendant pulled down her pajamas and laid her on the floor. The child answered affirmatively when asked whether defendant put his private parts in her private parts. Although the child did not respond when asked to point

STATE v. GREEN

[95 N.C. App. 558 (1989)]

to where her private parts were located, the transcript reveals that the child knew where they were. The child responded that she did not want to point to her private parts and answered affirmatively when asked if private parts "were [where he] goes to the bathroom." The doctor who examined the child approximately one month after the alleged incident testified that he found no bruises, scrapes, healing abrasions (scabs) or other signs of trauma. However, the doctor also testified that the opening of the child's vagina was approximately two centimeters in diameter and there was evidence of tearing, and subsequent healing, of the hymen ring. In the doctor's opinion these physical findings were "compatible with penile penetration." The doctor testified he was unable to determine from the physical examination of the child when the penetration occurred. When viewed in the light most favorable to the State, the evidence was sufficient to withstand defendant's motion to dismiss.

III

[3] Defendant's third argument is that the trial court erred in failing to instruct the jury on attempted first degree rape. On this assignment of error defendant reasserts his argument regarding the vagueness of the child's testimony and the "conflict" with the testimony of the doctor. We disagree with defendant's argument and overrule his assignment of error.

An instruction on a lesser included offense is warranted only when evidence is presented from which a jury could find that defendant committed the lesser offense. *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986). Ordinarily, where there is evidence of some penetration by defendant sufficient to support a conviction of rape and the defendant denies any sexual relations with the victim, the defendant is not entitled to a charge of attempted rape. *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985). There is no evidence in this case that defendant merely attempted to rape the victim. All of the State's evidence tended to show that defendant penetrated the victim. Defendant denied having any sexual contact with the victim. Under these circumstances no instruction on attempted rape was warranted.

IV

[4] Defendant's fourth argument is that the trial court committed error in failing to declare a mistrial. In his brief defendant asserts that the

STATE v. GREEN

[95 N.C. App. 558 (1989)]

jury deliberated for seven hours total. After the jury returned from dinner the jury deliberated three hours. The foreman stated no progress had been made during that time. In all, the jury returned to the courtroom three times. At least once the foreman indicated that it was doubtful a verdict could be reached.

Defendant argues that these circumstances indicate there was no reasonable probability of the jury's agreement on a verdict. Defendant asserts that the trial court abused its discretion in denying his motion for mistrial. We disagree.

The granting or denying of a motion for mistrial is a matter within the sound discretion of the trial court. *State v. McGuire*, 297 N.C. 69, 74-75, 254 S.E.2d 165, 169, cert. denied, 444 U.S. 943, 100 S.Ct. 300, 62 L.Ed.2d 310 (1979). "[T]he action of the judge in declaring or failing to declare a mistrial is reviewable only in case of gross abuse of discretion." *State v. Darden*, 48 N.C. App. 128, 133, 268 S.E.2d 225, 228 (1980).

The transcript shows that the jury retired at 4:07 p.m. At 5:25 p.m. the jury informed the court that it had a question; the contents of the question are not shown in the record. The transcript shows that at 5:36 p.m. the trial court returned the jury to the courtroom and informed them that arrangements for their dinner were being made and telephones were available to them if needed. The jury went to dinner at 5:45 p.m. At 6:55 p.m. the jurors returned to the courtroom and then retired to deliberate. At 9:37 p.m. the jury returned to the courtroom and reported they were divided 10-2 and that no progress had been made since dinner. The court denied defendant's motions for a mistrial and a directed verdict. At 9:45 p.m., after being instructed by the court on the duty to consult and deliberate with a view to reaching a verdict, the jury returned to the jury room. At 10:49 p.m. the jury returned to the courtroom at the request of the court and reported that no progress toward a verdict had been made. The jurors did report that it was possible a verdict could be reached if deliberations were to continue the following day. The jury was instructed to discontinue deliberations and return the following day at 9:30 a.m. The following day the jurors returned and after deliberating for approximately two hours reached a guilty verdict. We fail to see how these facts disclose any sort of deadlock. Accordingly, we

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

hold that the court's denial of defendant's motion for mistrial was proper.

V

[5] Defendant's final argument is that the trial court's comment to the jurors before they resumed deliberations on the second day had the effect of coercing a verdict. The judge stated to the jurors: "You all may retire to the Jury room and make up your verdict." Defendant failed to object to the trial court's statement but asserts that it was plain error. We find no merit to defendant's argument and his assignment of error is overruled.

In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

State v. Alston, 294 N.C. 577, 593, 243 S.E.2d 354, 364-65 (1978). Under the circumstances it is clear that the trial court's statement was not coercive.

Defendant has abandoned his remaining assignment of error. App. R. 28(a). For the reasons stated, in the trial we find

No error.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. HAROLD GODWIN

No. 8816SC1214

(Filed 19 September 1989)

1. Criminal Law § 101.4— alternate juror in jury room during deliberations— defendant prejudiced

Prejudicial error occurred when an alternate juror retired to the jury room with the other twelve members and when, following the return of the verdict, the judge met privately with the jury members in the jury room, since nine minutes elapsed from the jury's retirement to the discovery of the al-

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

ternate; during that time the jury elected a foreperson; the trial judge did not ask the alternate whether any discussion of the case had occurred; and when the judge did inquire of the jury whether such discussion had begun during the alternate's presence he did so after meeting with them in the jury room.

2. Constitutional Law § 45— defendant permitted to represent self—no inquiry made—defendant prejudiced

The trial court erred in permitting defendant to represent himself without making the required inquiry at a point where his lawyer would most probably have sought a mistrial.

APPEAL by defendant from *Preston, Cornelius, Judge*. Judgment entered 29 January 1988 in Superior Court, ROBESON County. Heard in the Court of Appeals 22 August 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

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

BECTON, Judge.

A jury convicted the defendant, Harold Godwin, of first degree rape, first degree sexual offense, and second degree kidnapping. The judge sentenced defendant to consecutive life terms for the rape and sex offense convictions, and to a concurrent nine-year term for the kidnapping count. Defendant appeals, assigning as error the presence of an alternate juror in the jury room during the deliberation stage of the trial, the judge's entry into the jury room without defendant being present, the judge's decision to allow defendant to represent himself, and the judge's instruction to the jury on the elements of first degree sexual offense. We agree with defendant that prejudicial error occurred at his trial, and, therefore, we vacate the judgment and award a new trial.

The State's evidence tended to show that the prosecutrix was returning to her home at approximately 2:00 A.M. on 14 June 1986. A pickup truck, with only its parking lights turned on, followed her car. At a spot about a mile and a half from the prosecutrix's home, the driver of the truck pulled in front of her car and stopped. Defendant, Harold Godwin, exited the truck, came back

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

to the car and forced his way inside. As he held onto the prosecutrix, he ordered her to pull her car off the road. Defendant then forced the prosecutrix to get into the pickup truck. At one point, he told the prosecutrix that he was going "to screw" her.

Defendant drove down a dirt road and stopped the truck. Taking a handgun from behind the seat, defendant told the prosecutrix he would hurt her if she did not obey him. Defendant undressed and then removed the prosecutrix's clothing. Defendant forced the prosecutrix to perform fellatio on him while he performed cunnilingus upon her. Defendant then drove the truck farther down the road and stopped in a cornfield. There, he forced the prosecutrix to engage in vaginal intercourse with him. Following this, defendant returned the prosecutrix to her car and released her. The prosecutrix reported the assault and, on 20 June 1986, the police arrested the defendant.

Defendant presented testimony from two witnesses that they had seen the prosecutrix on several occasions at defendant's apartment. This evidence was in contrast to the prosecutrix's testimony that she did not know defendant and had never seen him prior to the morning of 14 June.

I

Defendant brings forward four assignments of error on appeal. Three of these, we believe, are a basis upon which to award him a new trial. As the fourth issue, involving jury instructions, is unlikely to arise at a second trial, we do not address it. The three remaining issues are closely related by the circumstances at trial; we begin by laying out their factual background.

A

The record reflects that after the judge instructed the jury, they retired to deliberate at 12:15 P.M. The court reporter subsequently told the judge that a thirteenth juror had gone into the jury room, and, at 12:24 P.M., the judge returned the jury to the courtroom. By this point, the jury members had elected one of their number as foreperson. The judge told the jury to stop its deliberations, and he recessed the trial for lunch.

Following the recess, the judge asked the parties if they had any motions they wished to make. The State suggested that the

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

alternate juror be removed from the jury room. The following then occurred between the judge, defendant's lawyer, and defendant:

[Defense Lawyer] Barrington: May it please the Court, during the luncheon recess after the jury was brought back in, I, about 20 minutes 'til two this afternoon, went back in one of the conference rooms and advised him of this. Basically my client's position is—and I think your Honor should question him as to his position—his position is he no longer wants me speaking for him.

The Court: Mr. Godwin, you want to speak for yourself, sir?

Defendant: Yes, sir. I just want to get it over with today. He said something about getting a mistrial declared. I don't want no mistrial. It's been a burden to my wife and my family and all, and I just want to get it over with today, your Honor. One way or the other I want it over with.

* * * * *

The Court: You do not wish you or your attorney to make a motion for a mistrial based upon the fact that the 13th juror went into the jury room?

Defendant: No sir, I don't . . . I'm not putting nothing on the State to retry me over again. I just want to get it over with today.

The Court: Mr. Godwin, you realize the Court will have to remove the 13th juror.

Defendant: Yes, sir.

The judge then brought the alternate juror into the courtroom and asked her: “[d]id you deliberate or participate in [the jury] deliberations up to this point”; “[h]ad you said anything in there”; “[h]ad you expressed an opinion to the other jurors about how you felt about this matter”; “[h]ave they asked your opinion”; “[h]ave you said anything at all in there”; “[h]ave you talked to any of them in there?” To each of these questions, the alternate gave a negative answer. Pursuant to a suggestion from defendant's lawyer, the judge asked the alternate if the jury had “taken a vote on these matters in there,” to which the alternate replied that no vote had been taken. The judge then heard from the State and

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

from defendant, who again said he did not want a mistrial and that he did not want his lawyer to speak for him on that subject.

After putting findings of fact into the record, the judge returned the jury to the courtroom and instructed them not to consider anything resulting from the alternate's presence in the jury room. The jury retired to deliberate at 2:36 P.M. and returned its verdict seven minutes later.

Following the verdict, the judge sent the jury back to the jury room. He told them, "I will be back to talk with you in just a moment." The judge then ordered a short recess and went into the jury room for approximately ten minutes. When court reconvened, the judge returned the jury to the courtroom for the purpose of making additional findings of fact. In response to a question by the judge, the foreperson said that, at the time the alternate's presence was discovered, the jury had not begun its deliberations. The judge told the other jury members that if "deliberations had begun during the time [the alternate was in the jury room] to the extent that you feel that she influenced you in any way, please raise your hand . . ." None of the members responded. The judge then dismissed the jury and held the sentencing hearing.

B

[1] Defendant alleges that prejudicial error occurred when the alternate juror retired to the jury room with the other twelve members and when, following the return of the verdict, the judge met privately with the jury members in the jury room. Although defendant has made these allegations the basis of two assignments of error, we shall discuss these issues together.

An alternate juror's presence in the jury room after a criminal case has been submitted to the regular panel of twelve "is always error." *State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531 (1975). The error is prejudicial when the alternate's presence occurs during the actual *deliberations* of the jury. *Id.* at 627, 220 S.E.2d at 533; N.C. Const. art. I, Sec. 24; N.C. Gen. Stat. Sec. 9-18 (1986). The rule in this State is that "at anytime an alternate is in the jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial." *Bindyke*, 288 N.C. at 627-28, 220 S.E.2d at 533 (emphasis in original).

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

Although it is error for 13 people to retire to the jury room, our courts endeavor to draw "common sense" distinctions as to the degree of error that may result from the alternate's presence. In *Bindyke*, our Supreme Court noted an Illinois case in which the alternate went into the jury room to retrieve her coat at a point before any deliberations had occurred. Our Court agreed with the Supreme Court of Illinois that such occurrences do not warrant reversal of a defendant's conviction. *See id.* at 628, 288 S.E.2d at 533-34. The *Bindyke* Court thus formulated the following rule to be applied in cases involving an alternate's presence:

The presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial. The alternate has participated by his presence; and the court will conduct no inquiry into the nature or extent of his participation. However, if through inadvertence, the alternate retires with the jury at the time the case is submitted to it, and his presence in the jury room is discovered so promptly that the trial judge believes it probable no deliberations have begun, he may recall the jury and the alternate and make the limited inquiry whether there has been any discussion of the case or comment with reference to what the verdict should be. If the answer is YES, the judge must declare a mistrial; if the answer is NO, the jury will retire to begin its deliberations.

Id. at 629-30, 220 S.E.2d at 534-35.

Defendant contends that the judge erred by making an inquiry of the alternate when it was apparent that jury deliberations had begun, by making the inquiry of the alternate outside the presence of the jury panel, by making an incorrect inquiry of the alternate, and by meeting alone with the jury. The State argues that the judge correctly determined that no deliberations had occurred by the point of the discovery of the presence of the alternate, and that no prejudicial error occurred as a result. We find defendant's argument the more convincing.

In *Bindyke*, our Supreme Court said that when a jury has been in the jury room for a substantial length of time, the assumption must be made that deliberations are taking place. *Id.* at 628, 220 S.E.2d at 534. When the jury's retirement has been for a shorter period, however, determining whether it is engaged in deliberations is more problematic. In such circumstances, the judge, relying on his or her trial experience and knowledge of the par-

STATE v. GODWIN

[95 N.C. App. 565 (1989)]

ticular case, must conclude whether it is probable that deliberations have begun. *Id.* at 628-29, 220 S.E.2d at 534. If the judge believes it likely that no deliberation has taken place, "he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been *any* discussion of the case." *Id.* at 629, 220 S.E.2d at 534 (emphasis in original).

We would overrule defendant's assignment of error were the only issue before us whether the judge properly concluded that no deliberations had occurred during the nine-minute interval between the jury's retirement to the jury room and their return to the courtroom following the discovery of the alternate's presence. In our view, however, too many deviations from the procedure established in *Bindyke* took place for us to hold the cumulative error harmless. As defendant correctly points out, the judge's initial inquiry was addressed only to the alternate, and at no point did he ask her *whether any discussion of the case* had occurred.

Most critically, when the judge did inquire of the jury whether such discussion had begun during the alternate's presence, he did so after meeting with them in the jury room. *Bindyke* requires that the judge inquire of the jury in open court; here, it is likely that the first inquiry took place in private. We in no way imply that the judge said anything improper during this meeting. We cannot know, however, what the jury members inferred from this discussion and how this discussion influenced the responses they gave in open court. In open court, for example, the jury foreperson said that no discussions had occurred with the alternate present and that the members had been using the restroom when they realized the alternate had come into the jury room with them. When the judge initially returned the members to the courtroom, however, they had, by that point, elected one of their number as foreperson.

The State, in our view, asks for too elastic an application of the *Bindyke* requirements to the procedure the judge used in this case. We do not lightly impose the rigors of a second trial upon this prosecutrix; at the same time, defendant has been sentenced to two consecutive terms of life imprisonment. As a result of the aberrations that occurred during the deliberation stage of this trial, the law requires that this case be remanded.

STATE v. AVERY

[95 N.C. App. 572 (1989)]

C

[2] Intertwined with the errors that resulted from the alternate's presence in the jury room, we agree with defendant that the judge erred by permitting defendant to represent himself at a time when defendant's lawyer might have petitioned the court for a mistrial. On this ground as well, therefore, we award defendant a new trial.

A defendant may elect "to proceed in a trial of his case without the assistance of counsel *only after* the trial judge makes a thorough inquiry" that satisfies the judge that the defendant has been clearly advised of his right to the assistance of counsel, understands and appreciates the consequences of his decisions to represent himself, and comprehends the nature of the charges and proceedings and the range of permissible punishments. N.C. Gen. Stat. Sec. 15A-1242 (1988) (emphasis added). The inquiry is a mandatory one, and failure to conduct it is prejudicial error. *State v. Bullock*, 316 N.C. 180, 185-86, 340 S.E.2d 106, 108-09 (1986). In this case, the judge, without making the mandated inquiry, allowed defendant to speak for himself at a point where his lawyer most probably would have sought a mistrial. We hold that this was prejudicial error.

II

For the foregoing reasons, we are compelled to vacate the judgment of the trial court, and the case is remanded for a new trial.

New trial.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. LEONARD D. AVERY

No. 8814SC1283

(Filed 19 September 1989)

1. Criminal Law § 91.9— Speedy Trial Act—resentencing—not applicable

The Speedy Trial Act, N.C.G.S. § 15A-701 *et seq.*, did not apply where defendant was sentenced for multiple offenses, the Supreme Court vacated convictions on two of the offenses

STATE v. AVERY

[95 N.C. App. 572 (1989)]

and remanded for resentencing, the judgment of the Supreme Court was certified to the Durham County Superior Court on 30 December 1985, and the resentencing hearing was held on 13 June 1988. The language of the statute clearly applies to a new trial and does not address resentencing.

2. Constitutional Law § 50— speedy trial—resentencing—no violation

Although the Sixth Amendment guarantee of a speedy trial extends to the sentencing phase of a criminal prosecution and the factors in *Barker v. Wingo*, 407 U.S. 514, apply for determining unreasonable delay, this defendant's constitutional rights were not violated where two of his convictions were remanded for resentencing on 30 December 1985 and the resentencing hearing was held on 13 June 1988. Length of delay is merely viewed as the triggering mechanism that precipitates the speedy trial issue and its significance in the balance is not great; the State attributed the delay to its efforts to schedule the action at a time when it was convenient for all parties, including the judge who originally sentenced defendant; there was no evidence of neglect or willfulness on the part of the prosecution; defendant conceded his failure to assert his right to a speedy trial; and defendant was already incarcerated pursuant to a sentence of life imprisonment and other consecutive sentences totalling sixty-nine years and showed no prejudice resulting from the delay.

APPEAL by defendant from *Lee, Judge*. Order entered 14 June 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 August 1989.

In an opinion filed on 10 December 1985 the Supreme Court affirmed the conviction of the defendant on several offenses whose punishment included a sentence of life imprisonment and other consecutive sentences totalling sixty-nine (69) years. In the same opinion the Supreme Court vacated the defendant's conviction of two counts of assault with a firearm upon a law enforcement officer. After determining that the jury had found facts which would support the defendant's conviction of the lesser included offense of assault with a deadly weapon, the Supreme Court remanded the two cases for resentencing only on the two charges. The judgment of the Supreme Court was certified to the Durham County Superior Court on 30 December 1985. At the resentencing hearing on 13

STATE v. AVERY

[95 N.C. App. 572 (1989)]

June 1988, the defendant moved to dismiss the charges on the ground that the two and one-half year delay awaiting resentencing violated his statutory and constitutional rights to a speedy trial. The trial judge found that the North Carolina Speedy Trial Act, G.S. 15A-701 *et seq.*, did not apply to resentencing and that the defendant's constitutional rights to a speedy trial were not violated by the delay in resentencing defendant. The trial court sentenced defendant to two consecutive two year sentences. Defendant appeals.

Attorney General Thornburg, by Associate Attorney General Debra C. Graves, for the State.

Thomas F. Loflin, III, for defendant-appellant.

EAGLES, Judge.

[1] Defendant assigns as error the trial court's conclusion that as a matter of law the North Carolina Speedy Trial Act, G.S. 15A-701 *et seq.*, did not apply to resentencing delays and that the defendant's constitutional rights were not violated by the delay. We find no prejudicial error.

We note that the Speedy Trial Act, G.S. 15A-701 *et seq.*, created "new rights, supplemental to the speedy trial rights existing under the Sixth Amendment to the United States Constitution." *State v. Reekes*, 59 N.C. App. 672, 677, 297 S.E.2d 763, 766, *cert. denied*, 307 N.C. 472, 298 S.E.2d 693 (1982). The defendant argues that G.S. 15A-701(a1)(5) which would entitle him to a new trial "within 120 days from the date the action occasioning the new trial becomes final following an appeal or collateral attack," should also apply to resentencing.

The language of the statute clearly applies to a new *trial* after either remand from a higher court or collateral attack. The statute does not address resentencing. Since the statute is merely supplemental to a person's constitutional right to a speedy trial and there is no indication that the language of the statute was intended to be construed to encompass a resentencing hearing, we hold that the trial court was correct in concluding that as a matter of law G.S. 15A-701(a1)(5) does not apply here. Parenthetically, we note that effective 1 October 1989 the 1989 General Assembly repealed Article 35 of Chapter 15A (G.S. 15A-701 through 15A-704). 1989 S.L. Ch. 688, s. 1.

STATE v. AVERY

[95 N.C. App. 572 (1989)]

[2] The defendant next assigns as error the trial judge's determination that he was not deprived of his constitutional right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. Amend. VI. "The Speedy Trial clause is applicable to state trials as a part of the due process required by the Fourteenth Amendment." *Burkett v. Cunningham*, 826 F.2d 1208, 1219 (3d Cir. 1987), quoting *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 995, 18 L.Ed.2d 1, 8 (1967).

Similarly, Article I, Section 18 of the North Carolina Constitution provides that "all courts shall be open to every person . . . without favor, denial or delay." N.C. Const., Art. I, Section 18. There is no definitive holding in this state which provides that the constitutional right to a speedy trial also encompasses a resentencing hearing. The United States Supreme Court in *Pollard v. United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957), did not decide the issue but merely assumed "arguendo that sentence is a part of the trial for purposes of the Sixth Amendment." *Id.* at 361, 77 S.Ct. at 486, 1 L.Ed.2d at 399. In *Pollard*, the court further noted that "[t]he time for sentence is of course not at the will of the judge and that Rule 32(a) of the Federal Rules of Criminal Procedure required the imposition of sentence 'without unreasonable delay.'" *Id.*, quoting Fed. R. Crim. P. 32(a).

In *Pollard*, the defendant was given probation after he embezzled a United States Treasury check while eligible for parole on a prior conviction. The trial judge imposed the probation after the defendant had left the courtroom, and the defendant learned about the probationary period after his release from state prison for the prior conviction. After violating the terms of his probation, the trial judge set aside the judgment and order of probation and sentenced the defendant to two years imprisonment. The defendant appealed the conviction on the grounds that the sentence was imposed for violating an invalid probation order. After an unsuccessful appeal, the defendant appealed to the United States Supreme Court. The Court affirmed the defendant's conviction noting that the deprivation of rights depends upon the circumstances and that the delay must not be purposeful. *Id.* at 361, 77 S.Ct. at 486, 1 L.Ed.2d at 399. The Court stated that the prosecution's omission

STATE v. AVERY

[95 N.C. App. 572 (1989)]

was "accidental and promptly remedied when discovered." *Id.* There was no violation of the Sixth Amendment or of Rule 32(a). *Id.* at 362, 77 S.Ct. at 486, 1 L.Ed.2d at 400.

Though not required by *Pollard*, we believe that the Sixth Amendment guarantees of a speedy trial extend to the sentencing phase of a criminal prosecution. Further, we believe that for North Carolina sentencing proceedings, the factors to be utilized in determining unreasonable delay in sentencing or resentencing are those articulated in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In *Barker*, the defendant, Barker, and Silas Manning were arrested for the murder of two elderly people. Since the state felt that its case against Barker would be strengthened by first convicting Manning, who could then testify against Barker, the state sought and obtained sixteen continuances of Barker's trial. After the state moved for its twelfth continuance, Barker moved to dismiss the indictment. Nevertheless, the court allowed the twelfth and subsequent continuances. At trial, Barker unsuccessfully moved to dismiss the indictment on the grounds that his right to a speedy trial had been denied. Barker was convicted and later appealed. *Id.* at 519, 92 S.Ct. at 2186, 33 L.Ed.2d at 110.

When determining whether the delay in bringing Barker to trial had been unreasonable, the U.S. Supreme Court listed the following factors to be weighed: 1. the length of delay; 2. the reason for the delay; 3. the defendant's assertion of his right; and 4. prejudice to the defendant. *Id.* at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. "These factors were adopted as the standard under North Carolina constitutional law." *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), *cert. denied*, 315 N.C. 392, 338 S.E.2d 881 (1986). *See id.*, *State v. Smith*, 289 N.C. 143, 221 S.E.2d 247 (1976), and cases cited therein. We believe they apply with equal vigor to sentencing and resentencing proceedings.

In *Smith*, the defendant moved to dismiss murder charges against him on the grounds that his constitutional right to a speedy trial had been denied. The court determined that the *Barker* balancing test presented interrelated factors for determining if the defendant's constitutional rights had been violated. The court also stated that "the question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case and that the burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay

STATE v. AVERY

[95 N.C. App. 572 (1989)]

was due to neglect or willfulness of the prosecution." *Id.* at 148, 221 S.E.2d at 250.

While we agree with defendant that the *Barker* factors as discussed in *Smith, supra*, apply equally to delay in resentencing cases, we disagree with defendant's contention that he should prevail here. Applying the *Barker* four prong speedy trial test, the defendant argues that he is entitled to receive no sentence at all. We disagree. First, as to the length of delay, the defendant argues that two and one-half years is clearly inordinate especially in the context of the case. "The length of delay is not determinative of whether a violation has occurred." *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984). The length of delay is merely viewed as the "triggering mechanism" that precipitates the speedy trial issue. Viewed as such, its significance in the balance is not great." *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975).

Second, the defendant contends that the State had no legitimate reason for its delay. On the contrary, the record indicates that the State attributed the delay to its efforts to schedule the action at a time where it was convenient for all parties including the judge who originally sentenced the defendant. The State argues that any delay would not prejudice the defendant so long as the resentencing was done in front of the same judge who heard the evidence at trial and who did the sentencing originally. The State having offered reasons for the delay, the burden is then on the defendant to show that the delay was due to neglect or willfulness of the prosecution. There is no evidence of neglect or willfulness on the part of the prosecution.

Third, the defendant has conceded his failure to assert his right to a speedy trial under the third prong of the *Barker* test.

Finally, the defendant contends that he was prejudiced in several ways. First, the defendant states that he suffered personal prejudice because of the stress and anxiety inherent in the uncertainty which arises when an individual is awaiting sentencing. Secondly, the defendant argues that he was prejudiced because of the possibility of losing potential benefits including concurrent sentences and favorable classification and treatment within the correctional system. Thirdly, the defendant argues that even though emotional distress standing alone is not enough to meet the four part test, when weighed and scrutinized in light of the length of the delay and the reasons for the delay, it may be sufficient to tip the balance

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

in his favor under the Sixth Amendment. *Citing United States v. Macino*, 486 F.2d 750 (7th Cir. 1973). The defendant here showed no prejudice resulting from the delay. We note that he was already incarcerated pursuant to sentences of life imprisonment and other consecutive sentences totaling sixty-nine (69) additional years. On this record defendant has failed the *Barker* test as discussed in *Smith, supra*. Accordingly, his assignment of error must fail.

The defendant finally assigns as error the trial court's determination that his new sentence should run consecutively to his other sentences and not concurrently. Defendant's argument is based upon his contention that his statutory rights and his federal and state constitutional rights were violated. Since the defendant's speedy trial rights were not violated, this assignment of error must fail.

In summary, we find no prejudicial error in the trial court's decision to deny defendant's motion to dismiss. Accordingly, we affirm.

Affirmed.

Judges JOHNSON and GREENE concur.

ROBIN LAXTON SHOOK v. TONY RALPH SHOOK

No. 8825DC895

(Filed 19 September 1989)

1. Divorce and Alimony § 18.9— alimony—dependent spouse—no showing by plaintiff

The trial court properly dismissed plaintiff's claim for alimony and alimony pendente lite where plaintiff asserted in her complaint that she was a dependent spouse, but the only support she offered for this conclusion was factually incorrect evidence of her husband's salary, and she presented no evidence that she needed assistance to subsist during prosecution of the suit.

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

2. Attorneys at Law § 7.7; Rules of Civil Procedure § 11 – insufficient basis for alimony claim – inflated figures knowingly used by attorney – sanctions

The trial court did not abuse its discretion in imposing sanctions against plaintiff's attorney pursuant to N.C.G.S. § 1A-1, Rule 11(a) where he filed a complaint on her behalf for alimony and alimony pendente lite which was not well grounded on fact or law and not based on any reasonable factual inquiry, and the attorney consistently used inflated figures even after the opportunity to amend.

APPEAL by plaintiff from *Bogle (Ronald E.)*, Judge. Order entered 18 May 1988 in District Court, CALDWELL County, dismissing plaintiff's request for alimony and for Rule 11 sanctions against her attorney. Heard in the Court of Appeals 16 March 1989.

W. P. Burkheimer for plaintiff-appellant.

Wilson and Palmer, P.A., by Hugh M. Wilson, for defendant-appellee.

ORR, Judge.

Plaintiff and defendant were married on 17 January 1987. On 14 March 1988, plaintiff filed a complaint requesting a divorce from bed and board, alimony and alimony *pendente lite*, attorney fees, court costs and equitable distribution. See G.S. 50-7, 50-16.2, 50-16.3, 50-16.5, and 50-20. Plaintiff's complaint included the following requests: \$3,000.00 per week for support, \$10,000.00 for costs and expenses for maintaining the action, \$20,000.00 for "expenses incurred in presenting plaintiff's claim for relief . . ." and \$30,000.00 for "expenses of the appeal"

On 24 March 1988, defendant filed a motion to dismiss plaintiff's claim pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. In addition, on 24 March 1988, defendant filed a motion to strike plaintiff's complaint and to impose G.S. 1A-1, Rule 11(a) sanctions against plaintiff's attorney because many of the allegations in the complaint were "untrue and ridiculous" and were made with plaintiff's attorney's knowledge.

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

I.

[1] Plaintiff's first contention is that the trial court erred by finding her pleadings were insufficient on their face and dismissing her action for alimony and alimony *pendente lite*. We disagree.

Plaintiff requested alimony *pendente lite* under G.S. 50-16.3 and permanent alimony under G.S. 50-16.5. These statutes require there be a "dependent spouse." A "dependent spouse" is defined in G.S. 50-16.1(3) as a spouse "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

Plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence (which was factually incorrect) of her husband's salary. She did not present any evidence that she needed assistance to "subsist during the prosecution or defense of the suit . . ." G.S. 50-16.3. Such evidence is critical to plaintiff's claim because in order to be awarded the relief she requested the court must make a finding that she is a dependent spouse.

This Court has overturned alimony *pendente lite* awards when "the trial court made factual findings as to the earnings of the parties, but made no finding of fact that the wife in this case is either 'substantially dependent' upon her husband for her maintenance and support or that she is 'substantially in need of maintenance and support' from her husband." *Manning v. Manning*, 20 N.C. App. 149, 152, 201 S.E.2d 46, 49 (1973).

The trial court in the case at bar properly dismissed plaintiff's claim for alimony and alimony *pendente lite* in accordance with defendant's G.S. 1A-1, Rule 12(b)(6) motion. Plaintiff failed to state a claim upon which relief could be granted and we affirm the trial court's ruling.

II.

[2] Plaintiff's next contention is that the trial court abused its discretion by imposing sanctions against her attorney pursuant to G.S. 1A-1, Rule 11. Plaintiff claims there was no legal basis for the imposition of sanctions. We disagree.

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

G.S. 1A-1, Rule 11(a) states:

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 existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay 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 because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

G.S. 1A-1, Rule 11(a). (Emphasis added.)

The North Carolina Supreme Court has recently set the standard for appellate review of trial court decisions imposing Rule 11(a) sanctions. See *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). In reversing the Court of Appeals' use of the "clearly erroneous" standard, the Supreme Court set out the following three-part test for *de novo* review:

In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. [sec.] 1A-1, Rule 11(a).

Id. at 165.

In the case *sub judice*, the complaint stated that defendant, a postal service employee, earned "income of about \$5,000.00 or more per week . . ." Plaintiff alleged that \$3,000.00 per week was from defendant's job with the U.S. Postal Service. If this allegation was true, defendant's income from the postal service would be \$156,000.00 per year. Further, plaintiff's own affidavit

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

states defendant made \$3,000.00 per *month*, not per week. After defendant's initial motion to strike and for appropriate sanctions, plaintiff's counsel filed income tax returns of plaintiff but took no action to amend the original pleadings. Plaintiff's counsel had a second opportunity to amend the pleadings when defendant filed a second motion for sanctions on 6 April 1988. However, plaintiff again failed to do so despite having an additional 40 days before the order was entered 18 May 1988.

Judge Bogle's findings of fact in his order of 18 May 1988 include the following:

1. The Plaintiff has initiated this action seeking from the Defendant, *inter alia*, first, a divorce from bed and board to include the following:

(a) \$3,000.00 per week in temporary and permanent support payments to Plaintiff.

(b) Attorney fees equal to 15% of the gross assets of Defendant alleged to be \$500,000.00; an additional sum of 20% of the gross value of Defendant's assets upon the entry of a permanent order; or an additional 25% of the gross value of Defendant's assets if the Defendant should appeal from the judgment to this Court. Under the circumstances most favorable to Plaintiff, she seeks attorney fees equal to 40% of the alleged value of Defendant's estate (or \$200,000.00).

(c) Additionally, Plaintiff seeks "\$10,000.00 estimated costs and expenses of bringing and maintaining this action," plus an additional "\$20,000.00 for presenting Plaintiff's claims for relief to be paid at the entry of final judgment, or \$30,000.00 additional expense assessment if Defendant should appeal." But in no case less than \$30,000.00, nor more than \$40,000.00 for estimated costs in this non-complex matter.

7. This Court is of the opinion that it is unrealistic to believe that a postal employee earns \$156,000.00 per year, and *any* effort by counsel for Plaintiff would have revealed the unreasonableness of his contentions. Counsel for Plaintiff knew or should have known that they were false or inaccurate.

8. The complaint contends that the Plaintiff needs \$3,000.00 per week for temporary and permanent alimony. The court has carefully reviewed her financial affidavit in support of

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

her claim and, even in the light most favorable to her, the affidavit alleges expenses of only \$779.00 per month, along with a bi-weekly gross income of \$1,615.00 and bi-weekly net income of \$1,175.00. The documents of Plaintiff on their face tend to negate the need of any temporary alimony. On the issue of permanent alimony, there is no allegation in the pleadings that Defendant is the "supporting spouse"; and without such claim, she would not otherwise be entitled to that relief.

9. Most shocking to the Court is the claim of Plaintiff for \$30,000.00 to \$40,000.00 in alleged, "costs and expenses of bringing and maintaining this action," which does not appear to be of a complex nature; along with the claim of Plaintiff's counsel that he receive 35% to 40% of the gross assets of the parties which he alleges to be worth \$500,000.00 based upon his alleged reasonable factual inquire for "attorney fees." These claims for costs and attorney fees are unconscionable.

Judge Bogle also made the following conclusions of law and judgment:

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court concludes as a matter of law, as follows:

1. That the complaint of Plaintiff is not well grounded in fact or law, and is not based upon any reasonable factual inquiry.

. . .

ORDER

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the Court does impose sanctions upon counsel for Plaintiff, and orders that he shall reimburse Defendant for reasonable attorney fees in the amount of \$725.00.

. . .

Applying the three-prong test which the Supreme Court mandates in *Turner*, we find the trial court clearly met each requirement. The findings of fact set out in Judge Bogle's order were supported on the face of the complaint plaintiff's attorney filed

SHOOK v. SHOOK

[95 N.C. App. 578 (1989)]

in this action. The trial court's conclusions of law reflect the fact that sanctions were filed against plaintiff's attorney after he filed the complaint and he still failed to inquire and amend the pleadings even with ample opportunity to do so. The trial court's conclusions of law required sanctions be imposed under G.S. 1A-1, Rule 11(a).

The North Carolina rule governing sanctions was amended (effective 1 January 1987) to include the stricter language of the parallel Federal rule. The advisory committee's notes to Federal Rule 11 state:

the words 'shall impose' in the last sentence [of Rule 11] focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the Rule. It has discretion to tailor sanctions to particular facts of the case with which it should be well acquainted.

Fed. R. Civ. P. 11. Advisory committee notes (citation omitted).

The Supreme Court states in *Turner* that Federal Rule 11(a) was amended in 1983 "to reduce the reluctance of the federal courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations by the imposition of sanctions." *Turner*, 325 N.C. at 163, 381 S.E.2d at 713. *Accord, Harris v. March*, 679 F.Supp. 1204 (E.D.N.C. 1987).

In a recent federal court case, sanctions were imposed against an attorney for signing and filing a complaint without a reasonable inquiry into its factual and legal basis. *Lyles v. K-Mart Corp.*, 703 F.Supp. 435 (W.D.N.C. 1989). The Court held:

[i]f an attorney's conduct appears to fall within the scope of Rule 11, the court must first examine the action at issue according to a standard of objective reasonableness . . . [T]he inquiry focuses only on whether a reasonable attorney in like circumstances would believe his actions to be factually and legally justified. If the standard of objective reasonableness is not met, sanctions are mandatory.

Id. at 440.

Under this new objective standard, we believe the consistent use of inflated figures in plaintiff's complaint, after the opportunity to amend, was sufficient evidence for the trial court to support

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

its findings of fact, make its conclusions of law and impose Rule 11 sanctions. Therefore, this assignment of error is overruled.

The trial court's ruling is affirmed.

Affirmed.

Judges BECTON and PARKER concur.

LEWIS RANKIN YOUNG, JR., ADMINISTRATOR OF THE ESTATE OF LEWIS REID
YOUNG, DECEASED v. WILLIAM S. WARREN

No. 8828SC1120

(Filed 19 September 1989)

**1. Assault and Battery § 2— civil assault—defense of family—
affirmative defense—failure to plead—submission to jury im-
proper**

A defendant in a civil action may assert defense of family to justify assault on a third party, but it is an affirmative defense which must be affirmatively pled. Defendant in this action did not properly plead defense of family in his answer; the parties neither expressly nor impliedly consented to trying the issue; plaintiff objected to submission of the issue to the jury; and even if the defense had been properly raised, evidence did not support its submission to the jury where there was no evidence that defendant reasonably believed his daughter was at the time of the shooting in peril of death or serious bodily harm.

**2. Evidence § 15— wrongful death action—victim's possession
of firearm and blood alcohol level—no knowledge by defend-
ant—evidence improperly admitted**

The trial court in a wrongful death action should have granted plaintiff's motion to prevent admission of testimony concerning the victim's possession of a firearm and his blood alcohol level, since there was no evidence that defendant knew that deceased had a handgun in his possession or had consumed alcohol, and this evidence therefore was not relevant.

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

3. Death § 6— wrongful death action—evidence of criminal prosecution arising out of death—instructions proper

The trial court in a wrongful death action properly instructed that the jury could consider defendant's plea of guilty in a criminal case arising from the same facts as this civil action but that the conviction was not conclusive evidence of defendant's culpable negligence.

APPEAL by plaintiff from *Hyatt (J. Marlene)*, Judge. Order entered 15 June 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 April 1989.

Westall, Gray, Kimel & Connolly, P.A., by Ronald L. Moore, and John O. Shuford, III, for plaintiff-appellant.

Frank J. Contrivo and Robert G. McClure, Jr. for defendant-appellee.

GREENE, Judge.

In this civil action the plaintiff appeals from a final judgment entered by the trial court, pursuant to a jury verdict, denying any recovery on a wrongful death action.

The evidence introduced at trial showed that defendant shot and killed Lewis Reid Young ("Young") on 12 May 1986. The death occurred as a result of a 20-gauge shotgun blast fired at close range into the deceased's back. On 14 October 1986, the defendant pled guilty to involuntary manslaughter.

Prior to the shooting, in the early morning hours of 12 May 1986, Young, who had been dating defendant's daughter for several months, went to the home of defendant's daughter who lived with her two children within sight of the defendant's residence. Upon arriving at the defendant's daughter's home, Young threw a large piece of wood through the glass in the front door. He then entered the home by reaching through the broken window and unlocking the door. Once inside the house Young argued with the defendant's daughter and "jerked" her arm. At that point, the defendant arrived with his loaded shotgun, having been awakened by a telephone call from a neighbor, his ex-wife, who had told him "something bad is going on" at his daughter's house. When the defendant arrived at his daughter's house, he heard screaming and saw Young standing inside the door. The defendant then testified:

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

A. I told him like, 'Come on out. This doesn't make any sense,' and he kind of came forward, you know, kind of had his hands up like that. (Indicating) I backed away from the door and I told him to get on out. 'This can be taken care of tomorrow,' or something to that effect.

Q. You told him to get the hell out, didn't you?

A. Well, okay; something like that.

Q. Okay. And then what happened?

A. Then he walked out the door and I just backed up like he came out the door and he walked over about six feet. There is a cement porch there, and he stepped right there, and I was behind him anywhere from a foot to eighteen inches, maybe even two foot, and he stopped. And in my opinion, he started to turn around. . . .

Q. What did he do?

A. He stopped and started to lower his hands and started to turn around.

Q. What did you do?

A. I prodded him with the gun and told him to get on out, and that's when it went off.

The trial judge submitted two issues to the jury, the second issue being submitted over the objection of the plaintiff:

1. Did Lewis Reid Young, deceased, die as a result of the negligent acts of the defendant, William S. Warren?

Answer: Yes.

2. Did the defendant, William S. Warren, act in the lawful defense of his daughter, Autumn Stanley, and her children, his grandchildren?

Answer: Yes.

Pursuant to the jury's answers to the issues submitted by the judge, the trial court ordered "that the plaintiff, Lewis Rankin Young, Jr., have and recover nothing of the defendant, William S. Warren, and that the costs be taxed against the plaintiff."

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

The determinative issue is whether the trial court erred in submitting the defense of family issue to the jury.

I

[1] We first determine whether a defendant in a civil action may assert defense of family to justify assault on a third party. While self-defense and defense of family are seen more often in the context of criminal law, these defenses are nonetheless appropriate in civil actions. See *Harris v. Hodges*, 57 N.C. App. 360, 291 S.E.2d 346, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982); S. Spieser, C. Krause & A. Gans, *The American Law of Torts* Sec. 5:8 at 802 (1983) (self-defense and defense of others recognized in both criminal and civil law); 22A Am. Jur. 2d *Death* Sec. 163 at 237 (1988) (the "defense of self-defense is available in a wrongful death action").

If the defenses apply, the defendant's conduct is considered "privileged" and the defendant is not subject to tort liability for actions taken within the privilege. Spieser, *The American Law of Torts* Sec. 5:6 at 794. The defenses, as they result in avoidance of liability, are considered affirmative defenses and must be affirmatively pled. N.C.G.S. Sec. 1A-1, Rule 8(c) (1983); see also Spieser, *The American Law of Torts* Sec. 5:8 at 802. The burden of proof is on the defendant to prove the defenses by a preponderance of the evidence. Annot. "Death Action—Self-Defense—Proof," 17 A.L.R.2d 597, 601 (1951).

An assault on a third party in defense of a family member is privileged only if the "defendant had a well-grounded belief that an assault was about to be committed by another on the family member" *State v. Hall*, 89 N.C. App. 491, 494, 366 S.E.2d 527, 529 (1988). However, in no event may defendant's action be in excess of the privilege of self-defense granted by law to the family member. *Id.*; Spieser, *The American Law of Torts* Sec. 5:10 at 810. The privilege protects the defendant from liability only to the extent that the defendant did not use more force than was necessary or reasonable. Prosser & Keeton, *The Law of Torts* Sec. 20 at 130 (5th ed. 1984); *Hall*, 89 N.C. App. at 493, 366 S.E.2d at 528. Finally, the necessity for the defense must "be immediate, and attacks made in the past, or threats for the future, will not justify" the privilege. Prosser & Keeton, *The Law of Torts* at 130.

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

The defendant did not properly plead in his answer the "defense of family." N.C.G.S. Sec. 1A-1, Rule 8(c) (matter constituting affirmative defense must be pled). The parties neither expressly nor impliedly consented to trying the issue of "defense of family." In fact, the plaintiff objected to the submission of this issue to the jury. Procedurally, no grounds existed for placing the issue before the jury. See *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984) (when affirmative defense is not pled, parties may by "express or implied consent" waive pleading of the affirmative defense).

Additionally, the record contains no evidence that the defendant reasonably believed his daughter was, at the time of the shooting of the plaintiff, in peril of death or serious bodily harm. At that time, the plaintiff stood outside the house with his back to the defendant. Defendant's daughter and children were inside the house, removed from any likely harm from plaintiff. Accordingly, assuming *arguendo* the "defense of family" had been adequately pled or tried by consent, the evidence in this trial did not support the submission of the issue to the jury, and the plaintiff is entitled to a new trial. See *Hall*, 89 N.C. App. at 494; *Cf. Harris*, 57 N.C. App. at 361, 291 S.E.2d at 347 (self-defense issue for jury only after evidence was presented from which jury may infer defendant acted in self-defense).

II

On remand, as several of the additional issues raised by plaintiff's assignments of error may arise at retrial, we briefly address them.

A

[2] Plaintiff first contends the trial court erred in denying his *in limine* motion seeking to prevent the admission of testimony concerning Young's possession of a firearm and his blood/alcohol level. We agree. An autopsy report indicated Young's blood/alcohol level at the time of his death was .23 and that a detective removed a .22 caliber pistol from plaintiff's pocket after his death. However, no testimony exists on record that the defendant knew Young had a handgun in his possession or that he was aware that Young had consumed any alcohol. Accordingly, we determine this evidence was not relevant as it had no tendency to "make the existence of any fact that is of consequence to the determination of the

YOUNG v. WARREN

[95 N.C. App. 585 (1989)]

action more probable or less probable than it would be without the evidence." N.C.G.S. Sec. 8C-1, Rule 401 (1988). Therefore, the evidence was not admissible, and the motion *in limine* should have been allowed. N.C.G.S. Sec. 8C-1, Rule 402 (1988).

B

[3] The plaintiff next argues the trial court incorrectly instructed the jury as follows:

The defendant's plea of "guilty" in the criminal case may be considered by you on the issue of the defendant's potential liability in this civil case. However, I instruct you that this conviction is not conclusive of the defendant's civil liability because this case involves different parties

We find no error in this part of the trial court's instructions. Evidence of a plea of guilty to a criminal charge is generally admissible in a civil case, but it is not conclusive evidence of defendant's culpable negligence. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963).

C

Plaintiff next argues that his motion for directed verdict on the issue of the defendant's negligence should have been allowed since defendant had pled guilty to manslaughter. Again, the evidence of the plea of guilty to manslaughter is only some evidence in the civil proceeding and does not justify a directed verdict for the plaintiff on the issue.

D

Plaintiff finally argued in his motion for directed verdict that, as a matter of law, Young was not contributorily negligent. Again we disagree. Whether Young's actions amounted to contributory negligence in this case is a question for the jury. *See Taylor v. Walker*, 320 N.C. 729, 734-35, 360 S.E.2d 796, 800 (1987). We do note, if on retrial the jury determines the defendant's negligence amounted to a willful or wanton injury, the defense of contributory negligence would not be available. *Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967).

As the other assignments of error raised by the plaintiff are not likely to recur at trial, we do not address them.

CITY OF KANNAPOLIS v. CITY OF CONCORD

[95 N.C. App. 591 (1989)]

New trial.

Judges ARNOLD and LEWIS concur.

CITY OF KANNAPOLIS, APPELLANT v. CITY OF CONCORD, APPELLEE

No. 8819SC1342

(Filed 19 September 1989)

1. Municipal Corporations § 2.3— annexation—contiguous property—resolution to annex invalid

A resolution of intent to annex Lake Concord property by the City of Concord on 14 October 1987 was not valid because the Lake Concord property was not contiguous to the municipal boundaries at the time even though Concord on the same date passed a resolution fixing the date for a public hearing to accept petitions for voluntary annexation of a privately owned strip of land (the Copperfield property) between Lake Concord and the municipal boundaries. The Lake Concord property was clearly annexed under N.C.G.S. § 160A-31(g), which requires that the resolution of intent to annex municipally owned property state that the property to be annexed is contiguous. The Copperfield property did not become legally annexed until 31 October 1987; the two properties were annexed by different procedures with independent requirements and cannot be considered one area for the purpose of satisfying the contiguity requirement.

2. Municipal Corporations § 2.1— annexation—statement that involuntary annexation effective in one year omitted—resolution invalid

A resolution of annexation by the City of Kannapolis was invalid where Kannapolis sought to annex property pursuant to the statute for involuntary annexation, N.C.G.S. § 160A-49, but its resolution of intent did not provide that the annexation would take effect one year after passage of the resolution. The statute does not require merely that the annexation not take effect for one year, but explicitly requires that the resolution state that the annexation will not take effect for one year; where Kannapolis's resolution of intent omits an essential

CITY OF KANNAPOLIS v. CITY OF CONCORD

[95 N.C. App. 591 (1989)]

condition of compliance with N.C.G.S. § 160A-49(j), the error is fatal.

3. Municipal Corporations § 2—annexation by two municipalities—invalid resolutions—first mandatory procedural step

Summary judgment for the City of Concord was appropriate in an action arising from attempts by Kannapolis and Concord to annex the same area where Concord passed a resolution of intent to annex the Lake Concord property on 24 September 1987; Kannapolis passed a resolution of intent to annex the same property on 14 October 1987; Concord passed a new resolution of intent to annex the property on 10 December 1987; the original Concord resolution was invalid because the Lake Concord property was not contiguous to the boundaries of Concord; the Kannapolis resolution was invalid for failure to comply with an essential requirement of N.C.G.S. § 160A-49(j); and Concord had by 10 December annexed the property between its boundaries and Lake Concord, so that its last resolution was valid and was the first mandatory step.

Judge PHILLIPS dissenting.

APPEAL by City of Kannapolis from *Cornelius (C. Preston)*, Judge. Judgment entered 19 September 1988 in Superior Court, CABARRUS County. Heard in the Court of Appeals 7 June 1989.

On 24 September 1987 the City of Concord passed two resolutions. The first fixed the date for a public hearing to accept petitions for voluntary annexation of a privately owned strip of land (the "Copperfield" property). The second was a resolution of intent to annex a municipally owned piece of property on which Lake Concord is situated (the "Lake Concord" property). The Copperfield property was contiguous to the City of Concord. The Lake Concord property was contiguous to the Copperfield property but was not contiguous to the boundaries of the City of Concord. On 14 October 1987 the City of Kannapolis passed a resolution of intent to annex the same Lake Concord property.

On 29 October 1987 the City of Kannapolis filed a civil complaint alleging that Concord's resolution of intent to annex the Lake Concord property was invalid because this property was not contiguous to the municipal boundaries of Concord as required by G.S. 160-31. Concord subsequently passed a new resolution of intent to annex the Lake Concord property on 10 December 1987.

CITY OF KANNAPOLIS v. CITY OF CONCORD

[95 N.C. App. 591 (1989)]

At trial both parties filed for summary judgment. The trial judge denied the motion filed by Kannapolis and granted the motion filed by Concord. The City of Kannapolis appeals.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr. and Jeane Schulte Scott, and Rutledge, Friday, Safrit & Smith, by Walter M. Safrit, II, for appellants.

Petree, Stockton & Robinson, by Penni Pearson Bradshaw, Kenneth S. Broun, and Johnson, Belo & Plummer, by Gordon L. Belo, for appellees.

LEWIS, Judge.

Neither party suggests the presence of any issue of material fact. We therefore limit our review of this case to determine whether the city of Concord was entitled to summary judgment as a matter of law. *Brawley v. Brawley*, 87 N.C. App. 545, 361 S.E.2d 759 (1987), *cert. denied*, 321 N.C. 471, 364 S.E.2d 918 (1988). Where two municipalities are attempting to annex the same area, North Carolina has adopted the Prior Jurisdiction Rule. *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534 (1984). The first municipality to institute a valid annexation proceeding has priority and subsequent annexation proceedings are invalid. *Id.* The rule applies from the date of the first mandatory procedural step. *Id.* Where applicable, the resolution of intent to annex is considered the first mandatory procedural step. *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 357 S.E.2d 686 (1987), *reh'g denied*, 320 N.C. 639, 360 S.E.2d 106 (1987).

I

[1] Appellant, the City of Kannapolis, contends that it instituted the first mandatory procedural step with respect to the Lake Concord property on 14 October 1987. Appellant contends that Concord's resolution of intent to annex on 24 September 1987 was invalid because the Lake Concord property was not contiguous to the municipal boundaries of Concord at the time. Contiguity is required by the subsection under which Concord sought to annex the Lake Concord property. 160A-31(g).

For purposes of this section, an area shall be deemed 'contiguous' if, at the time the petition is submitted, such area either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way,

CITY OF KANNAPOLIS v. CITY OF CONCORD

[95 N.C. App. 591 (1989)]

a creek or river, or the right-of-way of a railroad or other public service corporation, lands owned by the municipality of some other political subdivision or lands owned by the State of North Carolina.

G.S. 160A-31(f). It is an undisputed fact that the Lake Concord property is not geographically contiguous to the legal municipal boundaries of Concord as they stood on 24 September 1987. However, Concord contends in their brief that the Lake Concord property was only one part of the "area" annexed on that day, and that the area as a whole is "contiguous" to Concord because the Copperfield property is contiguous to Concord and the Lake Concord property is contiguous to the Copperfield property. We reject this contention. The Lake Concord property was annexed under G.S. 160A-31(g). That statute states that a city "may initiate annexation of contiguous property owned by the municipality by adopting a resolution stating its intent to annex the property. . . . The resolution shall . . . state that the property is contiguous to the municipal boundaries. . . ." G.S. 160A-31(g). The statute clearly requires that the resolution of intent to annex municipally owned property state that the property to be annexed in the resolution is contiguous. Concord's resolution of intent to annex the Lake Concord property did not and could not truthfully have so stated. Even though a resolution concerning the Copperfield property was passed on the same day, the Copperfield property was not yet legally annexed and did not become legally annexed until 31 December 1987, as stated in Concord's Ordinance to Extend the Corporate Limits of the City of Concord of 8 October 1987. The two properties were annexed by different procedures with independent requirements and cannot be considered one whole area for the purpose of satisfying the contiguity requirement. Since the Lake Concord property was not at that date contiguous to Concord, and since the annexation statute requires that municipally owned property be contiguous, Concord's attempt to annex the Lake Concord property was void.

II

[2] Kannapolis contends that its own resolution of intent on 8 October 1987 to annex the Lake Concord property was therefore the first valid mandatory procedure. Kannapolis sought to annex the Lake Concord property pursuant to the statute for involuntary annexation, G.S. 160A-49. Kannapolis initiated its annexation procedure pursuant to 160A-49(j), which states that a previous resolu-

CITY OF KANNAPOLIS v. CITY OF CONCORD

[95 N.C. App. 591 (1989)]

tion of consideration need not be filed, "if the resolution of intent describing the area and the ordinance annexing the area both provide that the effective date of the annexation shall be at least one year from the date of passage of the annexation ordinance." Concord contends that Kannapolis' attempt to annex Lake Concord was void because its resolution of intent did not provide that the annexation would take effect one year after passage of the ordinance. Unlike the statute for voluntary annexation, the statutory procedure for involuntary annexation requires a one-year waiting period. *Town of Hazelwood v. Town of Waynesville*, *supra* at 94, 357 S.E.2d at 689. However, Kannapolis' mistake is not fatal if it is in "substantial compliance" with the essential requirements of the state. *In re Annexation Ordinance Adopted by City of Jacksonville*, 255 N.C. 633, 642, 122 S.E.2d 690, 697 (1961). Kannapolis contends that its mistake is purely procedural because the annexation still does not take effect for one year and because the error did not materially prejudice anyone. We reject this contention. The absence of prejudice does not in itself guarantee "substantial compliance." *Id.* The statute states that a municipality may bypass a resolution of consideration only if both the resolution of intent and the ordinance to annex express the one-year provision. G.S. 160A-49(j). The statute does not require merely that the annexation not take effect for one year, but explicitly requires that the resolution of intent state that this is the case. *Id.* Where Kannapolis' resolution of intent omits an essential condition of compliance with G.S. 160A-49(j), the error is fatal. Kannapolis' resolution of intent therefore does not trigger the Prior Jurisdiction Rule.

III

[3] Next, we consider Concord's contention that its second resolution of intent to annex the Lake Concord property on 10 December 1987 is the first valid mandatory procedural step. We conclude that this resolution did satisfy the Prior Jurisdiction Rule in Concord's favor. Though Concord's original resolution of intent on 24 September 1987 to annex the Lake Concord property was invalid, its annexation of the Copperfield property on that same day was in compliance with the procedure for voluntary annexation by petition set forth in 160A-31. When that annexation became effective on 31 October 1987 the Lake Concord property became contiguous to the municipal boundaries of Concord. Concord's resolution of intent to annex the Lake Concord property on 10 December 1987 therefore satisfied the contiguity requirement of G.S. 160A-31, as

BOLTON CORP. v. STATE OF NORTH CAROLINA

[95 N.C. App. 596 (1989)]

the first valid "mandatory procedure" toward annexation of the property, and triggered the Prior Jurisdiction Rule. *City of Burlington v. Town of Elon College, supra*. We therefore conclude that summary judgment for Concord was appropriate.

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion Kannapolis took the first valid step toward annexation, its failure to state in the Notice of Intent to Annex that annexation would be delayed for a year was a minor rather than a fatal defect, and summary judgment should have been entered for it instead of Concord.

BOLTON CORPORATION AND WILLIAM E. BOLTON, III, PLAINTIFFS v. STATE OF NORTH CAROLINA, DEFENDANT

No. 8810SC1125

(Filed 19 September 1989)

1. State § 4.4—breach of contract—claim against State—contractor as assignee of subcontractor

A prime contractor's claim against the State for breach of contract as assignee of its subcontractor was properly dismissed by summary judgment because an assignment of a claim against the State is void under N.C.G.S. § 143-3.

2. State § 4—breach of contract—claim against State—contractor's claim on behalf of subcontractor

A prime contractor's claim against the State on behalf of its subcontractor for breach of a contract for construction of a building at UNC-CH was barred by sovereign immunity since the subcontractor had no contractual relationship with the State, the State's sovereign immunity on a contract claim by the subcontractor was thus not waived by N.C.G.S. § 143-135.3, and the prime contractor has no claim on the subcontractor's behalf because the subcontractor has no claim.

BOLTON CORP. v. STATE OF NORTH CAROLINA

[95 N.C. App. 596 (1989)]

3. Contracts § 14.2; State § 4.4— public construction project— contract between State and general contractor— heating and air conditioning contractor not third party beneficiary

Plaintiff heating and air conditioning contractor for construction of a building at UNC-CH was not a third party beneficiary of the contract between the State and the general contractor for the project so as to give plaintiff a right of action against the State for breach of contract based on change work orders entered into by the State and the general contractor which delayed plaintiff and extended the completion date of the project.

4. State § 4— public construction contract— State's delay of general contractor— claim by another prime contractor barred by sovereign immunity

A heating and air conditioning contractor's claim against the State based on change work orders which delayed the general contractor's work and in turn delayed plaintiff's work was outside the scope of N.C.G.S. § 143-135.3 and was thus barred by sovereign immunity since plaintiff failed to allege or show a breach of its own contract with the State.

APPEAL by plaintiffs from *Read (J. Milton, Jr.), Judge*. Orders entered 2 November 1987 and 18 November 1987 in Superior Court, WAKE County, and from *Stephens (Donald W.), Judge*, order entered 15 January 1988 in Superior Court, WAKE County, and from *Barnette (Henry V., Jr.), Judge*, order entered 9 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 19 April 1989.

Plaintiff, Bolton Corporation (Bolton Corp.), a heating ventilation and air/conditioning (HVAC) contractor, and Bolton Corp.'s president William E. Bolton, III (Bolton) filed this breach of contract action on behalf of themselves and their subcontractor, Phillips Sheet Metal (Phillips), alleging that certain acts or omissions of the defendant prevented the timely performance of their contract in the construction of the central library of the University of North Carolina (UNC-CH). On 2 November 1987, Judge Read granted defendant's summary judgment motion to dismiss the claims of Phillips as advanced by its assignee, Bolton. On 18 November 1987, Judge Read denied plaintiffs' partial summary judgment motion on the issue of defendant's liability. On 15 January 1988, Judge

BOLTON CORP. v. STATE OF NORTH CAROLINA

[95 N.C. App. 596 (1989)]

Stephens granted defendant's partial summary judgment motion to dismiss Phillips' claims advanced by Bolton Corp. and finally, on 9 March 1988, Judge Barnette granted defendant's summary judgment motion as to Bolton Corp.'s remaining claims. Plaintiffs appeal the entry of these orders.

Graham & James, by J. Jerome Hartzell and Mark Anderson Finkelstein, for plaintiff-appellants.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Donald R. Teeter, for defendant-appellee.

LEWIS, Judge.

In September 1979 plaintiffs entered into a contract with defendant to be prime contractor for HVAC work for the new UNC-CH central library. Plaintiff, Bolton Corp., was one of four prime contractors on the project including T.A. Loving Company (T.A. Loving) which was the general contractor. Plaintiff's contract and the contracts of the other prime contractors, provided *inter alia* that construction on the library was to be completed in 930 days or by 1 May 1982. During the course of construction defendant, through the project architect Leslie Boney, entered into a total of 29 change work orders with T. A. Loving extending the final construction date through the date the project was completed.

In its complaint plaintiffs asserted that defendant's change work orders as well as its failure to properly coordinate and administer the project significantly delayed T.A. Loving's work which in turn delayed plaintiff and its subcontractor, Phillips, and resulted in their incurring increased costs and expenses. Defendant answered, generally denying plaintiffs' contentions, and asserted lack of subject matter jurisdiction and failure to state a claim pursuant to G.S. 1A-1, Rules 12(b)(1) and 12(b)(6) as to Bolton's claims as Phillips' assignee.

Plaintiffs bring forward several assignments of error to the lower court's summary judgment orders which ultimately resulted in the dismissal of their entire suit against defendant. G.S. 1A-1, Rule 56(c) provides that summary judgment is proper if, "the pleadings, depositions, answers to interrogatories, 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."

BOLTON CORP. v. STATE OF NORTH CAROLINA

[95 N.C. App. 596 (1989)]

[1] We first address the partial summary judgment order entered against Bolton as assignee of Phillips. G.S. 143-3 provides, “[a]ll transfers and assignments of any claim upon the State of North Carolina or any of its departments or . . . any State institution, whether absolute or conditional and whatever may be the consideration thereof . . . shall be absolutely null and void.” “Where the pleadings or proof of either party disclose that no claim . . . exists, summary judgment is proper.” *Warren Brothers Co., a Div. of Ashland Oil, Inc. v. N.C. Dept. of Transportation*, 64 N.C. App. 598, 599, 307 S.E.2d 836, 837 (1983). This assignment of error is overruled.

[2] Next we address the trial court’s granting of summary judgment as to Bolton Corp.’s claims on behalf of Phillips. G.S. 143-135.3 waives the State’s sovereign immunity to allow a “contractor” to file a contract claim against the State. “Contractor” is defined as “any person, firm, association or corporation which has *contracted* with a State board for . . . services in connection with construction . . . as well as those persons who have *contracted* to perform such construction.” G.S. 143-135.3(a) (emphasis added). Phillips had no contract with the State. Indeed, Article 32 of Bolton Corp.’s contract provided, “[t]he Contractor agrees that no contractual relationship exists between the sub-contractor and the owner in regard to this contract.” Clearly, since Phillips had no contractual relationship with the State, its claim is barred by sovereign immunity. See *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). Thus, because Phillips has no claim, Bolton Corp. has no claim on Phillips’ behalf. *Warren Bros., supra*.

[3] Finally, we address the summary judgment as to Bolton Corp.’s remaining claims. The State asserts that the lower court properly granted its motion for summary judgment because Bolton Corp.’s claim was outside the scope of G.S. 143-135.3 and thus barred by sovereign immunity. Alternatively, it contends that it was well within its contract rights with T.A. Loving to change the work orders and that Bolton Corp.’s contract provided a remedy for extra costs—extension of time—which Bolton Corp. chose not to exercise. Plaintiff, however, contends that its claim is not barred by sovereign immunity in that it is a third-party beneficiary to the contract provisions between T.A. Loving and defendant relating to change of work and that T.A. Loving’s contract could not be modified without notifying and compensating plaintiff. Additionally, plaintiffs contend that under ordinary contract principles, defend-

BOLTON CORP. v. STATE OF NORTH CAROLINA

[95 N.C. App. 596 (1989)]

ant's acts in delaying T.A. Loving in turn prevented Bolton Corp. from the timely performance of its contract and therefore they should be allowed to recover the extra costs caused by the delay.

"[I]t is well settled in North Carolina that where a contract between two parties is entered into for the benefit of a third party, the latter may maintain an action for its breach or in tort if he has been injured as a result of its negligent performance." *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E.2d 571, 573-4 (1978). However, a mere incidental beneficiary to a contract acquires no right against the promisor or the promisee. *Matterness v. City of Winston-Salem*, 286 N.C. 1, 209 S.E.2d 481 (1974). "Whether a contract was intended for the benefit of a third party is generally regarded as one of construction of the contract. The intention of the parties is determined by the provisions of the contract construed in light of the circumstances under which it was made and the apparent purpose of the parties are trying to accomplish." *Johnson, supra*.

In support of their argument plaintiffs point to specific contract provisions imposing liability on each prime contractor to each other for delays and damages to their work and to G.S. 143-128 which holds contractors liable to the State and other contractors for full performance of their work under their contracts. While it is clear that this language imposes a duty on contractors to cooperate with each other in the full performance of their contracts, we do not think it indicates, as plaintiffs contend, that the State's contract with T.A. Loving was entered into with the intention or purpose of benefiting plaintiffs. This conclusion is bolstered by the fact that Bolton Corp. was equally bound by the identical provisions in its contract and G.S. 143-128. The plaintiffs' argument is without merit.

[4] Plaintiffs' second contention is also without merit. At the time Bolton Corp. entered into its contract with the State G.S. 143-135.3 (Cum. Supp. 1983) provided:

Upon completion of any contract for construction or repair work awarded by any state board to any contractor, under the provisions of this Article, should the contractor fail to receive such settlement as he claims to be entitled to *under terms of his contract*, he may, . . . submit to the Secretary of Administration a written and verified claim for such amount

WILLIAMS v. MOORE

[95 N.C. App. 601 (1989)]

as he deems himself *entitled to under the terms of said contract*, setting forth the facts upon which said claim is based.

As to such portion of a claim which may be denied by the Secretary of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be *entitled to under said contract* by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County.

(Emphasis added.) In construing this provision, our Supreme Court in *Davidson and Jones, Inc. v. N.C. Dept. of Administration*, 315 N.C. 144, 337 S.E.2d 463 (1985) stated, “[w]e interpret this statute as requiring . . . that the contractor’s claim arise out of a breach of the contract or some provision thereof . . . to entitle the contractor to some relief.” *Id.* at 149, 337 S.E.2d at 466. Plaintiffs here have failed to allege or show a breach of the terms of *its* contract with the State. Rather, the basis of their complaint is that various acts or omissions by defendant, including the granting of change orders, delayed T.A. Loving’s work which in turn delayed their work. We therefore hold that Bolton Corp.’s claims are barred under G.S. 143-135.3 and summary judgment was proper.

For the foregoing reasons the lower court’s order is affirmed.

Affirmed.

Judges ARNOLD and GREENE concur.

CLAVEN C. WILLIAMS AND WIFE, BETTY LOU T. WILLIAMS, KENNETH R. TAYLOR AND WIFE, MILDRED F. TAYLOR, LUTHER E. TAYLOR, JR. AND WIFE, HARRIETT T. TAYLOR, FRANK DONNELL TAYLOR AND WIFE, ANNE S. TAYLOR v. EDWARD F. MOORE

No. 894SC53

(Filed 19 September 1989)

1. Rules of Civil Procedure §§ 12, 55 — time to answer complaint — when time begins to run — motions for entry of default and default judgment timely

The thirty days defendant has under N.C.G.S. § 1A-1, Rule 12 to answer the complaint begin running when defendant

WILLIAMS v. MOORE

[95 N.C. App. 601 (1989)]

is served with the summons and complaint, not when plaintiff mails it, and there is thus no need to apply Rule 6(e) to extend the time to answer by three days; therefore, plaintiffs' motions for entry of default and default judgment filed thirty-one days after service of the summons and complaint on defendant were made after defendant's time to answer had expired, as required by Rule 55.

2. Rules of Civil Procedure § 55— claim not for sum certain— entry of default judgment by clerk improper

Plaintiffs' claim was not for a sum certain or a sum which could by computation be made certain and entry of default judgment by the clerk was therefore improper where plaintiffs' claimed damages were mitigated by a sum dependent on plaintiffs' estimate of the "fair rental value" of some unspecified amount of land, and plaintiffs alleged that they were entitled to \$19,762.50 for expenses incurred during each of two years for land clearing, but there was no clear showing as to how plaintiffs arrived at this figure. N.C.G.S. § 1A-1, Rule 55(b)(1).

APPEAL by defendant, Edward F. Moore, from *Reid, Jr., Judge*. Judgment entered 19 October 1988 in Superior Court, DUPLIN County. Heard in the Court of Appeals 31 August 1989.

On 19 March 1983, plaintiffs and defendant entered into a five-year lease of 364 acres of cleared farm land and 160 acres of woods land in Duplin County. Under the lease, the rent owed was based on the total amount of cleared land at the start of each year, at a rate of \$288 per cleared acre. In the lease, plaintiffs agreed to secure a loan to clear the 160 acres of woods land, while defendant agreed to pay plaintiffs' expenses in securing the loan and to make payments on the loan.

In the complaint, filed 22 January 1988, plaintiffs alleged breach of the lease by defendant and sought rental payments for 1986 and 1987, and a sum due under the land clearing agreement. Plaintiffs also alleged that they had re-leased the farm for \$50 per acre and alleged \$23,996 based on this rental as mitigation of their damages.

On 26 January 1988, defendant was served by certified mail with the summons and complaint. Defendant did not open the correspondence and did not file an answer.

WILLIAMS v. MOORE

[95 N.C. App. 601 (1989)]

On 26 February 1988, thirty-one days after service of the summons and complaint on defendant, plaintiffs filed motions for entry of default and for default judgment by the clerk. Plaintiffs supported their motions with affidavits of plaintiffs' attorney. The affidavits set out the total amount of damages plaintiffs sought and referred to the unverified complaint to substantiate that sum.

On 26 February 1988, the assistant clerk of Duplin County Superior Court granted plaintiffs' motions for entry of default and default judgment in the amount of \$306,046.92. On 8 September 1988, defendant filed a motion to set aside the entry of default judgment in Duplin County Superior Court. On 19 October 1988, defendant's motion was denied. From denial of his motion, defendant appeals.

Thompson & Ludlum, by E. C. Thompson, III, for plaintiff appellees.

Ward & Smith, by Douglas K. Barth, for defendant appellant.

ARNOLD, Judge.

Defendant contends the trial court erred in denying his motion to set aside the entry of default and default judgment. A motion to set aside entry of default and default judgment is addressed to the sound discretion of the trial court. *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510, 181 S.E.2d 794, 798 (1971). The trial court's order ruling on such a motion will not be disturbed absent a showing of abuse of discretion.

[1] The defendant first argues the entry of default and default judgment are void because they were entered before the time to answer plaintiffs' complaint had expired. The relevant portion of Rule 12 of the N.C. Rules of Civil Procedure provides:

(a)(1) A defendant shall serve his answer within 30 days after service of the summons and complaint upon him.

Rule 6 of the N.C. Rules of Civil Procedure, in pertinent part, provides:

(e) *Additional time after service by mail.*—Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

WILLIAMS v. MOORE

[95 N.C. App. 601 (1989)]

Defendant argues that since the summons and complaint were served upon him by mail, Rule 6(e) applies to extend his time to answer to thirty-three days.

Although no North Carolina case addresses this precise question, the rationale of Rule 6(e) of the N.C. Rules of Civil Procedure will not support extending defendant's time to answer to thirty-three days. Rule 6(e) was designed to "alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right." *Trust Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97 (1973). See also W. Shuford, *N.C. Civil Practice and Procedure* § 6-8 (3d ed. 1988) (stating rationale for Rule 6(e) consistently with *Trust Co.*). But see *Sturges, Judgments—A Practitioner's Guide to Entry of Default, Default Judgments, and Motions to Set Aside in North Carolina*, 18 Wake Forest L. Rev. 683, 687 (1982).

The thirty days defendant has under Rule 12 to answer the complaint begin running when defendant is served with the summons and complaint, not when plaintiff mails it. N.C.R. Civ. P. 4(j2)(2). Under these circumstances, there is no need to apply Rule 6(e) to extend the time to answer by three days. Plaintiffs' motions for entry of default and default judgment were made, therefore, after defendant's time to answer had expired, as required by Rule 55 of the N.C. Rules of Civil Procedure.

Defendant next argues that plaintiffs' affidavit, standing alone, must meet the requirements of Rule 55 for entry of default judgment by the clerk and that the affidavit cannot be supplemented by allegations in plaintiffs' unverified complaint. Plaintiffs' affidavit refers to the complaint and the complaint contains the lease as Exhibit A. While the basis for plaintiffs' motion would have been clearer if all material had been in either an affidavit or a verified complaint, we see nothing improper in plaintiffs referring in their affidavit to material already set out in or attached to their complaint.

[2] Next, defendant contends plaintiffs' affidavit in support of their motion does not substantiate that plaintiffs' claim is for a "sum certain or for a sum which can by computation be made certain," as required by Rule 55(b)(1). Given our response to defendant's preceding argument, we will consider both the affidavit and the complaint in determining whether plaintiffs' claim is for a "sum certain"

WILLIAMS v. MOORE

[95 N.C. App. 601 (1989)]

The portion of Rule 55 governing entry of default judgment by the clerk provides:

(b)(1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

North Carolina courts have found the requirement that plaintiffs' claim be for "a sum certain or for a sum which can by computation be made certain" met by: an agreement to move plaintiffs' house for a specified sum of money. *Smith v. Barfield*, 77 N.C. App. 217, 218, 334 S.E.2d 487, 488 (1985); an action to recover for personal services rendered for a sum fixed in an express contract. *McGuire v. Sammonds*, 247 N.C. 396, 100 S.E.2d 829 (1957).

Plaintiffs' claim is not for "a sum certain or a sum which can by computation be made certain." First, in an effort to mitigate damages caused by defendant's alleged breach of the lease, plaintiffs re-leased the farm, although it is unclear how much acreage was re-leased, for \$50 per acre. Although neither plaintiffs' affidavit nor complaint explicitly set out the calculations necessary to compute \$306,046.92 in damages, plaintiffs presumably subtracted \$23,996 in mitigation of damages to arrive at this figure. Plaintiffs' claim is not for a "sum certain . . ." when their damages are mitigated by a sum dependent on plaintiffs' estimate of the "fair rental value" of some unspecified amount of land.

In addition, there is uncertainty about other elements of plaintiffs' damages. In paragraph 9 of the lease, entitled *Clearing the Land*, plaintiffs agreed to secure a loan to clear 160 acres of woods land so defendant could farm that additional land. Defendant agreed to "pay all expenses incurred by the Lessors in securing said loan, including the attorney's fees, origination fee at The Federal Land Bank Association, and the stock at The Federal Land Bank Association when due." Defendant also agreed "to pay all payments on the loan on or before the due date . . ." In the complaint, plaintiffs allege expenses of \$19,762.50 for each of the years 1986 and 1987 for land clearing. Given the uncertainty of how plaintiff arrived

NCNB v. APPLE

[95 N.C. App. 606 (1989)]

at this figure, it is not a "sum certain . . ." subject to entry of default judgment by the clerk.

In his last argument, defendant contends the default judgment is void because plaintiffs' affidavit supporting their motion was made by plaintiffs' counsel, who lacked personal knowledge of the material allegations of the affidavit, rather than plaintiffs themselves. Since the clerk lacked authority to grant a default judgment on a claim that was not a sum certain, it is unnecessary for us to examine the sufficiency of plaintiffs' motion and affidavit before the clerk.

Entry of default by the clerk is affirmed. Grant of default judgment by the clerk is set aside, and the cause remanded to Duplin County Superior Court for a hearing, in accordance with Rule 55(b)(2) of the N.C. Rules of Civil Procedure, to determine the amount of plaintiffs' damages.

Affirmed in part, vacated and remanded in part.

Judges BECTON and COZORT concur.

NORTH CAROLINA NATIONAL BANK OF GREENSBORO, NORTH CAROLINA,
EXECUTOR OF THE ESTATE OF ANNA M. KREIMEIER, PLAINTIFF-APPELLEE
V. MS. JEAN APPLE AND MRS. PATRICIA (APPLE) CREWS, DEFENDANTS-
APPELLEES, AND THE ESTATE OF LILLIAN P. BRENNAN, DECEASED, AND
WILLIAM R. BRENNAN, DEFENDANTS-APPELLANTS

No. 8818DC1333

(Filed 19 September 1989)

1. Wills § 28.6— ambiguous language — survivor — construction of

Language in a will leaving all of the testator's property to her two adopted daughters and three grandchildren in stated percentages, "with the part of any deceased daughter or grandchild to go to the survivor in the percentage indicated," was construed to mean that, upon the death of one named beneficiary, each surviving beneficiary would take her share in the percentage indicated. Since the percentages will not add up to 100% on this or any reading of the will, partial intestacy is avoided by multiplying the percentage assigned to each surviving named

NCNB v. APPLE

[95 N.C. App. 606 (1989)]

beneficiary by the ratio of the whole estate to that which has been apportioned.

2. Wills § 66.1— anti-lapse clause—residuary clause—deceased beneficiary

A provision in a will which disposed of “all . . . property . . . not required to carry out the provisions hereinabove” was a residuary clause and, under the anti-lapse statute, N.C.G.S. 31-42(c), the share of the testator's deceased daughter would pass to all other named beneficiaries. Since each beneficiary is a beneficiary according to the percentage assigned to them in the will, each would take the deceased daughter's share according to the percentage assigned, yielding the identical result determined by the court in upholding the will.

APPEAL by defendants, the Estate of Lillian P. Brennan and William R. Brennan, from *Daisy (William L.)*, Judge. Judgment entered 3 October 1988 in District Court, GUILFORD County. Heard in the Court of Appeals 7 June 1989.

Anna M. Kreimeier died testate on 10 November 1987. She named plaintiff as executor of the will. Her will contained the following provision:

All of my property, both real and personal, not required to carry out the provisions hereinabove, I will, devise and bequeath to my two adopted daughters and three grandchildren in the following percentages, the part of any deceased daughter or grandchild to go to the survivor in the percentage indicated.

<u>Names</u>	<u>Percentages</u>
Mrs. Lillian Brennan	35%
Mrs. Elizabeth P. Apple	35%
Jean Apple	10%
Patricia Apple	10%
William R. Brennan	10%

Lillian Brennan and Elizabeth Apple were the testator's adopted daughters. Jean Apple, Patricia Apple and William Brennan are the testator's grandchildren. Elizabeth Apple predeceased the testator and was survived by her children Patricia and Jean Apple.

On 18 December 1987 plaintiff filed a complaint seeking declaratory judgment on the interpretation of the above-cited pro-

NCNB v. APPLE

[95 N.C. App. 606 (1989)]

vision. Specifically, plaintiff asked the court to determine who the testator meant to be a "survivor" and whether she meant the surviving issue of a named beneficiary, or a surviving named beneficiary.

Lillian Brennan died after the filing of plaintiff's complaint and the court granted a motion to substitute her husband/estate administrator as a party in this action.

After a hearing, the court concluded that the term "survivor" was ambiguous and that it was unable to determine the testator's intent. Therefore, the court applied the anti-lapse statute, G.S. 31-42(a), and ordered that Elizabeth Apple's 35% share should go to her surviving daughters Jean and Patricia Apple.

Defendants, the Estate of Lillian Brennan, William Brennan executor, appeal, alleging that the intent of the word "survivor" clearly represents all surviving named beneficiaries, and that the court should not have applied the anti-lapse statute.

Booth, Harrington, Johns and Campbell, by A. Frank Johns, for plaintiff-appellee North Carolina National Bank of Greensboro.

James W. Lung for defendant-appellees Ms. Jean Apple and Mrs. Patricia (Apple) Crews.

Rivenbark, Kirkman, Alspaugh & Moore, by Douglas E. Moore and John W. Kirkman, Jr., for William R. Brennan.

LEWIS, Judge.

[1] In construing wills there is a general presumption against intestacy. *McKinney v. Mosteller*, 85 N.C. App. 429, 365 S.E.2d 612 (1987), *rev'd on other grounds*, 321 N.C. 730, 365 S.E.2d 612 (1988). A residuary clause in a will should be construed so as to prevent intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary. *Id. Citing Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916). The court has a duty to render a will operative and to give effect to testator's intent if reasonable interpretation can be given which is not in contravention of some established rule of law. *Stephenson v. Rowe*, 315 N.C. 330, 338 S.E.2d 301 (1986).

Guided by the court's duty to render the will operative and the presumption against intestacy in whole or in part, we turn to the language of the will to ascertain the testator's intent. *Moore*

NCNB v. APPLE

[95 N.C. App. 606 (1989)]

v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980). The testator writes that "the part of any deceased daughter or grandchild [is] to go to the survivor in the percentage indicated." The question before us is whether "survivor" signifies the predeceased daughter's surviving issue alone or all those named beneficiaries who survived the testator, including Mrs. Brennan. To interpret the word "survivor" we look at the clause which follows: "in the percentage indicated." Had the testator intended for "survivor" to mean the issue surviving a deceased daughter, the phrase "in the percentage indicated," would be wholly redundant and superfluous. In that the testator had already written that "the part of any deceased daughter or grandchild" would go to the survivor, the phrase "in the percentage indicated" has meaning only if that "percentage" is different from the "part" of the deceased beneficiary. In other words, had the testator meant "survivor" to signify the issue of that beneficiary, then she could have left out the final clause and ended the sentence after the word "survivor." The sentence then would have read, ". . . the part of any deceased daughter or grandchild [is] to go to the survivor."

Every word and clause in a will must be presumed to have some meaning and if possible be given an effect. *Kale v. Forrest*, 278 N.C. 1, 178 S.E.2d 622 (1971). The final clause, "in the percentage indicated" adds meaning to the sentence only if the "percentage[s]" referred to are those assigned to the other named beneficiaries, according to which they will divide that part of the estate originally intended for the deceased beneficiary. To read this final clause otherwise is to remove the due effect of those words. Since all heirs named in the will had percentages assigned, all are survivors.

We conclude that the testator intended that upon the death of one named beneficiary, each surviving named beneficiary should take her share, "in the percentage indicated." The trial judge stated that on this or any reading of the will, the percentages will not add up to 100%. Following, once again, the presumption against partial intestacy, we conclude that the will can be read to avoid partial intestacy by multiplying the percentage assigned to each surviving named beneficiary by 100/65, the ratio of the whole estate to that which has been apportioned. This method yields the following results:

NCNB v. APPLE

[95 N.C. App. 606 (1989)]

Mrs. Lillian Brennan	53.84615%
Jean Apple	15.38462%
Patricia Apple	15.38462%
William R. Brennan	15.38462%

This method accounts for the whole estate by apportioning the predeceased daughter's share to each surviving named beneficiary according to the "percentage indicated" in the residuary clause.

This will can be given a reasonable construction so to uphold it and avoid partial intestacy. *Stephenson v. Rowe, supra*. We conclude that the term "survivor" signifies those named beneficiaries who survived the testator.

[2] We have therefore concluded that the language of the will can be upheld to avoid intestacy. We add, however, that were this not the case and had this provision of the will been deemed fatally ambiguous, correct application of the anti-lapse statute would have yielded the same result. While the trial judge apparently applied G.S. 31-42(a) in assigning Elizabeth Apple's share to Elizabeth's children, G.S. 31-42(c)(2) states that where a residuary devise is void or revoked, "such devise or legacy shall continue as a part of the residue and shall pass to other residuary devisee or legatee. . . ." The provision of the will in question is a "residuary devise" because it disposes "all . . . property . . . not required to carry out the provisions hereinabove," and therefore accounts for all property which has not otherwise been disposed. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916). Elizabeth Apple's share would, according to G.S. 31-42(c), pass on to all other "named beneficiaries." *Bear v. Bear*, 3 N.C. App. 498, 165 S.E.2d 518 (1969). In that each beneficiary is a beneficiary according to the percentage assigned to them in the will, each would then take Elizabeth Apple's share according to the percentage assigned, yielding the identical result we have determined in upholding the will.

Vacated and remanded for judgment in accordance with this opinion.

Judges BECTON and PHILLIPS concur.

STATE v. ENGLISH

[95 N.C. App. 611 (1989)]

STATE OF NORTH CAROLINA v. KENNETH BRADLEY ENGLISH

No. 8818SC1230

(Filed 19 September 1989)

1. Arson § 4.1— first degree arson—sufficiency of evidence

The State presented sufficient evidence that defendant caused a fire and that the fire was willfully set to support defendant's conviction of first degree arson where the State's evidence tended to show that defendant had a history of mental illness; he was seen entering the home he shared with his mother and grandmother; thirty minutes later the home was observed to be on fire; at the time of the fire, the home was occupied by defendant's grandmother; the fire originated on defendant's bed; defendant remained at the scene but did not render aid and was seen laughing; the fire was of incendiary origin; and during the prior evening defendant quarreled with his mother and became agitated.

2. Arson § 3— expert testimony—opinion that fire intentionally set

An expert witness was properly permitted to state his opinion in an arson case that the fire was intentionally set where the witness was a captain in the fire department who had served for nine years as a fire inspector and had received special training in fire investigation; his testimony explained the accepted method of eliminating accidental causes of fires; and he described to the jury how he applied that method in this case and how he reached his conclusion that the fire was intentionally set.

3. Arson § 3; Criminal Law § 34— arson—evidence of prior fire—prejudicial error

In a prosecution of defendant for arson of the home in which he lived, testimony that a fire occurred at defendant's former residence five years earlier was not admissible under N.C.G.S. § 8C-1, Rule 404(b) where there was no evidence connecting defendant with the cause of the earlier fire, and the admission of such testimony was prejudicial error.

APPEAL by defendant from *Crawley, Jack B., Judge*. Judgment entered 10 June 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 22 August 1989.

STATE v. ENGLISH

[95 N.C. App. 611 (1989)]

Defendant was convicted of first-degree arson and sentenced to the maximum term of life imprisonment. At trial, the State's evidence tended to establish that defendant, who lived with his mother and grandmother, had a long history of mental illness. At about 2:30 p.m. on 24 February 1987 there was a crash and defendant was seen entering his home. Approximately thirty minutes later, defendant's home was observed to be on fire. At the time of the fire, the home was occupied by defendant's grandmother. Defendant remained at the scene, but did not render aid and was observed laughing. The fire originated in defendant's room on his own bed. There was no evidence of accidental cause of the fire and the fire was of incendiary origin. During the prior evening defendant quarreled with his mother and became agitated.

From the judgment entered on the jury's verdict of guilty, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy L. Miller, for the State.

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

WELLS, Judge.

Defendant has brought forward three assignments of error, challenging the sufficiency of the evidence and the admission of evidence. We overrule two of defendant's assignments of error, but find merit in one of them and accordingly award a new trial.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss. North Carolina retains the common law definition of arson. Hence, to establish arson, the State must prove a "willful and malicious burning of the dwelling of another person." *State v. Eubanks*, 83 N.C. App. 338, 349 S.E.2d 884 (1986). Differing degrees of arson were unknown at common law. N.C. Gen. Stat. § 14-58 (1986) provides in pertinent part:

There shall be two degrees of arson as defined at the common law. If the dwelling house burned was occupied at the time of burning, the offense is arson in the first degree[.]

Defendant argues that the State failed to establish either that defendant was in fact the cause of the fire or the fire was willfully

STATE v. ENGLISH

[95 N.C. App. 611 (1989)]

set, in that no one testified that they observed him in the act of starting the fire. We disagree.

Criminal agency in an arson case is seldom proved by direct evidence. *State v. Hicks*, 70 N.C. App. 611, 320 S.E.2d 697 (1984). Defendant's motion to dismiss for insufficiency of evidence raises the question of whether there is substantial evidence to support each essential element of the crime charged and of defendant's being the perpetrator. In resolving this question, we must consider the evidence in the light most favorable to the State. *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985). The State is also entitled to all reasonable inferences to be drawn from the evidence. *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* When substantial evidence supports a finding that the crime was committed, and that a defendant is the criminal agent, the case must be submitted to the jury. *Id.* The evidence need not exclude every reasonable hypothesis of innocence in order to support the denial of a defendant's motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). This test of sufficiency of the evidence is the same for both direct and circumstantial evidence. *Id.* Measuring the State's evidence against these standards, we conclude that the issue of defendant's guilt was properly submitted to the jury in this case. This assignment of error is overruled.

[2] Defendant next assigns as error the admission of opinion testimony by the State's expert witness that the fire was intentionally set. Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. It states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (1988). Our courts construe this rule to admit expert testimony when it will assist the jury "in drawing certain inferences from facts, and the expert is better qualified than the jury to draw such inferences." *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988), *cert. denied*, --- U.S. ---, 109 S.Ct. 513 (1989) (citations omitted). A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion. *Id.* No such abuse of discretion is present here.

STATE v. ENGLISH

[95 N.C. App. 611 (1989)]

Forensic fire investigation is a highly technical subject that requires specialized knowledge of both the potential causes of fires and the procedures for determining a fire's point of origin. The record shows that the State's expert witness was a captain in the fire department who had served for nine years as a fire inspector and had received special training in fire investigation. His testimony explained, in clear terms, the accepted method for eliminating accidental causes of fires. He described to the jury both how he applied that method in this case and how he reached his conclusion that the fire was intentionally set. Such testimony was clearly instructive to the jury. We find no error in its admission.

[3] Finally, defendant assigns as error the admission of evidence of an earlier fire in another house. The record discloses that the following testimony during the State's cross-examination of defendant's mother was elicited over defendant's objection: (1) a fire occurred at defendant's former residence in 1982; (2) defendant's mother was, at the time of that fire, engaged in efforts to have defendant civilly committed; (3) defendant's grandmother occupied the former residence at the time of the fire; and (4) defendant's mother spoke to him regarding the fire. There was no evidence that defendant had performed any act with respect to the 1982 fire nor was there any evidence placing defendant at the scene or its vicinity at the time of that fire. In short, no connection whatsoever between defendant and the cause of the earlier fire was established.

The State urges that the testimony is admissible under Rule 404(b) of the North Carolina Rules of Evidence. That rule provides that evidence of other crimes, wrongs, or acts may be admissible for "purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity[.]" N.C. Gen. Stat. § 8C-1, Rule 404(b) (1988). To be admissible under this rule, evidence of other acts must contain similarities that "support the *reasonable inference that the same person* committed both the earlier and the later [acts]." *State v. Green*, 321 N.C. 594, 365 S.E.2d 587 (1988) (emphasis added). Such an inference clearly cannot be supported absent a demonstrable nexus between the defendant and the act sought to be introduced against him. No such nexus is present here. Thus, when examined in connection with the evidence already present in the record, the questioned testimony was without doubt highly prejudicial to defendant. The trial court erred in admitting that testimony. Defendant is therefore entitled to a

BUTT v. GOFORTH PROPERTIES, INC.

[95 N.C. App. 615 (1989)]

New trial.

Judges PHILLIPS and PARKER concur.

BETTE J. BUTT AND KENNETH BUTT, PLAINTIFFS v. GOFORTH PROPERTIES, INC., SECURITY BUILDING COMPANY, INC., CHAPEL HILL GRADING COMPANY, INC., AND CHAPEL HILL ELECTRIC COMPANY, INC., DEFENDANTS

No. 8814SC1164

(Filed 19 September 1989)

1. Appeal and Error § 6.2— fewer than all claims adjudicated— substantial right affected—order appealable

The trial court's order which dismissed only the claims for punitive damages did not adjudicate all of plaintiff's claims for relief contained in the complaint, but it was nevertheless appealable since it affected plaintiffs' substantial right to have all of their claims for relief tried at the same time before the same judge and jury.

2. Damages § 17.7— negligence in unhitching trailer—no willful or wanton conduct—summary judgment for defendants on punitive damages claim

The trial court properly entered summary judgment for defendants on plaintiffs' punitive damages claim where plaintiffs alleged that defendants failed adequately to secure a trailer before unhitching it from a truck, and it rolled down two hills and across a road before crashing into plaintiffs' house; the evidence was sufficient to show that defendants may have been negligent, but it did not show willful or wanton conduct on the part of defendants.

APPEAL by plaintiffs from *Hight (Henry W., Jr.), Judge*. Revised Order entered 12 August 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 May 1989.

BUTT v. GOFORTH PROPERTIES, INC.

[95 N.C. App. 615 (1989)]

Beskind and Rudolf, P.A., by Andrea A. Curcio, Heidi G. Chapman and Donald H. Beskind; and William Reppy, of counsel, for plaintiff-appellants.

Manning, Fulton & Skinner, by Robert S. Shields, Jr.; and Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog and Lee Poole, for defendant-appellees.

ORR, Judge.

The uncontroverted facts are that on 4 February 1987, plaintiffs filed a claim against defendants Goforth Properties, Inc. and Security Building Company, Inc. They alleged that plaintiff, Bette Butt, sustained physical and emotional injuries arising out of defendants' negligent attempt to attach a heavy equipment trailer to a truck. Plaintiffs' amended complaint alleged that defendant failed to adequately secure the trailer before unhitching it from the truck. Consequently, when the trailer was freed it rolled down a hill, across a road and down a second hill where it crashed into plaintiff's bedroom, damaging her house and injuring her. The complaint, which sought recovery under theories of negligence, negligent infliction of emotional distress and loss of consortium, also sought punitive damages on the basis of defendants' alleged willful and wanton misconduct.

After plaintiffs amended their complaint to add as defendants Chapel Hill Grading Company, Inc. and Chapel Hill Electric Company, Inc., all defendants filed partial summary judgment motions to dismiss plaintiffs' claim for punitive damages. Plaintiffs thereafter filed affidavits in opposition to defendants' motions. On 12 August 1988, the court granted defendants' motions and dismissed plaintiffs' punitive damages claim only. From that order plaintiffs now appeal.

I.

[1] The court's order, which only dismissed the claims for punitive damages, did not adjudicate all of plaintiffs' claims for relief contained in the complaint. Our inquiry, then, must first focus on whether plaintiffs' appeal should be dismissed as interlocutory.

An interlocutory order "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" *Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981), *disc. rev. denied*, 308 N.C. 675, 304 S.E.2d 754 (1983). When

BUTT v. GOFORTH PROPERTIES, INC.

[95 N.C. App. 615 (1989)]

an order is interlocutory, it can be appealed when, and only when, the judge who enters the order states that there is "no just reason for delay" pursuant to G.S. 1A-1, Rule 54(b), or when the court's order affects a substantial right of the appellant. *See Cunningham*, 51 N.C. App. at 266, 276 S.E.2d at 721.

In the case at bar, the court entered a revised order in which it stated, *inter alia*, that "There is no genuine issue as to any material fact on the punitive damages claim; that there is no just reason for delay; that the defendants are entitled to a partial summary judgment as a matter of law . . . this partial summary judgment is a final judgment[.]" Consequently, the trial court certified this case for appellate review. Furthermore, we find that according to *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987), and *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976), this appeal involves plaintiffs' "substantial right to have all of [their] claims for relief tried at the same time before the same judge and jury . . ." *Byrne* at 264, 354 S.E.2d at 279. Therefore, this appeal is properly before us as it meets the requirements of *Cunningham*.

II.

[2] Our next issue involves the question of whether the court erred in granting defendants' motions for summary judgment. The rule regarding motions for summary judgment states that:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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) (1983). In a summary judgment hearing, all facts must be viewed in the light most favorable to the nonmoving party. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). Furthermore, the court must consider evidence beyond the mere pleadings. *Id.* "The determination of what constitutes a 'genuine issue as to any material fact' is often difficult." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Plaintiffs' amended complaint claims that defendants' conduct of (1) using a broken hydraulic jack on their trailer after it had been broken for some time, and (2) their failure to properly immobilize the trailer before "safely" unhitching it from the truck

BUTT v. GOFORTH PROPERTIES, INC.

[95 N.C. App. 615 (1989)]

constitute a willful, wanton disregard for the rights of plaintiffs. Also, plaintiffs introduced two affidavits in opposition to defendants' motions. One affidavit was from a licensed general contractor who had been in the construction industry for twenty-four years. That affiant stated that he was very familiar with construction standards and safety measures, and that "several things occurred in this incident that were entirely contrary to established construction practices and all safety regulations outlined and prescribed by the Association of General Contractors" It was his opinion that no heavy equipment trailer should be unhitched from a truck without proper wheel chocks behind both rear tires. He stated that "the workers involved violated established construction standards"

The second affidavit submitted by plaintiffs was from a certified engineer. This affiant received his B.S. in engineering in 1959. Based upon his review of certain depositions given by defendants' employees, and an examination of certain photographs from this incident, he concluded that "this trailer crash resulted from the extremely poor judgment of the two men in charge of the equipment. . . . [T]his incident resulted from poor safety training and supervision by the companies employing these men." The affiant stated that this improper side-hill hitch separation while using improper equipment was "unconscionable."

Plaintiffs claim that these materials created a question of fact as to whether defendants' conduct constituted a willful, wanton, or reckless disregard for their rights and safety. Defendants contend that plaintiffs' evidence demonstrated as a matter of law that their conduct was not willful or wanton because plaintiffs presented no evidence that defendants intended to injure them.

The established law in North Carolina regarding the recovery of punitive damages in tort actions is that 'the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed' When the underlying action is grounded in negligence, punitive damages may be recovered where the negligence is gross or wanton. 'Conduct is wanton when in conscious and intentional disregard of or indifference to the rights and safety of others.'

Paris v. Kreitz, 75 N.C. App. 365, 373-74, 331 S.E.2d 234, 241, *disc. rev. denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). (Citations omitted.) Punitive damage awards are intended to punish a defend-

BUTT v. GOFORTH PROPERTIES, INC.

[95 N.C. App. 615 (1989)]

ant for his wrongful acts and to deter others from committing the same acts. *Id.* Consequently, the trial court must review the facts before it to determine whether there is any evidence to be submitted to the jury on the issue of punitive damages, and if so, whether the award which the jury makes is an excessive one. *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E.2d 894 (1943).

In the case at bar, plaintiffs submitted affidavits which stated that defendants' employees were extremely careless and that they exercised poor judgment. One affiant suggested that the defendants' employees deviated from customary practices in the industry and that an alternative was available—the workers could have moved the truck to level ground before unhitching it. On the other hand, defendants' employees testified at their deposition hearings that the truck's jack had only been broken for approximately one week, and that a new part had been ordered for the truck immediately after it was discovered that the truck was in disrepair. Another employee stated that a cylinder block had been placed behind a wheel of the truck and that the incline was not a very steep one.

The trial judge concluded that this evidence was insufficient to raise a jury question concerning punitive damages. We agree. This evidence, which neither party disputes, demonstrates that defendants may have been negligent. However, these facts do not rise to the level of willful or wanton conduct. Plaintiffs' evidence falls short of raising a question as to whether defendant recklessly disregarded their rights or safety. *See Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E.2d 333 (1955).

Based upon the foregoing, we affirm the trial court's entry of summary judgment on plaintiffs' punitive damages claim.

Affirmed.

Judges EAGLES and PARKER concur.

HUNT v. SCOTSMAN CONVENIENCE STORE

[95 N.C. App. 620 (1989)]

HAROLD HUNT, EMPLOYEE, PLAINTIFF v. SCOTSMAN CONVENIENCE STORE
No. 93, EMPLOYER, AND HOME INSURANCE COMPANY, CARRIER, DEFENDANT

No. 8810IC1397

(Filed 19 September 1989)

**Master and Servant § 65.2— workers' compensation— back injury—
plaintiff's testimony not credible**

The evidence was sufficient to support the Industrial Commission's denial of plaintiff's claim for compensation for a back injury on the ground that plaintiff's testimony as to how the injury occurred was not credible and failed to establish an injury by accident.

ON 21 June 1985 plaintiff, a store clerk for Scotsman Convenience Store No. 93, allegedly injured his back while lifting a crate of empty drink bottles. According to plaintiff, he was lifting the crate when a customer came up behind him and spoke to him in a loud voice, startling plaintiff and causing him to turn sharply and injure his back. Defendants refused to acknowledge plaintiff's injury, and as a result plaintiff filed a workman's compensation claim and requested a hearing.

After a hearing on 14 April 1987, the Deputy Commissioner denied plaintiff's claim. In his opinion and award the Deputy Commissioner made the following findings and conclusions which were excepted to by defendant:

The plaintiff's testimony was not credible. His testimony was notable for its constant exaggeration and misstatement of the truth. For instance, on cross-examination, the plaintiff initially stated categorically that he had never hurt his back prior to August of 1984. However, the stipulated medical records of Drs. Patterson and Cox indicate that on August 7, 1984 the plaintiff gave Dr. Cox 'a history of similar back pain with radiation into the left leg several years ago when a large crate fell on him. He was hospitalized and treated medically at this time for about three weeks.' The plaintiff also gave Dr. Cox a history of 'persistent chronic back pain.'

Other testimony notable for its distortion of the facts involved the plaintiff's contention that he 'was in pretty good shape' prior to the alleged accident on June 21, 1985. In actuali-

HUNT v. SCOTSMAN CONVENIENCE STORE

[95 N.C. App. 620 (1989)]

ty, the stipulated medical records indicate that the plaintiff suffered from a medley of physical problems including high blood pressure, osteoarthritis, insulin dependent diabetes, exogenous obesity, hiatal hernia, degenerative joint disease, peptic ulcer, dysphagia, depression, pneumonia, chronic lung disease, arthritis in the spine, frequent skin lesions or infections, depression, and chest pain which had necessitated a trip to the emergency room in Greenville as recently as April 20, 1985. In addition, plaintiff had had ear and knee surgery.

Finally, the plaintiff claimed that his weight at the time of the accident was 'in the neighborhood of 200 pounds.' However, the stipulated medical records reveal that on November 21, 1984 his weight was 260 pounds and on July 30, 1985 his weight was 249 pounds. In order for the plaintiff's testimony to have been accurate, he would have needed to lose approximately 60 pounds in the six months between November 21, 1984 and the date of the alleged accident on June 21, 1985 and then regain approximately 50 pounds in the 39 days between June 21, 1985 and July 30, 1985. The possibility of this having happened is regarded as extremely remote.

The plaintiff's demeanor at the hearing and his misstatements of evidence compel a finding of the alleged injury by accident are not accepted as credible.

4. The plaintiff did not sustain an injury by accident as alleged on June 21, 1985.

Plaintiff appealed to the full commission which affirmed the Deputy Commissioner's order and award.

Hugh D. Cox for plaintiff-appellant.

Hedrick, Eatman, Gardner and Kincheloe, by Francis B. Prior and Anne Strader Tise, for defendant-appellees.

LEWIS, Judge.

Plaintiff brings forward the following three assignments of error:

1. The Full Commission's affirmation of the Opinion and Award of the . . . Deputy Commissioner of the North Carolina Industrial Commission, in his Finding of Fact No. 3 that the

HUNT v. SCOTSMAN CONVENIENCE STORE

[95 N.C. App. 620 (1989)]

plaintiff's testimony was not credible because of exaggeration and misstatement of the truth. . . .

2. The Full Commission's affirmation of the Opinion and Award of the . . . Deputy Commissioner of the North Carolina Industrial Commission, in his Finding of Fact No. 4 that the plaintiff did not sustain an injury by accident. . . .

3. The Full Commission's affirmation of the Opinion and Award of the . . . Deputy Commissioner of the North Carolina Industrial Commission, in his Conclusion of Law No. 1 that the plaintiff's testimony did not establish credible evidence of his injury by accident which entitles the plaintiff to benefits under General Statute Section 97-29.

Plaintiff's assignment of errors are to the Commission's findings of fact and conclusions as to plaintiff's credibility. The law is well established that the Industrial Commission is the sole judge of the credibility of witnesses and the weight of testimony before the court. *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981); *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985); *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965). On appeal from an award of the Industrial Commission the jurisdiction of the court is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact. *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950). Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commissioner is conclusive on appeal. *Dolbow v. Holland Indus., Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). The duty of this Court in reviewing the validity of the award on appeal is to ascertain whether there is *any* competent evidence in the record to support such a finding. *Dolbow, supra*.

The Deputy Commissioner's specific findings setting forth the basis for his determination that the plaintiff was less than credible are supported by the record. Plaintiff, on cross examination, admitted to the many discrepancies contained in his direct testimony. His misstatements coupled with his lengthy history of back injury as well as many other ailments, supports the Commission's findings. The fact that plaintiff's doctor testified that plaintiff's disability was attributable entirely to his alleged accident at defendant's

CITY FINANCE CO. v. MASSEY MOTOR CO.

[95 N.C. App. 623 (1989)]

store is not ground for reversal. The Commission is free to assign more weight or credibility to certain testimony than to other testimony. *Dolbow, supra*.

Accordingly, we affirm.

Affirmed.

Judges ARNOLD and ORR concur.

CITY FINANCE COMPANY, INC. v. MASSEY MOTOR COMPANY, INC.

No. 888DC1291

(Filed 19 September 1989)

**Uniform Commercial Code § 45— sale of collateral—automobile
—notice to subordinate creditor omitted**

The trial court correctly granted defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of an action seeking damages for failing to notify plaintiff of a disposition of collateral in which plaintiff had a subordinate security interest where Wachovia Bank had financed the purchase of a car for an individual; Wachovia had recorded a lien on the title of the car and plaintiff had recorded a second lien; Wachovia repossessed the car and, pursuant to a recourse agreement with defendant, assigned its title on the auto to defendant; and defendant subsequently sold the car without giving notice to plaintiff. Although plaintiff contends that the automobile became inventory when the dealer repossessed the automobile and that further notice was then required, the issue turns on the classification of the car at the time plaintiff entered into a security agreement with the individual who owned the car, and the car was consumer goods at the time plaintiff entered into the finance arrangement. To have protected its interest in the collateral as a subordinate secured party, plaintiff at the time the loan was made could have notified defendant or its assignor by letter of its demand that any proceeds remaining after a disposition of collateral be applied toward satisfaction of plaintiff's security interest. N.C.G.S. § 25-9-504.

CITY FINANCE CO. v. MASSEY MOTOR CO.

[95 N.C. App. 623 (1989)]

APPEAL by plaintiff from *Setzer, Judge*. Order entered 25 August 1988 in District Court, LENOIR County. Heard in the Court of Appeals 22 August 1989.

In this civil action plaintiff seeks damages from defendant for failing to notify it of a disposition of collateral in which plaintiff had a security interest. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim upon which relief could be granted. After a hearing on the motion, an order was entered dismissing the complaint against the defendant, from which the plaintiff appeals. Plaintiff's complaint contains the following allegations of fact:

Plaintiff and defendant are both North Carolina corporations principally located in Kinston, Lenoir County. On 10 May 1984, Wachovia Bank financed the purchase of a car for an individual. The bank recorded a lien on the title of the car with the Department of Motor Vehicles. On 5 September 1986, plaintiff recorded a second lien on the title of the car with the Department of Motor Vehicles. In March 1986 the bank repossessed the car, and, pursuant to a recourse agreement with the defendant, assigned its lien on the auto to the defendant. Subsequently, defendant sold the car without giving notice to the plaintiff, which, plaintiff complains, is required by N.C.G.S. § 25-9-504(3). As a result of the lack of notice, plaintiff claims that it was unable to protect its interest in the car and was damaged in the amount of \$2,400.57 plus interest.

Harrison and Simpson, by Fred W. Harrison, for plaintiff appellant.

White & Allen, by David J. Fillippeli, Jr., for defendant appellee.

ARNOLD, Judge.

The trial court did not err in dismissing plaintiff's complaint for failure to state a claim on which relief can be granted.

A motion made pursuant to N.C.R. Civ. Pro. 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 106, 176 S.E.2d 161, 168 (1970). In judging a motion made pursuant to N.C.R. Civ. Pro. 12(b)(6), the allegations of the complaint must be taken as true. *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 sup-

CITY FINANCE CO. v. MASSEY MOTOR CO.

[95 N.C. App. 623 (1989)]

port of the claim." W. Shuford, *N.C. Civil Practice and Procedure* § 12-10 (1988).

The Uniform Commercial Code, Chapter 25, Article 9 of the North Carolina General Statutes governs security interests in goods. N.C.G.S. § 25-9-504(3) states the law which governs the outcome of this appeal:

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

* * * *

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. *In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.*

Whether the defendant must give the plaintiff notice depends entirely upon the classification of the car under the Uniform Commercial Code. Plaintiff argues that when the dealer repossessed the automobile, "it ceased to be consumer goods and became inventory." Plaintiff correctly states that if the automobile was inventory, further notice may have been required, if plaintiff had made written notice of a claim of interest in the collateral. However, the weight of authority defies plaintiff's interpretation of the statute.

A car, such as the collateral in this case, is a consumer good if used or bought primarily for personal use. N.C.G.S. § 25-9-109. See *Joyce v. Cloverbrook Homes, Inc.*, 81 N.C. App. 270, 273,

CITY FINANCE CO. v. MASSEY MOTOR CO.

[95 N.C. App. 623 (1989)]

344 S.E.2d 58, 60 (1986). "The manner in which a product is classified is determined at the time of agreement between the parties giving rise to the security interest, and, as to them, the categorization remains unaffected by a later transfer of the product in question." *Franklin Investment Co. v. Homburg*, 252 A. 2d 95, 98 (1968); see 77 A.L.R.3d 1225, 1235; White and Summers *Uniform Commercial Code* § 22-9 (Third Edition 1988). Therefore, the issue in this case turns on the classification of the car at the time plaintiff entered into a security agreement with the individual who owned the car.

In its complaint plaintiff does no more than identify by name the individual who bought the car, and who, in 1986, made a finance agreement with the plaintiff. Plaintiff contends that "when the dealer repossessed the automobile, it ceased to be consumer goods," thereby admitting, at least until the time of repossession, that the car was consumer goods. Nothing else appearing, we conclude that the car was consumer goods at the time plaintiff entered into the finance arrangement.

N.C.G.S. § 25-9-504(1) addresses the question of how proceeds from the sale of collateral are to be applied. To have protected its interest in the collateral as a subordinate secured party, plaintiff could have, at the time the loan was made, notified defendant (or its assignor) by letter of its demand that any proceeds remaining after a disposition of collateral by defendant be applied toward satisfaction of plaintiff's security interest. N.C.G.S. § 25-9-504(1)(c).

The order of the trial court dismissing plaintiff's complaint for failure to state a claim is

Affirmed.

Judges BECTON and COZORT concur.

STATE v. WILLIAMS

[95 N.C. App. 627 (1989)]

STATE OF NORTH CAROLINA v. BOBBY RAY WILLIAMS

No. 883SC1204

(Filed 19 September 1989)

1. Burglary and Unlawful Breakings § 5.5; Criminal Law § 60.5—fingerprint evidence—sufficiency of evidence of felonious breaking or entering

The evidence with regard to the presence of defendant's fingerprints on both sides of a window to a stranger's room in which there was no apparent reason for his presence and from which a television had recently been taken was sufficient to support his conviction of felonious breaking or entering.

2. Criminal Law § 116— request for instruction on defendant's silence—requested instruction given in substance

Defendant's requested instruction that the jury not presume from his silence any admission that his fingerprints were impressed at the crime scene at the time the crime was committed was given in substance when the court instructed that defendant's decision not to testify should create no presumption against him and that his silence should not influence their decision in any way.

APPEAL by defendant from *Wright (Paul), Judge*. Judgment entered 20 November 1987 in Superior Court, PITT County. Heard in the Court of Appeals 21 August 1989.

The defendant was indicted on 8 September 1987 on charges of first degree burglary, felonious larceny and felonious possession of stolen goods for allegedly stealing a television from the room of a nursing home resident. At trial, the State produced evidence indicating the presence of defendant's thumbprint on a ledge inside the room's window and three of his fingerprints on the aluminum frame of the outside screen. He was convicted on 20 November 1987 by a jury of the lesser included offense of felonious breaking or entering. The trial court sentenced the defendant to an active term of nine years and nine months. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Greenville Public Defender Robert L. Shoffner, Jr., by Assistant Public Defender Arthur M. McGlaufflin, for defendant-appellant.

STATE v. WILLIAMS

[95 N.C. App. 627 (1989)]

LEWIS, Judge.

I

[1] Defendant argues that the court committed reversible error by denying his motion to dismiss all charges against him upon the completion of the presentation of evidence by the State.

In determining whether to grant a defendant's motion to dismiss, the trial court must consider all the evidence admitted in the light most favorable to the State and decide whether there is substantial evidence of each element of the offense charged and that the defendant committed it.

State v. McLaurin, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987), citing *State v. LeDuc*, 306 N.C. 62, 74-5, 291 S.E.2d 607, 615 (1982). The evidence is considered substantial if a reasonable mind might accept it as adequate to support a conclusion. *Id.*, citing *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). On the other hand, the motion to dismiss should be granted if the evidence produced is sufficient only to raise a suspicion or conjecture as to the commission of the crime or identity of the perpetrator. *State v. McLaurin*, 320 N.C. at 146-7, 357 S.E.2d at 638, citing *State v. LeDuc*, 306 N.C. at 75, 291 S.E.2d at 615 (1982).

We hold that the presence of defendant's fingerprints on both sides of a window to a room in which there was no apparent reason for his presence and from which a television had recently been taken, is evidence sufficient to support a conclusion with respect to the charges against the defendant. In addition, windows are not customary entranceways to rooms. See *State v. Brown, supra*. Defendant's argument on appeal speaks almost exclusively to the fact that the State could not establish that the fingerprints were impressed on the day the television was taken. The rule in a case involving fingerprint evidence is that a motion for dismissal is properly denied if in addition to testimony by a qualified expert that fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find the fingerprints were impressed at the time the crime was committed. *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983). Noting the presence of the fingerprints on both sides of the window and expert testimony that the prints were likely impressed within the past few hours, as well as the absence of any other explanation for defendant's entrance to a stranger's

STATE v. WILLIAMS

[95 N.C. App. 627 (1989)]

room through the window, we conclude that the judge did not err in denying the defendant's motion to dismiss. This evidence, though somewhat circumstantial, was substantial and adequate to support a conclusion of guilt when construed in light most favorable to the State and sufficient to support denial of the motion to dismiss. *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979).

II

[2] Defendant also assigns as error the trial court's rejection of defendant's requested instruction to the jury. The requested instruction read as follows:

You as members of the jury are not permitted to infer solely from Bobby Ray Williams' silence that his fingerprint, if any, could only have been impressed upon the window ledge and screen frame in Room 123 of the Greenville Villa nursing home during the commission of the crime.

Defendant cites *State v. Bradley*, *supra*, for the proposition that the court must give a requested instruction in substance when it is correct in law and supported by the evidence. The court did give the following instructions:

Mr. Williams, in this case, has not testified. The law of North Carolina and the United States gives him this privilege. This same law also assures him that his decision not to testify is to create no presumption against him. Therefore, his silence is not to influence your decision in any way. In fact, you are not to even bring it up in your deliberations in the jury.

Fingerprints corresponding to those of the defendant, Bobby Ray Williams, are without probative force unless circumstances show that they could only have been impressed at the time the crime was committed. The burden is not upon the defendant to explain the presence of his fingerprints, but upon the State to prove his guilt beyond a reasonable doubt.

When a requested instruction is correct in law and supported by the evidence, the trial court must give the instruction in substance. *Id.*, citing *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). While defendant's requested instructions are correct in law, *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979), the trial court is not required to charge the jury in the exact language requested by the defendant. *State v. Carson*, 80 N.C. App. 620, 625, 343

HAILEY v. ALLGOOD CONSTRUCTION CO.

[95 N.C. App. 630 (1989)]

S.E.2d 275, 278 (1986), *citing State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). The instructions given were correct.

The defendant bears the burden, when challenging a jury instruction, to show that a different result would have been reached had the requested instruction been given, or at least that the jury was misled or misinformed. *Id.* The defendant has failed to carry this burden. The defendant asked for the jury to be instructed that they not presume from his silence any admission that his fingerprints were impressed at the scene at the time the television was taken. The trial judge instructed the jury that the defendant's decision not to testify should create no presumption against him, and that his silence should not influence their decision in "any way." In our view the import of the requested instruction is covered by the instructions given. Our review of those instructions given by the trial judge in their context in the record leads us to conclude that the requested instructions were given "in substance." *See State v. Monk, supra.* We find no error in the judge's refusal of the requested jury instructions.

No error.

Chief Judge HEDRICK and Judge ORR concur.

AGGIE L. HAILEY v. ALLGOOD CONSTRUCTION COMPANY, INC. AND DAVID
J. MARCONE

No. 8920DC14

(Filed 19 September 1989)

**Rules of Civil Procedure § 13— conversion action not compulsory
counterclaim to contract action**

Plaintiff's claim for conversion of screens, storm doors, frames and other materials was not a compulsory counterclaim to a prior action brought by defendant in another county to recover on a contract to install vinyl siding on plaintiff's home.

APPEAL by plaintiff and defendants from *Honeycutt, Judge*.
Order entered 9 August 1988 in District Court, ANSON County.
Heard in the Court of Appeals 25 August 1989.

HAILEY v. ALLGOOD CONSTRUCTION CO.

[95 N.C. App. 630 (1989)]

This is a civil action in which plaintiff alleges that on or about 25 April 1987 defendant Allgood's agents and defendant Marcone, or his agents, "took and carried away and stole property owned by the plaintiff, namely screens, stormdoors, frames and other materials owned by the plaintiff." Plaintiff seeks compensatory and punitive damages. Defendants answered and denied all material allegations in plaintiff's complaint. Defendants also asserted that plaintiff's claim was a compulsory counterclaim that was required to have been filed in a prior action between the parties. Defendants moved for dismissal under Rules 12(b)(6), 13(a), and 11(a) of the North Carolina Rules of Civil Procedure. Defendants also requested attorney's fees under Rule 11 and G.S. 6-21.5.

The prior action between the parties was commenced on 18 September 1987 when Allgood filed suit in District Court, Guilford County, against Hailey. There Allgood alleged that Hailey entered into a contract with Allgood for the installation of vinyl siding on Hailey's home and that Hailey owed \$840 on the contract which she refused to pay. The contract was alleged to have been entered into on or about 27 March 1987 and completed on or before 24 April 1987. On 4 January 1988 default judgment was entered against Hailey in Guilford County.

In this action the trial court granted defendants' Rule 13(a) motion to dismiss but denied defendants' motion for attorney's fees. Plaintiff appeals the dismissal of her action. Defendants cross-appeal the trial court's denial of attorney's fees.

Henry T. Drake for plaintiff-appellant, cross-appellee.

Henson, Henson, Bayliss and Teague, by Perry C. Henson, Jr. and Kenneth B. Rotenstreich, for defendant-appellees, cross-appellants.

EAGLES, Judge.

Initially we address defendants' motion to dismiss for failure to timely file the record on appeal. Rule 12(a) of the North Carolina Rules of Appellate Procedure provides that the appellant shall file the record on appeal within 15 days after the record is settled. Additionally, Rule 25 states that on motion of any party an appeal may be dismissed for failure to act within the time allowed by the Rules. Although the plaintiff failed to timely file in this court the record on appeal, in our discretion we suspend the requirements

HAILEY v. ALLGOOD CONSTRUCTION CO.

[95 N.C. App. 630 (1989)]

of Rule 12(a) and deem the record timely filed. See Rule 2, N.C. Rules App. Proc.

The crux of plaintiff's appeal is whether the trial court erred in granting defendants' motion to dismiss plaintiff's action for conversion as a compulsory counterclaim to the contract action filed by defendant Allgood in Guilford County. We hold that the trial court erred in finding plaintiff's claim was a compulsory counterclaim to the prior action. Therefore, we reverse the dismissal of plaintiff's claim.

G.S. 1A-1, Rule 13(a) provides in pertinent part that:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The issue here is whether plaintiff's claim for conversion arose from the same transaction or occurrence as defendant Allgood's previous contract claim.

In determining whether certain claims arose out of the same transaction or occurrence as a prior action for purposes of treating them as compulsory counterclaims, several factors are considered: (1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions. There must be not only a common factual background but also a logical relationship in the nature of the actions and the remedies sought.

Brooks v. Rogers, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986) (citations omitted).

Plaintiff excepted to the following finding made by the trial court:

The Court found as fact that the plaintiff's complaint in this lawsuit had a logical relationship in law and fact as was presented in the prior action in Guilford County and this action commenced by the plaintiff was a compulsory counterclaim arising out of the same transaction or occurrence and same subject matter as the prior lawsuit filed in Guilford County.

HAILEY v. ALLGOOD CONSTRUCTION CO.

[95 N.C. App. 630 (1989)]

Based upon the record here, we conclude that the evidence does not support the finding of fact and that the trial court erred in making this finding.

The issues of fact and law are different in plaintiff's conversion proceeding from the issues involved in Allgood's action on the contract. Plaintiff's claim requires her to prove her ownership of the personal property involved and wrongful possession or conversion of the property by defendants. See *Gadson v. Toney*, 69 N.C. App. 244, 246, 316 S.E.2d 320, 321-22 (1984). The issues in defendant Allgood's action on the contract were whether a contract had been formed, what were the terms of the contract, was the contract completed, and what amount was due. These do not overlap in the least. Additionally, each action does not involve presentation of substantially the same evidence. Plaintiff asserts the conversion occurred on 25 April 1987. Defendant Allgood asserted the contract was completed on or before 24 April 1987. Although there may be a common factual background between the two actions, this is not enough to require that plaintiff's conversion action be designated a compulsory counterclaim in defendant Allgood's Guilford County action. As this court has stated, "Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other." *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E.2d 323, 325 (1980).

In light of our determination of plaintiff's appeal, we affirm the trial court's denial of defendants' motion for attorney's fees. Defendants' assignments of error are therefore overruled.

For the reasons stated, the trial court's dismissal of plaintiff's claim is reversed and denial of defendants' motion for attorney's fees is affirmed.

Affirmed in part; reversed in part and remanded.

Judges JOHNSON and GREENE concur.

STATE v. TEW

[95 N.C. App. 634 (1989)]

STATE OF NORTH CAROLINA v. CHARLIE TEW

No. 888SC1324

(Filed 19 September 1989)

Automobiles and Other Vehicles § 126.2— breathalyzer tests— difference greater than .02— inadmissibility

Breathalyzer test results were inadmissible in a DWI prosecution pursuant to N.C.G.S. § 20-139.1(b3) where the reading for the first test was between .22 and .23, and the reading for the second test was .20, since the readings for defendant's two breathalyzer tests differed from each other by an alcohol concentration greater than .02.

Judge COZORT dissenting.

APPEAL by defendant from *Currin, Judge*. Judgment entered 21 September 1988 in Superior Court, WAYNE County. Heard in the Court of Appeals 24 August 1989.

Defendant was arrested for DWI on 22 July 1987. He was taken before State Trooper J. D. Booth who administered two tests of defendant's breath for alcohol content. The first test recorded an alcohol concentration of between .22 and .23 grams of alcohol per 210 liters of breath (the reading appears to have been closer to .23, and defendant contends that it was .226). The second test recorded an alcohol concentration of .20 grams of alcohol per 210 liters of breath.

Defendant was tried and convicted of DWI on 24 March 1988 in district court. He appealed to the superior court for a trial *de novo*. At the beginning of the trial, defendant orally moved to suppress the results of the chemical analysis. The trial court held a *voir dire* on the motion, but ultimately denied it. Defendant then entered a plea of guilty, but reserved his right to appeal. The trial court found the defendant guilty of DWI, and from that judgment defendant appeals.

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

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

STATE v. TEW

[95 N.C. App. 634 (1989)]

ARNOLD, Judge.

The procedures governing the admissibility and performance of a breath test are contained in N.C.G.S. § 20-139.1. The relevant portion of this statute provides:

(b) . . . A chemical analysis, to be valid, must be performed in accordance with the provisions of this section. The chemical analysis must be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Human Resources for that type of chemical analysis. The Commission for Health Services is authorized to adopt regulations approving satisfactory methods or techniques for performing chemical analyses

In addition, subsection (b3) provides:

By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the breath must require the testing of at least duplicate sequential breath samples. Those regulations must provide:

* * * *

- (2) That the test results may only be used to prove a person's particular alcohol concentration if:
 - a. The pair of readings employed are from consecutively administered tests; and
 - b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

N.C.G.S. § 20-139.1(b3).

The Commission for Health Services has published operating procedures for conducting breathalyzer tests pursuant to N.C.G.S. § 20-139.1(b). Regulation 7B.0354 provides in part:

(a) When performing chemical analyses of breath under the authority of G.S. 20-139.1 and the provisions of these rules, chemical analysts shall report alcohol concentrations on the basis of grams of alcohol per 210 liters of breath. All results

STATE v. TEW

[95 N.C. App. 634 (1989)]

shall be reported to hundredths. Any result between hundredths shall be reported to the next lower hundredth.

N.C. Admin. Code tit. 10, r. 7B.0354 (eff. Feb. 1987).

Following the regulations of the Commission for Health Services, Trooper Booth rounded the first test results down to .22. He then recorded the two readings as .22 and .20 (by rounding down the first reading, the two results were within .02 of each other which is required by N.C.G.S. § 20-139.1(b3)).

The readings from defendant's two breath tests differed from each other by an alcohol concentration greater than 0.02. Defendant's motion to suppress the test results should have been granted.

Reversed.

Judge BECTON concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I do not disagree with the majority's literal interpretation of the specific statute at issue here. Nonetheless, I believe that, when this specific statute is considered *in pari materia* with the rest of the statutes on procedures governing chemical analyses, the General Assembly did not intend for the evidence of breathalyzer readings to be suppressed when the "rounded down" readings are within .02. *Cf. Pollard v. Smith*, 324 N.C. 424, 378 S.E.2d 771 (1989).

N.C. Gen. Stat. § 20-139.1 permits the admission in evidence of the lower reading of a pair of consecutively administered tests. The purpose underlying the requirement of at least two tests is to assure the accuracy of the readings. *State v. White*, 84 N.C. App. 111, 114, 351 S.E.2d 828, 830, *appeal dismissed*, 319 N.C. 409, 354 S.E.2d 887 (1987). I believe that purpose is fulfilled when the "rounded down" readings are within .02 of each other.

In the case below, the first reading was between .22 and .23 and the second was .20. I do not believe those readings demonstrate unreliability of the machine. I also take judicial notice that these readings indicate an excessive consumption of alcohol. A purely technical reading of the statute works to suppress evidence of this excessive consumption. I vote to affirm the trial court's ruling denying the motion to suppress.

BLACKWELL v. DOROSKO

[95 N.C. App. 637 (1989)]

BRETT BLACKWELL AND DANA E. BLACKWELL v. GEORGE DOROSKO, CHARLES H. WEST, AND CAROLINA BEACH REALTY, INC. v. KICK ENTERPRISES, INC., D/B/A CAROLINA BEACH REALTY, AND SEASIDE REALTY, D/B/A CAROLINA BEACH REALTY

No. 885SC650

(Filed 19 September 1989)

Vendor and Purchaser § 6; Unfair Competition § 1— earlier opinion— sale of beachfront property— summary judgment upheld— withdrawn in part

An earlier opinion in the same matter, 93 N.C. App. 310, was withdrawn in part on reconsideration by the Court of Appeals because the trial court made a finding that attempted to resolve an issue of material fact concerning defendant West's offer to contact the Homeowner's Association for plaintiffs, rendering summary judgment invalid as to the fraud and negligent misrepresentation claims against defendants West and Carolina Beach Realty. Moreover, the Court of Appeals misstated the legal standard governing unfair and deceptive trade practices by defining a deceptive practice as one "calculated" to deceive the other party, when in fact *Marshall v. Miller*, 302 N.C. 539, defines a deceptive trade practice as "one that has the capacity or tendency to deceive"; proof of actual deception is not required under the statute.

APPEAL by plaintiff from *Napoleon B. Barefoot, Judge*. Judgment entered 30 March 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 January 1989. Plaintiff-appellants' petition for rehearing allowed 8 May 1989.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellants.

Burney, Burney, Barefoot & Bain, by Roy C. Bain, for defendant-appellees Charles H. West and Carolina Beach Realty, Inc.

Prickett and Corpening, by Carlton S. Prickett, Jr.; and by Bruce H. Jackson, Jr., for defendant-appellee George Dorosko.

BECTON, Judge.

In an opinion in the above-styled matter filed 4 April 1989, this court affirmed summary judgment in favor of defendants on plaintiffs' claims of fraud, negligent misrepresentation, and unfair

BLACKWELL v. DOROSKO

[95 N.C. App. 637 (1989)]

and deceptive trade practices. We granted plaintiffs' petition to rehear in order to consider whether we misstated the legal standard for a claim asserted under N.C. Gen. Stat. Sec. 75-1.1 and whether we improperly affirmed the trial court's entry of summary judgment. We now withdraw our previous opinion in part, and we reverse and remand with respect to defendants West and Carolina Beach Realty.

Petitioners allege that the trial judge's making of findings of fact in his summary judgment order was improper. In ruling on a motion for summary judgment, a judge may recite the material facts forming the basis of his judgment when those facts are not at issue. *See Stone v. Conder*, 46 N.C. App. 190, 195, 264 S.E.2d 760, 763, *disc. rev. denied*, 301 N.C. 105 (1980). Petitioners argue that the judge's finding that defendant West offered to contact the Homeowner's Association for plaintiffs—which we accepted as a fact not at issue on the basis of our reading of Brett Blackwell's second deposition—is not supported by the record. Upon reconsideration, we now conclude that the deposition passage cited by the trial judge and by us does not, when read in a light most favorable to plaintiffs, *see Brice v. Moore*, 30 N.C. App. 365, 367, 226 S.E.2d 882, 883 (1976), demonstrate unequivocally that Mr. West made such an offer. Therefore, we conclude that the judge made a finding that attempted to resolve an issue of material fact, rendering the entry of summary judgment inappropriate. *See Stone*, 46 N.C. App. at 195, 264 S.E.2d at 763. Consequently, we vacate the award of summary judgment on the fraud and negligent misrepresentation claims as to defendants West and Carolina Beach Realty.

The forecast of the evidence does not demonstrate that plaintiffs ever met with defendant Dorosko or that Mr. Dorosko ever made any representations to plaintiffs. Further, the evidence does not show that Mr. Dorosko exercised any control over the realtors who brokered the sale of his condominium so as to suggest his vicarious liability. *See Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979). We hold, therefore, that the evidence in the record is insufficient as a matter of law to allow plaintiffs to proceed on these counts against Mr. Dorosko, and we hold that summary judgment was properly entered in his favor on these counts.

Our opinion misstated the legal standard governing unfair and deceptive trade practices by defining a deceptive practice as one

STATE v. MORGAN

[95 N.C. App. 639 (1989)]

“calculated” to deceive the other party. *Blackwell v. Dorosko*, 93 N.C. App. 310, 314, 377 S.E.2d 814, 818 (1989). We used this standard to hold that the depositions showed no evidence that defendant West “attempted to deceive” plaintiffs through misrepresentations. *Marshall v. Miller*, which we cited, in fact defines a deceptive trade practice as “one that has the *capacity or tendency* to deceive”; proof of actual deception is not required under the statute. 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (emphasis added). Our opinion misapplied *Miller*, and the basis upon which we affirmed summary judgment on this count for defendants West and Carolina Beach Realty cannot stand. We affirm summary judgment for defendant Dorosko on the same ground we articulated in our original opinion. See *Blackwell*, 93 N.C. App. at 314, 377 S.E.2d at 817-18.

The judgment of the trial court as to defendant Dorosko is affirmed; as to defendants West and Carolina Beach Realty, the judgment is

Reversed and remanded.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. DOUGLAS WAYNE MORGAN

No. 8830SC1396

(Filed 19 September 1989)

Narcotics § 1.3— defendant as purchaser of cocaine—conviction for conspiracy to possess cocaine with intent to sell or deliver improper

Defendant could not be convicted for conspiracy to possess cocaine with intent to sell or deliver because he was the purchaser to whom delivery was to be made and as such could not have had the requisite intent to sell or deliver.

APPEAL by defendant from *Gardner (John Mull)*, Judge. Judgment entered 24 August 1988 in Superior Court, JACKSON County. Heard in the Court of Appeals 28 August 1989.

On 7 October 1987 three men in an automobile were stopped by the SBI and arrested for possession of 18.8 grams of cocaine

STATE v. MORGAN

[95 N.C. App. 639 (1989)]

found in a drink cup in the middle of the front passenger floorboard. The defendant was not in the car. The front passenger, Mr. Kirby Queen, made a plea arrangement with the district attorney's office and said that he had bought the cocaine for the defendant, upon the defendant's request and using the defendant's money. He testified that he gave the money to a seller who delivered the cocaine to another passenger in the car, who in turn delivered it to him. The third passenger, upon a like plea arrangement, also implicated the defendant. At trial the defendant denied having engaged in any drug transactions.

The defendant was indicted for Conspiracy to Possess Cocaine with Intent to Sell or Deliver, and convicted on that charge. G.S. 90-98. Defendant sets forth three assignments of error. Defendant contends 1) that he was deprived of the effective assistance of counsel because counsel failed to move for dismissal at the close of all the evidence, 2) that the State's evidence was insufficient as a matter of law because it did not establish intent to sell or deliver the cocaine on the part of defendant, and 3) that the court admitted prejudicial evidence of previous drug transactions between the conspirators.

Attorney General Lucy H. Thornburg, by Associate Attorney General David N. Kirkman, for the State.

Smith & Queen, by Frank G. Queen, for defendant-appellant.

LEWIS, Judge.

Defendant contends that he was deprived of effective counsel and the possibility of appellate review because his counsel failed to move to dismiss at the close of the evidence. Appellate Rule 10(b)(3) states that a defendant who fails to so move to dismiss at the close of the evidence may not challenge on appeal the sufficiency of the evidence. In our discretion, we choose to review the sufficiency of the evidence pursuant to Appellate Rule 2.

Defendant contends that he cannot be convicted for conspiracy to possess cocaine with intent to sell or deliver, because he was the purchaser to whom delivery was to be made and as such could not have had the requisite intent to "sell or deliver." The defendant asserts and the State admits that this criminal charge is normally applied to those who conspire to sell or deliver cocaine to a third party, and that there is no precedent for the application of the

STATE v. MORGAN

[95 N.C. App. 639 (1989)]

charge to the purchaser when the purchaser is the one for whom the delivery is intended. Defendant argues that the " 'sale or delivery' called for in the statute is *not* a sale or delivery between conspirators: otherwise, *every* conspiracy to possess would include the element of sale or delivery," thereby undermining the difference between conspiracy to possess and conspiracy to possess with intent to sell or deliver. The two charges are clearly distinguished for purposes of punishment in G.S. 90-95(c) and (d). Defendant adds that "the only logical reading of the statute is that the 'sale or delivery' requirement means an intention to sell or deliver the drug to some other, third person—not a co-conspirator."

The defendant's assignment of error is valid. Had the delivery been executed and defendant received the narcotics, he could not have been charged with Possession with Intent to Deliver or Sell here, for there is no evidence whatever of any such intent. G.S. 90-95. Precedent indicates that "intent to deliver" means intent to deliver to "another," not to receive delivery. *State v. Creason*, 313 N.C. 122, 131, 326 S.E.2d 24, 29 (1985). The offense of possession with intent to sell or deliver has three elements. 1) There must be possession of a substance. 2) The substance must be a controlled substance. 3) There must be intent to distribute or sell. G.S. 90-95, *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982). Had the transaction been completed, it would have been theoretically impossible for defendant in this case to have had both "possession" and "intent to deliver" simultaneously. Where a defendant could not have been charged with Possession with Intent to Sell or Deliver had the act been accomplished, he cannot here be charged with Conspiracy to Possess with Intent to Sell or Deliver. G.S. 90-98. There is no theory of prosecution according to which this defendant can be convicted for the crime with which he is charged. We find this assignment of error valid, and accordingly, reverse. Having so reversed, we decline to consider appellant's additional assignments of error.

Reversed.

Chief Judge HEDRICK and Judge ORR concur.

VERNON v. BARROW

[95 N.C. App. 642 (1989)]

LAYMAN KEITH VERNON, PLAINTIFF v. PHILLIP M. BARROW, DEFENDANT

No. 8918DC45

(Filed 19 September 1989)

Assault and Battery § 3; Negligence § 20— injury from ricocheting bullet—assault and negligence actions—statute of limitations

Defendant's conduct in firing a gun which resulted in injury to plaintiff from a ricocheting bullet gave rise to actions for assault and battery and negligence, and where plaintiff filed his complaint some nineteen months after the incident, the assault claim was barred by the one-year statute of limitations of N.C.G.S. § 1-54(3), but the negligence claim was not barred by the statute of limitations.

APPEAL by plaintiff from *Vaden, Judge*. Order entered 31 August 1988 in District Court, GUILFORD County. Heard in the Court of Appeals 30 August 1989.

This is a civil action wherein plaintiff seeks damages for personal injuries sustained as a result of defendant's alleged negligence. The allegations in plaintiff's complaint, except where quoted, are summarized as follows: On 12 June 1984, defendant, owner of Skeeter's Lounge, went to the lounge to collect rent. Defendant noticed plaintiff standing at the bar, and defendant told him that he "should get off his property immediately." Thereafter, defendant left the lounge and went outside to the parking lot to conduct business with a customer. After finishing his business outside, defendant returned to the lounge and again asked plaintiff to leave. When plaintiff refused, defendant "pulled out a gun" and fired a shot into the floor of the lounge near plaintiff's feet. Plaintiff did not leave, so defendant fired the gun into the floor two more times. After the third shot, plaintiff felt pain in his leg and realized that one of the bullets had ricocheted, striking him in the left thigh. Defendant admitted these allegations in his answer.

On 31 August 1988, the trial court entered summary judgment for defendant based on G.S. 1-54(3), the one-year statute of limitations. In his order, the trial judge stated the following:

[T]he court finds that there is no material issue of fact that bears on the statute of limitation question, for that the firing of the pistol on June 12, 1984 by the defendant was

VERNON v. BARROW

[95 N.C. App. 642 (1989)]

intentional and the tort alleged is that of assault and not of negligence, and, therefore, this action is barred by the one-year statute of limitations, since the complaint was filed on March 20, 1986, more than one year later.

Plaintiff appealed.

Fish and Hall, P.A., by Konrad K. Fish, and Henson Henson Bayliss & Teague, by Perry C. Henson, for plaintiff, appellant.

McNairy, Clifford, Clendenin & Parks, by Locke T. Clifford, for defendant, appellee.

HEDRICK, Chief Judge.

The sole question presented on appeal is whether the trial court erred in holding that plaintiff's claim was barred by the one-year statute of limitations, G.S. 1-54(3). Plaintiff argues that defendant's conduct in firing the gun gave rise to actions for assault and battery and also for negligence. We agree.

The remedy of summary judgment is a drastic one and should be used with caution. *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976). The party moving for summary judgment must show that no genuine issue of material fact exists and that, as a result, the movant is entitled to judgment as a matter of law. *Watts v. Cumberland County Hosp. System*, 317 N.C. 321, 345 S.E.2d 201 (1986). Review of summary judgment on appeal is limited to whether the trial court's conclusions are correct as to the questions of whether there is a genuine issue of material fact and whether the movant is entitled to judgment. *Ellis v. Williams*, 319 N.C. 413, 335 S.E.2d 479 (1987).

This Court in *Lail v. Woods*, 36 N.C. App. 590, 592, 244 S.E.2d 500, 502, *disc. rev. denied*, 295 N.C. 550, 248 S.E.2d 727 (1978), stated that "[t]here are situations where the evidence presented raises questions of both assault and battery and negligence." We find this to be true in the present case. Plaintiff's forecast of evidence is sufficient to raise genuine issues of material fact regarding his negligence claim. While obviously an assault claim would be barred by the one-year statute of limitations, plaintiff has filed his claim well within the time prescribed for negligence actions. Defendant has failed to show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Thus,

STATE v. MOUL

[95 N.C. App. 644 (1989)]

the judgment of the trial court must be reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. DONALD RALPH MOUL

No. 889SC1323

(Filed 19 September 1989)

Criminal Law § 86.4— indecent liberties—prior conviction—suppressed—insufficient findings—no prejudicial error

There was no prejudicial error in a prosecution for taking indecent liberties with a child in suppressing a prior conviction in Nebraska in 1973 for contributing to the need for special supervision of a minor where the State offered no evidence or rebuttal to defendant's affidavits and allegations and there was no material conflict in the evidence before the trial court. Although the trial judge's conclusory findings do not satisfy the specific facts and circumstances requirement of N.C.G.S. § 8C-1, Rule 609(b), findings and conclusions are not necessary where there is no material conflict in the evidence.

APPEAL by the State of North Carolina from *Hight (Henry W., Jr.)*, Judge. Heard in the Court of Appeals 23 August 1989.

Defendant, an employee of Oxford Orphanage, was indicted for seven counts of taking indecent liberties with a child in violation of G.S. 14-202.1. The alleged incidents for which he was charged occurred in September, October and December of 1987. Prior to trial, the D.A. filed a "Motion to Allow Evidence of a Prior Conviction on Misconduct." The prior conviction was for "Contributing to the Need for Special Supervision of a Minor" and occurred in Nebraska in 1973. Defendant filed a response requesting a denial of the State's motion. The trial court denied the State's motion, ruling that the evidence did not satisfy G.S. 8C-1, Rule 404(b). The judge did not rule on the evidence's admissibility under G.S.

STATE v. MOUL

[95 N.C. App. 644 (1989)]

8C-1, Rule 609 but determined that the State had met Rule 609's notice requirement.

On 10 August 1988, defendant filed a pretrial motion to suppress pursuant to G.S. 15A-972 requesting 1) suppression of all evidence of defendant's prior conviction; 2) suppression of all references to the conviction; and 3) instruction by the D.A. to each State witness not to mention the conviction. The trial court granted defendant's motion after a hearing in which he made findings of fact and conclusions of law, including the following:

19. That the defendant was convicted on the 1st day of October, 1973 of contributing to the need for special supervision of a minor and was fined \$50.00 plus costs.

20. That Entry of Judgment in that matter was entered over fourteen (14) years ago and is barred by Rule 609 of Chapter 8C of the General Statutes of North Carolina from being introduced for the purpose of attacking the credibility of the defendant, Donald Ralph Moul.

21. That although the State of North Carolina has given sufficient advance notice of the intention to use the evidence of the defendant's 1973 conviction, this Court finds that the probative value of such conviction is not substantially outweighed by its prejudicial effect.

The State's subsequent motion to vacate the order was also denied. The State appeals and we affirm.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Lawrence Reeves, Jr., for the State.

J. Thomas Burnette for defendant-appellee.

LEWIS, Judge.

The State's sole assignment of error is to the lower court's suppression of defendant's prior conviction. It argues that the trial court made inadequate findings to support total suppression of the evidence and that G.S. 8C-1, Rule 609 allows introduction of the conviction to impeach the defendant should he testify.

It should be noted at the outset that our scope of review of an order such as this is strictly limited to determining whether the trial judge's underlying findings of fact are supported by compe-

STATE v. MOUL

[95 N.C. App. 644 (1989)]

tent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusion of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision. . . ." *Id.* at 134, 291 S.E.2d at 620.

We find that the trial court did not abuse its discretion in refusing to allow the admission of defendant's 1973 conviction at trial. As a general rule, after a hearing on a motion to suppress the evidence, the trial court must make written findings of fact and conclusions of law. G.S. 15-977(f); *State v. Parks*, 77 N.C. App. 778, 781, 336 S.E.2d 424, 426 (1985), *appeal dismissed and cert. denied*, 316 N.C. 384, 342 S.E.2d 904 (1986). When making its findings, G.S. 8C-1, Rule 609(b) requires that the court make findings as to the specific facts and circumstances which demonstrate that the probative value outweighs the prejudicial effect. *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985), *cert. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986).

In the present case, all the trial judge found was that the conviction was over fourteen years old and that the probative value was outweighed by the prejudicial effect. These conclusory findings do not satisfy the "specific facts and circumstances" requirement of Rule 609(b). *Id.* However, the trial court's failure to make appropriate findings is not reversible error. Where there is no material conflict in the evidence, findings and conclusions are not necessary. *State v. Edwards*, 85 N.C. App. 145, 354 S.E.2d 344, *cert. denied*, 320 N.C. 172, 358 S.E.2d 58 (1987).

In the present case, the State failed to make any objections, file an answer, or offer any evidence at the suppression hearing. Since the State offered no evidence or rebutted defendant's affidavits and allegations, there was no material conflict in the evidence before the trial court, and suppression was permissible.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE v. HOFFMAN

[95 N.C. App. 647 (1989)]

STATE OF NORTH CAROLINA v. ERNEST RAY HOFFMAN

No. 8820SC1384

(Filed 19 September 1989)

1. Criminal Law § 34.8; Rape and Allied Offenses § 4.1— prior sexual misconduct—admissibility to show common scheme or plan

Testimony by an eight-year-old rape and sexual offense victim concerning prior acts of sexual misconduct by defendant with the victim was admissible to establish a common scheme or plan by defendant to sexually molest the victim.

2. Rape and Allied Offenses § 4— evidence of failure to molest other children—irrelevancy

Testimony by parents that defendant had not molested their children and by children that defendant had not molested them was irrelevant and properly excluded in a prosecution for rape and sexual offense committed against defendant's eight-year-old niece.

3. Criminal Law § 117.5— character traits of defendant—failure to instruct—no plain error

The trial court's failure to instruct the jury in a rape and sexual offense case on certain character traits of the defendant was not plain error.

4. Rape and Allied Offenses § 6.1— rape case—instruction on attempted rape not required

The trial court in a first degree rape prosecution did not err in refusing to instruct the jury on attempted first degree rape.

5. Rape and Allied Offenses § 4.2— victim's panties—lab tests—defendant not prejudiced

Defendant was not prejudiced by the admission of panties allegedly worn by a child rape and sexual offense victim and the results of lab tests performed on the panties.

APPEAL by defendant from *Boner, Judge*. Judgment entered 21 July 1988 in Superior Court, RICHMOND County. Heard in the Court of Appeals 28 August 1989.

STATE v. HOFFMAN

[95 N.C. App. 647 (1989)]

Defendant was charged in a proper bill of indictment with one count of first degree rape in violation of G.S. 14-27.2 and one count of first degree sexual offense in violation of G.S. 14-27.4.

The evidence in the record tends to show the following: On 7 November 1987, defendant forced his eight-year-old niece to engage in repeated acts of sexual intercourse with him. On that same day, defendant also forced his five-year-old niece to engage in a sexual act with him. A jury found defendant guilty as charged on both counts. From judgments imposing two life prison terms to be served concurrently, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

Assistant Appellate Defender Mark D. Montgomery for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns as prejudicial error the trial court's allowance of testimony by the eight-year-old victim regarding prior acts of sexual misconduct. While testimony about prior acts of misconduct is not admissible to show defendant's propensity to commit the offense in question, Rule 404(b) of the North Carolina Rules of Evidence allows evidence of prior acts of misconduct if relevant for other purposes, including evidence of a common plan or scheme. In the present case, testimony regarding prior sexual misconduct by defendant with the eight-year-old victim is admissible to establish a common plan or scheme on the part of defendant to sexually molest his niece. Defendant's contention has no merit.

[2] Defendant also contends that the trial judge erred by not allowing defendant's witnesses to testify that he had not molested their children and by not allowing several children to testify that he had not molested them. Such testimony was totally irrelevant. We have examined each exception upon which defendant's assignment of error is based and conclude that the trial court did not err in excluding the testimony.

[3] Defendant's third argument, based on Assignments of Error 13 and 14, is set out in his brief as follows: "The trial court committed plain error in not instructing the jury on pertinent character traits of the defendant." Plain error arises only where error by the trial court is so fundamental as to deny a defendant a fair

TOWN OF KNIGHTDALE v. VAUGHN

[95 N.C. App. 649 (1989)]

trial or result in a miscarriage of justice. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Defendant must show, absent the error complained of, the jury would have reached a different result. *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). The failure of the trial court to instruct the jury as contended by defendant does not rise to the level of plain error in this case.

[4] Defendant also assigns error based on the denial of his request for a jury instruction on the lesser included offense of attempted first degree rape. Whether instruction on a lesser included offense is proper depends solely on whether there is evidence that would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater offense. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). The evidence in the record only tends to establish that defendant raped his minor niece. The court did not err in denying defendant's requested instruction on attempted first degree rape.

[5] In his final assignment of error, defendant contends that the trial court improperly admitted into evidence a pair of panties allegedly worn by defendant's eight-year-old niece and the results of lab tests performed on the panties. Upon consideration of defendant's argument, we find no conceivable prejudice by admission of the evidence in question.

Defendant had a fair trial free from prejudicial error.

No error.

Judges ORR and LEWIS concur.

TOWN OF KNIGHTDALE, PLAINTIFF v. PAUL ALTON VAUGHN, DEFENDANT

No. 8810SC982

(Filed 19 September 1989)

Injunctions § 13.2— zoning violation — preliminary injunction — allegation of irreparable harm — insufficient

A preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff's zoning ordi-

TOWN OF KNIGHTDALE v. VAUGHN

[95 N.C. App. 649 (1989)]

nance was vacated because plaintiff's conclusory affidavit of irreparable harm was insufficient to allow the trial court to weigh the equities and thereby determine in its sound discretion whether an interlocutory injunction should be issued or denied. N.C.G.S. § 160A-175(e). N.C.G.S. § 1A-1, Rule 65.

APPEAL by defendant from Order of *Judge Robert L. Farmer* entered 24 May 1988 in WAKE County Superior Court. Heard in the Court of Appeals 12 April 1989.

Kirk, Gay, Kirk, Gwynn & Howell, by Joseph T. Howell and Donna S. Stroud, for plaintiff appellee.

Burns, Day & Presnell, P.A., by Lacy M. Presnell, III, and Daniel C. Higgins, for defendant appellant.

COZORT, Judge.

Defendant appeals the trial court's issuance of a preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff's zoning ordinance. We hold that plaintiff failed to make the required showing of irreparable harm under N.C. Gen. Stat. § 1A-1, Rule 65. We therefore vacate the trial court's order.

Plaintiff instituted an action on 28 April 1988 alleging that defendant was operating a used car lot in violation of plaintiff's zoning ordinance. At the hearing on plaintiff's motion for preliminary injunction, the only evidence before the trial court was plaintiff's verified complaint. The complaint alleged that plaintiff had adopted a set of zoning ordinances in order to "accomplish a coordinated, balanced, and harmonious development of the land within the zoning jurisdiction"; that plaintiff "is informed and believes and therefore alleges" that defendant was the lessee of certain property within a district zoned as "Highway Commercial" and was using the property as a used car lot in violation of plaintiff's zoning ordinance; that plaintiff had no adequate remedy at law and would "suffer irreparable harm, damage, and injury unless the conduct of the Defendant above complained of is enjoined"; and that the irreparable harm "will continue during the litigation of this issue."

Based solely on plaintiff's complaint, the trial court found, *inter alia*, that defendant was using the property as a used car sales lot in violation of plaintiff's zoning ordinances, and that plaintiff had no adequate remedy at law and was suffering "real and

TOWN OF KNIGHTDALE v. VAUGHN

[95 N.C. App. 649 (1989)]

immediate irreparable injury . . . in that [defendant's] conduct represents a continuous impediment to the Plaintiff in carrying out the goals and purposes [of its zoning ordinances]." The court concluded that plaintiff was likely to prevail on the merits and would suffer irreparable harm if defendant's conduct was not enjoined. Defendant contends on appeal that the trial court's preliminary injunction was in error because plaintiff did not prove irreparable harm. We agree.

Initially, we hold that, although defendant's appeal is from an interlocutory order, defendant would be deprived of a substantial right—the right to operate his business—absent a review prior to determination on the merits. N.C. Gen. Stat. §§ 1-277, 7A-27; *Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

Before a preliminary injunction may be issued, a plaintiff must show (1) likelihood of success on the merits of its case and (2) likelihood of sustaining irreparable harm unless the injunction is issued, or if, in the court's opinion, issuance is necessary for the protection of the plaintiff's rights during the course of litigation. *Ridge Community Investor's, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). The applicant for a preliminary injunction has the burden of proving the probability of substantial injury to the applicant if the activity of which it complains continues to the final determination of the action. *Board of Provincial Elders v. Jones*, 273 N.C. 174, 182, 159 S.E.2d 545, 551 (1968). It is not enough that a plaintiff merely allege irreparable injury. Rather, "[t]he applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *United Tel. Co. of Carolina, Inc. v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). We therefore hold that plaintiff's conclusory allegation of irreparable harm was insufficient to allow the trial court to weigh the equities and thereby determine in its sound discretion whether an interlocutory injunction should be issued or refused. *Id.*

Although the General Assembly has given to municipalities the power to enforce ordinances through injunctive relief, a municipality must comply with the requirements of Rule 65 of the North Carolina Rules of Civil Procedure, which requires a clear showing of specific facts of irreparable injury. See N.C. Gen. Stat. § 160A-175(e) (1988) and N.C. Gen. Stat. § 1A-1, Rule 65(b) (1988).

FOURNIER v. HAYWOOD COUNTY HOSPITAL

[95 N.C. App. 652 (1989)]

Furthermore, the availability of injunctive relief as the appropriate ultimate remedy is not prima facie evidence establishing a municipality's right to injunctive relief prior to the resolution of a matter on its merits.

The preliminary injunction must therefore be

Vacated.

Judges PHILLIPS and PARKER concur.

ALCIDE J. FOURNIER, PLAINTIFF v. HAYWOOD COUNTY HOSPITAL,
DEFENDANT

No. 8830SC1389

(Filed 19 September 1989)

**Hospitals § 3; Physicians, Surgeons and Allied Professions § 12—
medical malpractice by hospital—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim against defendant hospital for medical malpractice where it alleged that plaintiff entered the hospital for hernia surgery; under the direction of his doctors, plaintiff was anesthetized by agents or employees of the hospital and his left arm was strapped to the operating table; immediately after the surgery, he noticed a numbness in his left hand, and this numbness has spread and worsened; and this condition has been diagnosed as ulnar neuropathy and was the direct and proximate result of the negligent procedures employed in anesthetizing and immobilizing plaintiff during surgery.

APPEAL by plaintiff from *Preston (Edwin S., Jr.)*, Judge. Order entered 7 December 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 23 August 1989.

On August 27, 1984 plaintiff entered Haywood County Hospital on the advice of his doctor, Henry B. Perry, M.D., for a right inguinal herniorrhaphy. The plaintiff was anesthetized and his left arm was strapped to the operating table. Surgery was performed successfully on August 28, 1984.

FOURNIER v. HAYWOOD COUNTY HOSPITAL

[95 N.C. App. 652 (1989)]

Immediately after surgery, plaintiff began to notice numbness in the fingers of his left hand. This condition has spread and worsened.

Plaintiff filed suit on 31 July 1987 against defendant Haywood County Hospital, Dr. Henry B. Perry and Dr. W. K. Braswell alleging medical malpractice. Plaintiff alleged that Dr. Perry, Dr. Braswell "and employees, agents, and/or servants of defendant . . . negligently" performed the surgery which resulted in ulnar neuropathy. In paragraph fourteen of his complaint, plaintiff alleges that this condition is the direct and proximate result of the negligent procedures employed in anesthetizing him and immobilizing his left arm during his inguinal herniorrhaphy. Defendant Haywood County Hospital moved to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). On 7 December 1987, the court granted its motion to dismiss. On 24 August 1988 plaintiff filed a voluntary dismissal as to Drs. Perry and Braswell. Plaintiff appeals the dismissal of his claims against Haywood County Hospital. We reverse.

Horton, Jarvis, Moore & Ferguson, P.A., by Hallett S. Ward, III, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Gene B. Johnson and Michelle Rippon, for defendant-appellee.

LEWIS, Judge.

The sole issue before us is whether plaintiff sufficiently set out his claim against Haywood County Hospital for medical malpractice. Plaintiff claims that his complaint sufficiently set out the standard of care, the acts and omissions of defendant, proximate cause and damages. Plaintiff argues his complaint, although "bare boned" in its content, is enough under our notice pleading requirements.

G.S. 1A-1, Rule 8(a)(1) requires only "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions . . . showing that the pleader is entitled to relief." However, the claim must still satisfy requirements of substantive law and it must give the substantial elements of the claim or it is subject to dismissal under 12(b)(6). *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970); *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). Defendant argues that plaintiff's claim is not sufficient because 1) he failed to allege the agency of Drs. Braswell and Perry; 2) he did not identify any act or omission by the "employers or agents"

FOURNIER v. HAYWOOD COUNTY HOSPITAL

[95 N.C. App. 652 (1989)]

who allegedly committed the acts; 3) he failed to allege what duty defendant violated; and 4) he failed to allege what orders the doctors gave and whether such orders were negligent.

Under the "notice theory" of pleading contemplated by Rule 8(a)(1), detailed fact pleading is no longer required. *Sutton v. Duke, supra*. A complaint is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. . . ." *Sutton v. Duke, supra* at 102, 176 S.E.2d at 165.

In the present case, plaintiff alleged that under the direction of his doctors, agents or employees of the hospital anesthetized him, that immediately after the surgery he noticed numbness in his left hand, later diagnosed as ulnar neuropathy, and that this condition was the direct and proximate result of the negligent procedures employed in anesthetizing him and immobilizing him during his surgery. Although plaintiff could have served "a bit more meat with the bare bones," *Nolan v. Boulware*, 21 N.C. App. 347, 350-51, 204 S.E.2d 701, 704 (1974), *cert. denied*, 285 N.C. 590, 206 S.E.2d 863 (1974), of his complaint, any vagueness or lack of detail should have been attacked by a motion for more definite statement and not a motion to dismiss. *Redevelopment Comm. of the City of Washington v. Grimes*, 277 N.C. 634, 645-46, 178 S.E.2d 345, 352 (1971). Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient. *Smith v. N.C. Farm Bureau Mut. Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776, *aff'd*, 321 N.C. 60, 361 S.E.2d 571 (1987).

In the present case, defendant did not make a motion for a more definite statement. In fact, as it appears from its answer, Haywood County Hospital had no difficulty understanding the nature of plaintiff's claim and was able to answer his complaint.

We find that while plaintiff's complaint may constitute notice, however slight, it did sufficiently set forth the events and claims so as to enable the defendant to answer and prepare for a trial on the merits.

Reversed.

Chief Judge HEDRICK and Judge ORR concur.

IN RE WILL OF PENLEY

[95 N.C. App. 655 (1989)]

IN THE MATTER OF THE WILL OF CLYDE M. PENLEY, DECEASED

No. 8928SC31

(Filed 19 September 1989)

Wills § 10— holographic codicil—sufficiency for probate

Caveators offered a sufficient writing for probate as a holographic codicil where they introduced two identical photocopies of a holographic testamentary disposition; presented testimony that the testator duly executed his signature on each photocopy before a notary public; offered evidence that the holographic writings were found among the testator's valuable papers; and presented the testimony of three witnesses that they were familiar with testator's handwriting and signature and believed the subject writings and signatures to be in testator's own hand. N.C.G.S. §§ 31-3.4, 31-18.2.

APPEAL by propounders from *Sherrill, W. Terry, Judge*. Judgment entered 3 October 1988 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 29 August 1989.

The testator, Clyde M. Penley, died 27 July 1987. His attested written will of 9 March 1983 was probated in common form on 3 August 1987. Letters testamentary were issued to testator's brother, James Penley, as provided by the will. A caveat, alleging a holographic codicil to the attested will, was filed 4 August 1988 by Joseph Penley, son of the testator. Citations were issued and served on the beneficiaries under the respective writings, and the parties were aligned by the superior court on 11 September 1988. Propounders were designated as James Penley and Carroll Penley. Caveators were designated as Joseph Penley, Betty Penley, and the Weaverville Baptist Church. The case was tried before a jury on 19-21 September 1988.

The record discloses that caveators were permitted to introduce into evidence two photocopies of a holographic testamentary disposition dated 26 January 1984. These writings were identical in every respect. The testator's original signature appeared on each photocopy. These signatures were duly acknowledged by testator before a notary public. Caveators also introduced testimony as to authenticity of the handwriting and signatures, as well as on the location where the writings were found after testator's death.

IN RE WILL OF PENLEY

[95 N.C. App. 655 (1989)]

At the close of evidence, propounders moved for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure on the grounds that caveators had failed to offer a writing subject to probate. This motion was denied. All issues were answered in favor of caveators and judgment declaring that the attested written will was modified by a duly executed holographic codicil was entered 3 October 1988.

Subsequent to the entry of judgment for caveators, the trial court entered an order awarding counsel fees to counsel for caveators, as cost in the action, in the sum of \$36,601.50.

From both the judgment and the order for counsel fees, propounders have appealed.

Ronald W. Howell, P.A., by Ronald W. Howell, for propounder-appellants.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Larry S. McDevitt and Michelle Rippon, for caveator-appellees.

WELLS, Judge.

Propounders' principal assignment of error goes to the trial court's denial of their motion for directed verdict. They argue that caveators did not offer a sufficient writing under the statute to be subject to probate. We disagree. A holographic will is one that (1) is entirely in the testator's own handwriting, (2) bears the testator's name in his own handwriting, and (3) was found among the testator's valuables. N.C. Gen. Stat. § 31-3.4 (1984). Such a writing may be offered for probate only upon the testimony of at least one witness that it was found among the testator's valuables, and of at least three witnesses that they each believe it to be entirely in the testator's own handwriting. *Id.* at § 31-18.2. A witness is competent to testify regarding the authenticity of a testator's handwriting where it is shown that such witness is familiar with both the testator's handwriting and signature. *In re Will of Loftin*, 24 N.C. App. 435, 210 S.E.2d 897, cert. denied, 286 N.C. 545, 212 S.E.2d 169 (1975). In reviewing the denial of a motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure, the standard to be applied is whether the evidence, taken in the light most favorable to the nonmovant and giving the nonmovant the benefit of every reasonable inference arising therefrom, is sufficient to go to the jury. *Alston v. Herrick*, 76 N.C. App.

IN RE WILL OF PENLEY

[95 N.C. App. 655 (1989)]

246, 332 S.E.2d 720 (1985), *affirmed*, 315 N.C. 386, 337 S.E.2d 851 (1986). The court should deny a motion for directed verdict if there is more than a scintilla of evidence to support the nonmovant's *prima facie* case. *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).

Applying these principles to the case at bar, we find no error. Caveators presented testimony that the holographic writings were found among papers which included the titles to testator's car and house trailer, copies of property deeds, health insurance papers, and cancelled bank notes. Caveators further presented testimony that testator duly executed his signature on the writings before a notary public. Finally, caveators presented the testimony of three witnesses who all testified that they were familiar with both the handwriting and signature of the testator and that they believed the subject writings and signatures to be in testator's own hand. It is true that the familiarity of one witness with testator's handwriting was based on knowledge acquired some forty years earlier during high school. This, however, does not go to admissibility but to credibility. *In re Williams' Will*, 215 N.C. 259, 1 S.E.2d 857 (1939). Moreover, when coupled with the testimony of the other two witnesses, one of whom was the testator's former wife, the evidence that the writings were in testator's own hand, taken in the light most favorable to caveators, was sufficient to take the case to the jury.

Because caveators presented sufficient indicia of a holographic will under N.C. Gen. Stat. § 31-3.4 and because they satisfied the requirements of N.C. Gen. Stat. § 31-18.2, propounders' motion for directed verdict was properly denied. Propounders' remaining assignments of error have been carefully considered, are found to be without merit, and are overruled.

We have also carefully reviewed the trial court's order for counsel fees and the materials submitted in support of caveators' petition for counsel fees, and we affirm that order.

In the trial, we find

No error.

The order for counsel fees is

Affirmed.

Judges PHILLIPS and PARKER concur.

CONCRETE SUPPLY CO. v. RAMSEUR BAPTIST CHURCH

[95 N.C. App. 658 (1989)]

CONCRETE SUPPLY COMPANY, PLAINTIFF v. RAMSEUR BAPTIST CHURCH,
DEFENDANT AND THIRD-PARTY PLAINTIFF v. WILLIE T. HOWELL, THIRD-PARTY
DEFENDANT

No. 8927DC52

(Filed 19 September 1989)

Rules of Civil Procedure § 60.4— Rule 60 motion for relief—no appeal taken—motion denied

The trial court correctly denied defendant's motion for relief from a judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) where defendant did not file an appeal from the judgment or make a motion for a new trial under N.C.G.S. § 1A-1, Rule 59. Motions under Rule 60(b)(6) are not to be used as a substitute for appeal and an erroneous judgment cannot be attacked under this clause.

APPEAL by Ramseur Baptist Church from *Hamrick (George W.)*, *Judge*. Heard in the Court of Appeals 30 August 1989.

Ramseur Baptist Church entered into a contract with Willie T. Howell for the purpose of constructing a driveway and parking lot on its property. The total contract price was \$12,450.85, inclusive of all labor and materials, including the concrete supplied by the plaintiff. He failed to pay plaintiff for its materials.

On July 28, 1987, plaintiff Concrete Supply Company filed a complaint against Ramseur Baptist Church seeking judgment in the amount of \$6,434.60 for concrete materials furnished by plaintiff. On December 7, 1987 Ramseur Baptist Church was granted leave to file a third-party complaint against Willie T. Howell. Entry of default against Howell was made on January 20, 1988. On 20 February 1989 Judge Hamrick conducted a trial without a jury and made findings of fact and conclusions of law.

After hearing all of the evidence, the court entered judgment for the plaintiff against Ramseur Baptist Church in the amount of \$6,434.60. The court further ordered that defendant Ramseur Baptist Church was entitled to recover \$6,434.60 from Willie T. Howell. Ramseur Baptist Church did not file an appeal, but instead, on August 2, 1988, filed a motion for relief from the February 8, 1988 judgment pursuant to G.S. 1A-1, Rule 60(b)(6). In its motion, the Church argued that since it had paid Willie T. Howell all of

CONCRETE SUPPLY CO. v. RAMSEUR BAPTIST CHURCH

[95 N.C. App. 658 (1989)]

the monies due under their contract, plaintiff was not subrogated to the rights of Willie T. Howell (the principal contractor) and therefore could not collect its debt from Ramseur Baptist Church. See G.S. 2A-44A-18(1). On September 6, 1988 Judge Hamrick denied defendant's motion.

Defendant Ramseur Baptist Church appeals Judge Hamrick's denial of their Rule 60(b)(6) motion.

Church, Paksoy & Wray, by Ali Paksoy, Jr., for plaintiff-appellee.

Brenda S. McLain for defendant-appellant.

LEWIS, Judge.

Defendant Ramseur Baptist Church contests the denial of its motion under G.S. 1A-1, Rule 60(b)(6). Rule 60(b)(6) sets forth the grounds for granting relief from a judgment as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after judgment, order, or proceeding was entered or taken. . . .

Rule 60(b)(6) is equitable in nature. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 587 (1987). This section empowers the court with the authority to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances. *Id.* Relief under this rule is discretionary, and the only question for appellate review is whether the trial court abused its discretion in denying defendant's motion for relief from judgment. *Sawyer v. Goodman*, 63 N.C. App. 191, 193, 303 S.E.2d 632, 633, cert. denied, 309 N.C. 823, 310 S.E.2d 352 (1983).

Rule 60(b)(6) is not as broad as it first appears. While subsection (b)(6) has been described as a "grand reservoir" of equitable power to do justice in a particular case, it is not a "catch-all"

CONCRETE SUPPLY CO. v. RAMSEUR BAPTIST CHURCH

[95 N.C. App. 658 (1989)]

rule. *Standard Equipment Co., Inc. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501 (1978). Although the Church's full payment of the contract price to Willie T. Howell would extinguish Concrete Supply's right to a materialman's lien on the church's property, Ramseur Baptist Church failed to assert this defense at trial and then failed to bring an appeal. "Motions under 60(b)(6), however, are not to be used as a substitute for appeal, and an erroneous judgment cannot be attacked under this clause." *Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 551, 233 S.E.2d 76, 78 (1977), *rev'd on other grounds*, 294 N.C. 200, 240 S.E.2d 338 (1978). If the trial court's findings of fact and conclusions of law were erroneous, Ramseur Baptist Church should have filed an appeal from the judgment or made a motion for a new trial under Rule 59. *See Waters, supra* (where we held that the only remedy from the judge's erroneous entry of summary judgment was by appeal to this Court). Since it did neither here, we must affirm.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 SEPTEMBER 1989

BARKER v. AGEE No. 8818SC813	Guilford (87CVS5079)	Affirmed
IN RE BYNDUM No. 894DC48	Onslow (88J81)	No Error
IN RE ESTATE OF SHARKEY No. 8820SC1282	Stanly (74E255)	Vacated & Remanded
JENKINS v. CITY OF KINGS MOUNTAIN No. 8827SC1122	Cleveland (86CVS913)	Dismissed
MCFADYEN v. OLIVE No. 8811SC1383	Johnston (86CVS1401)	Affirmed
PARKS CHEVROLET v. McILWAIN No. 8821DC1244	Forsyth (84CVD0757)	Affirmed in part. Reversed & remanded in part.
REG. ROBINSON REAL ESTATE v. MAY No. 8827SC1399	Gaston (88CVS33)	Vacated
RICH v. WRIGHT No. 8925SC363	Caldwell (85CVS1064)	Affirmed
STATE v. CHERRY No. 896SC305	Hertford (88CRS445)	No Error
STATE v. COOK No. 8918SC434	Guilford (88CRS13285)	No Error
STATE v. CREDLE No. 893SC208	Pitt (88CRS4565) (88CRS4566)	No Error
STATE v. DIGGS No. 8826SC1346	Mecklenburg (87CRS67373) (87CRS67374)	No Error
STATE v. FREUND No. 884SC1330	Onslow (88CRS8940)	Affirmed
STATE v. JACKSON No. 8927SC38	Gaston (87CRS16427)	No Error

STATE v. JEFFERS No. 894SC258	Sampson (84CRS1586) (84CRS1587) (84CRS1588) (84CRS1589) (84CRS1590) (84CRS1591) (84CRS1593) (84CRS2701)	No Error
STATE v. JOHNSON No. 8826SC1213	Mecklenburg (87CRS60435)	No Error
STATE v. LEONARD No. 8922SC381	Davidson (88CRS8970)	No Error
STATE v. McCRIMMON No. 8920SC230	Moore (87CRS03159)	No Error
STATE v. McLAUGHLIN No. 8920SC134	Richmond (88CRS3647) (88CRS3648)	No Error

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

DUKE UNIVERSITY v. THE ST. PAUL MERCURY INSURANCE COMPANY
AND CONTINENTAL CASUALTY COMPANY

No. 8814SC947

(Filed 3 October 1989)

1. Insurance § 149— refusal of insurer to defend—“no action” clause—beginning of limitations period

The “no action” clause in defendant’s liability policy, which precluded a suit by the insured against the insurer until the insured’s liability had been determined by judgment or settlement, did not apply in this direct suit brought by plaintiff insured against defendant insurer for breach of defendant’s obligation to defend, and the limitations period therefore did not begin to run on the date that plaintiff paid its final legal fees and defendant refused to pay the total costs of plaintiff’s defense of the underlying suit.

2. Insurance § 149; Limitation of Actions § 4.3— refusal of insurer to defend—limitation of three years from date each legal expense is incurred to bring suit

Pursuant to the three-year statute of limitations affecting contracts under N.C.G.S. § 1-52(1), an insured has three years from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured.

3. Limitation of Actions § 15— refusal of insurer to defend—settlement negotiations—no equitable estoppel to plead statute of limitations

In an action to recover legal fees incurred in the underlying action which defendant insurer refused to defend, there was no merit to plaintiff’s contention that defendant was equitably estopped to plead the statute of limitations, since the parties’ participation in settlement negotiations did not alone waive defendant’s right to assert the statute of limitations; even after the prospect of a partial settlement fell through, plaintiff still waited over eleven months before filing this suit; and plaintiff was not induced by any false representations by defendant that might have lulled it into believing that defendant would not assert the statute of limitations.

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

4. Insurance § 149— insurer's refusal to defend— plaintiff's delay in notifying insurer— delay justified

The trial court properly refused to dismiss plaintiff's action to recover attorney's fees on the ground that plaintiff delayed in notifying its insurer, where there was a significant delay of fifteen months between the time the underlying suit was filed against plaintiff and the time plaintiff notified defendant of the suit; the trial court properly found that plaintiff did not purposely and knowingly fail to notify defendant between the date of the underlying lawsuit and the date plaintiff's errors and omissions insurer advised plaintiff of defendant's possible liability since plaintiff was not aware until the latter date that defense of the underlying action was covered by defendant's general liability policy; the trial court properly found that the three and one-half month delay after plaintiff was advised of defendant's possible liability and notification to defendant was also in good faith since the delay was attributable to plaintiff's quarterly system of reporting claims to its insurers; and defendant failed its burden to show that plaintiff's good faith delay materially prejudiced defendant's duty to defend the underlying suit.

5. Insurance § 149— insurer's duty to defend— no duty to pay legal costs of counterclaims

In an action to recover legal fees from an insurer which had refused to defend, the trial court correctly disallowed plaintiff's legal expenses incurred in connection with the prosecution of its counterclaims; however, the trial court erred in disallowing plaintiff's recovery of legal expenses incurred in connection with its defense against injunctive relief where the complaint filed in the underlying action requested both injunctive relief and compensatory damages.

6. Insurance § 149— insurer's refusal to defend— action to recover legal fees— insurer entitled to credit from settlement payment with another insurer

In an action to recover legal fees from an insurer which had refused to defend, defendant was legally entitled to credit from plaintiff's settlement payment with another insurer to the extent that the settlement covered the same legal expenses awarded against defendant.

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

APPEAL by plaintiff Duke University and cross-appeal by defendant St. Paul Mercury Insurance Company from *Hobgood (Robert H.), Judge*. Judgment entered 21 December 1987 and amended 30 March 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 April 1989.

Maxwell, Martin, Freeman and Beason, P.A., by James B. Maxwell and Alice Neece Moseley, for plaintiff Duke University.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Theodore B. Smyth, for defendant St. Paul Mercury Insurance Company.

GREENE, Judge.

This appeal arises from a declaratory judgment action brought by Duke University ("Duke") against its general liability insurer, St. Paul Mercury Insurance Company ("St. Paul"), and its "errors and omissions" insurer, Continental Casualty Company ("CCC"). Duke originally sued both defendants to recover a total of \$51,477.99 in attorney's fees Duke incurred as a defendant in a lawsuit involving a psychiatric hospital owned by Duke (the "underlying action"). The underlying action arose from Duke's proposed sale of the psychiatric hospital to a third party, and the disbursement of various funds and accounts among the two plaintiffs, Duke, and nineteen other defendants who had a financial involvement or interest in the hospital. In the underlying action, Duke counterclaimed against the two doctor-plaintiffs for intentional torts including defamation, interference with contract, and unfair trade practices. Under Duke's policy with CCC, Duke would retain counsel acceptable to CCC, and CCC would reimburse Duke for the legal expenses incurred after the matter was concluded. Duke initially believed the underlying suit would be covered by its insurance policy with CCC. Duke therefore engaged the legal services of Powe, Porter, Alphin and Whichard, P.A. (now Moore and Van Allen), to represent Duke in the underlying action.

The underlying action progressed in federal court from July 1980 through June 1981. At that time, the senior claim representative for CCC informed Duke that its general liability policy with St. Paul could possibly obligate St. Paul to provide a defense of the underlying suit. The CCC claim representative's letter was turned over to Jeffrey Potter, an attorney in the office of the Duke University counsel generally responsible for matters involv-

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

ing insurance claims. Mr. Potter's office procedure typically called for quarterly reports to Duke's insurance carriers. On 18 September 1981 (the next quarterly period for reporting), Mr. Potter officially notified St. Paul about the underlying action and requested St. Paul's assistance. At that time, Duke had already incurred approximately \$29,000 in legal fees in the underlying action. On 24 September 1981, St. Paul sent Duke a letter reserving its rights based on the possible lack of coverage and Duke's late notice; however, St. Paul proceeded with its investigation of the underlying claim. On 19 October 1981, St. Paul informed Duke it had no coverage, and thus St. Paul refused to provide legal defense in the underlying suit.

The underlying suit was resolved on 16 July 1982, and all legal matters relating to settlement were concluded in January 1983. CCC and St. Paul both refused to pay Duke's legal expenses incurred in the underlying action. St. Paul contended it had no duty because its policy did not cover the claims and counterclaims pled in the underlying action, and Duke had breached the policy by not immediately notifying St. Paul of the underlying action. CCC contended it did not have primary coverage, and it was St. Paul's obligation to defend the lawsuit. Therefore CCC had only limited liability for certain other claims alleged in the underlying action. On 3 August 1984, St. Paul proposed a compromise to Duke by tendering fifty percent of the legal expenses incurred by Duke after September 1981 which totaled approximately \$11,000. Duke rejected that settlement offer and ultimately instituted this action on 12 July 1985 to collect its full legal fees of over \$51,000. Prior to trial, Duke reached a settlement with CCC whereby Duke released CCC from financial responsibility in return for a compromise payment of \$20,000.

St. Paul moved to dismiss Duke's claim for attorney's fees on the grounds Duke was barred by limitations and had breached its policy with St. Paul by not "immediately" notifying St. Paul of the underlying suit as required by the policy. The trial court denied St. Paul's motion to dismiss, entered various findings reciting the facts stated above, and also found that, of the legal fees incurred from July 1980 through September 1981, \$13,898.13 of those fees were incurred defending matters covered by the St. Paul policy. The trial court further found that, of the legal fees incurred between 10 October 1981 through January 1983, \$8,990.70 were in-

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

curred in defending matters covered by the St. Paul policy. The trial court concluded:

1. This action is not barred by the statute of limitations.

2. St. Paul was not notified by Duke University of the underlying action until September 21, 1981, and there was a delay of 15 months from June 27, 1980, the date the underlying action was filed, until September 21, 1981 in notifying the insurance company.

3. Duke did not purposely and knowingly fail to notify St. Paul Mercury Insurance Company of the lawsuit filed against it on July 2, 1980 by Hal G. Gillespie and Thomas A. Smith. Said underlying action involved complex legal issues and Duke reasonably believed the action, when initially filed, was not covered by the general liability policy issued by St. Paul. Duke was not aware of any possible fault for failure to notify St. Paul. The delay between the time the underlying action was filed and the time CNA suggested Duke contact St. Paul on June 1, 1981 was in good faith.

4. The delay between June 1, 1981 when a representative of CNA advised Duke that CNA believed there were allegations in the underlying lawsuit of Gillespie and Smith which could or might possibly be covered by St. Paul and the date Duke notified St. Paul on September 15, 1981 of the underlying action was also in good faith: there was no deliberate decision on behalf of Duke to not notify St. Paul, and Duke was not aware of possible fault for failure to notify during this time.

5. St. Paul was not prejudiced by the delay in notification of the underlying lawsuit until September 1981. The results obtained in the underlying lawsuit were favorable to the insured, Duke University, and the legal representation by the law firm, Powe, Porter, Alphin and Whichard, P.A., which had been employed by Duke and was a firm that St. Paul itself had from time to time used, was effective.

6. St. Paul's duty to defend was unaffected by the delay in notifying St. Paul of the underlying action.

7. The legal fees rendered by Powe, Porter, Alphin and Whichard, P.A. to Duke University in regard to the lawsuit brought by Gillespie and Smith were reasonable and justified.

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

8. The St. Paul policy did offer coverage for certain claims alleged in the underlying lawsuit brought by Gillespie and Smith including allegations of wrongful eviction, defamation of character, and mental anguish.

9. As between The St. Paul Mercury Insurance Company and Continental Casualty Company, St. Paul was the primary insurer in the underlying action brought against Duke University by Gillespie and Smith.

10. St. Paul is not entitled to credit against any amount it owes Duke for the cost of defense of the underlying action for any payment Continental may have given Duke in order to settle Duke's claim against it and in order to be released from this action.

11. Between July 2, 1980 and January 1983, Duke University incurred legal fees and expenses of \$51,460.73 which were reasonable and necessary for the cost of defense incurred in defending the lawsuit and in prosecuting Duke's counterclaims. Of that sum, \$22,888.83 were reasonably incurred on behalf of Duke University in defense of claims in which St. Paul provided primary coverage under its policy of general liability insurance issued to Duke University.

NOW THEREFORE, it is hereby ordered, adjudged and decreed that Duke University shall be entitled to recover from the St. Paul Mercury Insurance Company the sum of \$22,888.83 plus interest from July 16, 1982 to be assessed by the Clerk of the Court as provided by law.

Pursuant to the parties' agreement, the trial court subsequently amended its judgment under Rule 60(b) and additionally found that:

1. Of the total attorneys' fees paid by plaintiff in the underlying action, only \$22,888.83 were incurred for the defense of that action, as distinguished from attorneys' fees incurred for the prosecution of counterclaims, temporary restraining orders, and protection of plaintiff's proprietary rights in the hospital in question and certain bank accounts and funds.

2. Of the \$22,888.83 in defense costs incurred, plaintiff has recovered, by settlement with former defendant Continental Casualty Company, the sum of \$20,000.00 in reimbursement for such defense costs.

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

3. Defendant is entitled to a credit or setoff against the verdict and judgment heretofore rendered, in the sum of \$20,000.00. To rule otherwise would permit plaintiff to make a double recovery.

4. Interest on the judgment should run from February 9, 1983, rather than from July 16, 1982, as the plaintiff had not completed its payment of attorneys' fees to its counsel in the underlying action until February 9, 1983.

Based on these new findings, Duke's original award of \$22,888.83 was reduced to \$2,888.83. St. Paul and Duke both appeal.

These facts present the following issues: I) whether the trial court (A) erroneously denied St. Paul's motion to dismiss based on limitations, and (B) whether St. Paul was equitably estopped to assert the defense of limitations; II) whether the trial court erroneously failed to dismiss Duke's claim based on St. Paul's "late notice" defense; and III) whether the trial court's amended judgment (A) properly refused to award Duke the legal fees it incurred in prosecuting its counterclaims and defending against injunctive relief, and (B) properly credited St. Paul with the \$20,000 settlement reached between Duke and CCC.

I

A

[1] St. Paul first argues that Duke's claim was barred by the three-year statute of limitations for contracts under Section 1-52(1). N.C.G.S. Sec. 1-52(1) (1983). Duke filed its complaint for declaratory judgment and reimbursement of attorney's fees on 12 July 1985. St. Paul contends the three-year statute of limitations commenced on 19 October 1981 when it notified Duke in writing that "the St. Paul Insurance Companies will be unable to take over the defense of any part of this matter or provide coverage for same." See *Gedeon v. St. Farm Mut. Auto Ins. Co.*, 261 F. Supp. 122, 123 (W.D. Pa. 1966), *aff'd in part, rev'd in part on other grounds*, 386 F.2d 600 (3d Cir. 1968), *cert. denied*, 392 U.S. 937, 20 L.Ed.2d 1395 (1968) (breach of duty to insured occurs as soon as defendant declines defense of suit against insured); see also *Schimmer v. Wolverine Ins. Co.*, 54 Mich. App. 291, 220 N.W.2d 772, 775-76 (1974) (limitation commences when insurer refuses to defend). However, Duke contends the limitations period commenced at the earliest on 16 July

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

1982, the date the underlying suit against it was settled. In fact, Duke contends the better-reasoned view is that the limitations period did not commence until 9 February 1983 when it paid its final legal fees and St. Paul refused to pay the total costs of Duke's defense of the underlying suit.

Two authorities on insurance law state that, where a liability insurer refuses to defend its insured, the cause of action against the insurer commences on the date the final judgment is obtained against the insured, rather than on the date the insurer refuses to defend. 18A Rhodes, *Couch on Insurance 2d* Sec. 75:111 (1983 rev. ed.); 20A Appleman, *Insurance Law and Practice* Sec. 11614 (1980); see also *id.* at 478 n. 10 (criticizing *Schimmer* decision). The statements by both commentators are apparently based on the notion that the typical "no action" clause normally precludes a suit by the insured against the insurer until the insured's liability has been determined by judgment or settlement. *E.g.*, *Ginn v. State Farm Mut. Auto Ins. Co.*, 417 F.2d 119 (5th Cir. 1969) (given "no action" clause, statute did not commence until conclusion of litigation against insured). The "no action" clause in St. Paul's liability policy is typical and states:

No one can sue us on a liability claim until the amount of the protected person's liability has been finally decided either by trial or by written agreement signed by the protected person, by us and by the party making the claim. Once liability has been determined by judgment or by written agreement, the party making the claim may be able to recover under this policy, up to the limits of your coverage. But that party can't sue us directly or join us in a suit against the protected person until liability has been so determined. . . .

Thus, under *Ginn* and such cases, the statute of limitations does not commence on a claim arising from the insurer's duty to defend until a judgment has been entered or settlement reached which determines the insured's liability.

However, it appears most courts have held, contrary to *Ginn*, that the "no action" clause does not apply to a direct suit brought by the insured against the insurer for breach of the insurer's obligation to defend. *E.g.*, *Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252, 254 (10th Cir. 1981) (collecting cases). As the Tenth Circuit observed in *Paul Holt Drilling*:

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

If the no action clause applies to the insureds' claims, when would it no longer bar suit to recover for legal expenses they bear when the insurer wrongfully refuses to defend? Unless insureds refuse to pay their attorney, no judgment for those fees will ever be entered against them. There will never be a written agreement of 'the insured, the claimant and the company' with respect to the attorneys' fees and litigation costs. Additionally, 'claimant' in this context obviously refers to a third party claimant against the insured.

Id. at 255 (footnote omitted).

Furthermore, the courts of this state have consistently held that the "no action" clause will not bar the insured's immediate suit against the insurer for breaching the duty to defend where the insurer unjustifiably refuses to defend the insured. *E.g.*, *Nixon v. Liberty Mut. Ins. Co.*, 255 N.C. 106, 110, 120 S.E.2d 430, 433-34 (1961); *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, 80 N.C. App. 370, 375-76, 343 S.E.2d 15, 18-19 (1986). The insurer's refusal to defend an underlying action is "unjustified" if it is determined that the action is in fact within the coverage of the liability policy. *Indiana Lumbermen's Mut. Ins. Co.*, 80 N.C. App. at 376, 343 S.E.2d at 19. The trial court below ruled that St. Paul was obligated to defend Duke insofar as the St. Paul liability policy covered claims for wrongful eviction, defamation of character, and mental anguish. St. Paul does not assign error to that conclusion nor does it argue in its brief that the conclusion was erroneous. Since St. Paul's refusal to defend was therefore unjustified, Duke was not contractually bound by the "no action" clause to delay its suit until judgment or settlement of the underlying action. Therefore, the date the bar of limitations commenced was *not* delayed until the conditions of St. Paul's "no action" clause had been fulfilled.

We must nevertheless determine when the limitations period did commence on Duke's claim. The possibilities suggested by the Tenth Circuit are that an insurer breaches its obligation to defend at the time: (1) the insured first incurs legal expenses, (2) at the time the underlying litigation is completed, or (3) continuously or periodically during the course of the litigation. *Paul Holt Drilling, Inc.*, 664 F.2d at 255. The statute of limitations for contracts in this state commences on the date the contractual promise is broken. *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985).

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

[2] We believe St. Paul's duty to defend under the liability policy is a continuing obligation to defend throughout the course of the underlying litigation. See *Paul Holt Drilling, Inc.*, 664 F.2d at 255; *Coblentz v. American Surety Co.*, 416 F.2d 1059, 1062 (5th Cir. 1969); *Phillips v. Penland*, 196 N.C. 425, 147 S.E. 731 (1929) (under contract contemplating continuing services, statute of limitations commences at time of each expenditure). Each legal expenditure incurred as a result of the insurer's refusal to defend creates a new right in the insured to recover such legal expenditures from the insurer. Thus, given the three-year statute of limitations affecting contracts under Section 1-52(1), an insured has three years from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured.

Under *Penley*, St. Paul breached its promise to defend Duke on 19 October 1981 when it notified Duke in writing that it would not provide a defense of the underlying action. Duke had three years from 19 October 1981 to sue St. Paul for the legal expenditures it incurred as of that date. However, Duke did not commence this lawsuit until 12 July 1985. Therefore, assuming St. Paul was not estopped to plead limitations, Section 1-52(1) bars Duke's recovery of any legal expenses incurred before 12 July 1982, i.e., three years before the date it commenced suit on 12 July 1985.

B

[3] However, Duke argues the trial court made findings sufficient to show Duke was led to believe by St. Paul's conduct that St. Paul would pay some, if not all, of the costs of Duke's legal defense. Duke therefore contends St. Paul is equitably estopped to plead the statute of limitations since Duke's delay was based on its reasonable belief it would receive payment without resorting to legal action. Our courts have recognized that equitable estoppel may be invoked in a proper case to bar a defendant from relying upon the statute of limitations. *E.g.*, *Nowell v. The Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959). Equity will deny the right to assert the defense of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. *Id.* As stated by several commentators, "In order to warrant the application of the doctrine of estoppel, it must be shown that the conduct of the party against whom waiver of the . . . limitation is claimed is such as to cause the adverse party to change his position by

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

lulling him into false security, and causing him to delay or waive assertion of his rights to his damage." 18A Rhodes, *Couch on Insurance* 2d Sec. 75:183 at 177 (1983) (footnote omitted).

We note that Duke did not plead any facts showing St. Paul was equitably estopped from asserting the statute of limitations. Waiver and estoppel are affirmative defenses which must be pled with certainty and particularity and established by the greater weight of the evidence. N.C.G.S. Sec. 1A-1, Rule 8(c) (1983); *Rivenbark v. Moore*, 57 N.C. App. 339, 291 S.E.2d 293 (1982). Although the failure to plead an affirmative defense ordinarily results in its waiver, the parties may still try the issue by express or implied consent. *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984); see N.C.G.S. Sec. 1A-1, Rule 15(b) (1983). As the record and exhibits on appeal show, Duke introduced evidence of significant negotiations between the parties after St. Paul's October 1981 rejection letter. It appears some evidence was introduced at trial pertinent to the elements of equitable estoppel. See *Blizzard Building Supply Co. v. Smith*, 77 N.C. App. 594, 335 S.E.2d 762, *disc. rev. denied*, 315 N.C. 389, 339 S.E.2d 410 (1986) (summarizing elements of estoppel).

The trial court made two findings pertinent to the issue of equitable estoppel. First, the trial court found that "correspondence and discussions continued between representatives of Duke and St. Paul [after St. Paul had formally refused to defend on 19 October 1981], and in a letter from St. Paul to Duke dated December 23, 1981, St. Paul conceded that there was the 'possibility' of coverage under the St. Paul policy." Second, the trial court found that, "on August 3, 1984, St. Paul proposed a compromise to Duke by tendering fifty percent of the legal expenses incurred by Duke after September, 1981 were approximately \$11,000." However, these findings are not sufficient to show St. Paul should be equitably estopped from pleading the statute of limitations. The parties' participation in settlement negotiations does not alone waive St. Paul's right to assert the statute of limitations. "Mere negotiations with a possible settlement unsuccessfully accomplished is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute an estoppel by conduct thus precluding an assertion of . . . [limitations] by the insured." *Desai v. Safeco Ins. Co. of America*, 173 Ga. App. 815, 328 S.E.2d 376, 379 (1985). It is true that St. Paul wrote Duke on 3 August 1984 offering fifty percent of the \$21,000 in legal expenses incurred after St. Paul

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

received notice of the underlying action in September 1981. St. Paul's letter stated that the offer "represents our pro-rata share [with CCC] and . . . is not to be construed as an admission of coverage." This letter does not constitute an affirmative statement by St. Paul that would lead Duke to believe St. Paul intended to waive its assertion of the statute of limitations if the settlement offer was not accepted. It is apparent that St. Paul's offer to pay approximately \$11,000 of Duke's total claim of over \$50,000 did not lull Duke into thinking it would recover its total legal costs without instituting this action. As Mr. Potter stated in his deposition:

We weren't trying to independently settle with St. Paul. We were trying to get the entire amount of the defense costs back . . . As they typically do, you know, they were trying to buy their way out *It was never my purpose to cut a separate deal with St. Paul and then get the rest from CNA. I wanted the two companies to make me a joint proposal that would allow me to get a hundred percent of my costs.*

(emphasis added). Even after the prospect of a partial settlement dimmed in 1984, Duke still waited over eleven months before filing this suit. As the Georgia Court of Appeals held in a case on similar facts, plaintiffs "were aware before the period of . . . [limitations] had elapsed that if they intended to pursue their *whole claim*, they would have to file suit. This they did not accomplish" *Desai*, 328 S.E.2d at 379 (emphasis added).

This is not a case where the insurer expressly stated that it would waive a contractual limitation or that the insured's claim would be paid. *Cf. Vail v. Vermont Mut. Fire Ins. Co.*, 14 N.C. App. 726, 727-28, 189 S.E.2d 527, 528 (1972) (express statement); *Pennell v. Security Ins. Co.*, 18 N.C. App. 465, 467, 197 S.E.2d 240, 242 (1973) (insurer repeatedly told insured that claim would be paid). This is not a case where the party estopped did not deny liability for almost three years and made representations during that period which led the plaintiff to believe its entire bill would be paid. *See Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987). Duke has not alleged that St. Paul misrepresented or concealed any material fact as required for equitable estoppel. Duke was not induced by any false representations by *St. Paul* that might have lulled it into believing that St. Paul would not assert the statute of limitations. Instead, Mr. Potter relied on *his own* independent assumptions that St. Paul's October 1981 rejec-

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

tion letter was just a "form letter" and that St. Paul was not serious in rejecting Duke's claim:

I took [the rejection letter] as a form letter. . . . [M]y *impression* in talking with *my* insurance manager, Rose Morrow, was that they assumed this was some malpractice matter and they had sent us the wrong form letter. I may or may not be right about that

. . . .

Q So although she wrote this letter, the impression you got from her was that this was just a form letter?

A The impression I got after looking at the letter and talking to [my] insurance manager . . . was that it was a form letter and they had not paid careful attention to what we had asked them to do.

. . . .

Q You keep mentioning this is a form letter. You don't yourself have any personal knowledge of what went into the drafting of that letter or whether it was custom drafted for you or whether it was straight off a word processor, I take it?

A Right.

. . . .

Q But, nevertheless, after receiving [the rejection letter], St. Paul did enter into some form of settlement negotiations with you to try to reach some accommodation which, I take it, ultimately was unsuccessful and resulted in this litigation?

A Yeah. They tried to convince me . . . there was no coverage. We went back and forth a couple of times; they finally came down that there *conceivably* could be *possibly* coverage, which I took . . . meant yes in insurance parlance.

(emphasis added).

Duke had the burden to show by the greater weight of evidence that St. Paul was equitably estopped from asserting the defense of limitations. *Cf. Lea Co. v. North Carolina Board of Transportation*, 308 N.C. 603, 629, 304 S.E.2d 164, 181 (1983) ("The statute of limitations having been pled, the burden was on the plaintiff to show that its claim for relief accrued within the time pre-

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

scribed.”). However, neither the trial court’s findings nor the evidence in the record shows that Duke met that burden. Accordingly, we hold Section 1-52(1) barred Duke’s recovery of those legal expenses it incurred before 12 July 1982, i.e., three years before Duke filed its suit against St. Paul. Insofar as the trial court allowed legal expenses incurred *before* 12 July 1982, the trial court erred, and its award of legal fees must be reversed and remanded for new findings.

II

[4] Irrespective of the statute of limitations, St. Paul also contends Duke’s delay of almost fifteen months in notifying St. Paul of the underlying action bars Duke’s suit since the insurance policy obligated Duke to “immediately forward . . . every demand, notice, summons, or other process” after a claim was made against Duke. St. Paul contends Duke’s breach of this notice provision frustrated the purposes underlying its contractual right to defend the underlying suit. Citing *Great American Insurance Co. v. Tate Const. Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981) (“*Great American I*”), and *Great American Insurance Co. v. Tate Const. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) (“*Great American II*”), St. Paul contends it was excused from its duty to defend. In *Great American I*, our Supreme Court set forth a three-part test for determining whether the insured’s failure or delay in giving notice required under the policy bars the insured’s recovery against the insurer:

When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, e.g., that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Great American I, 303 N.C. at 399, 279 S.E.2d at 776. This three-part test was elaborated in *Great American II*:

More precisely phrased, the first step in the *Great American* test simply requires the trial court to determine whether there has been any delay in notifying the insurer. In most instances, unless the insurer’s allegations that notice was not timely are patently groundless, this first part of the test is met by the

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

fact that the insurer has introduced the issue to the court. Therefore only the good faith and prejudice steps remain to be addressed by the trial court.

. . . .

[The] test of lack of good faith involves a two-part inquiry:

- 1) Was the insured aware of his possible fault and
- 2) Did the insured purposely and knowingly fail to notify the insurer?

Both of these are, in the legal sense of the term, "subjective" inquiries—they ask not what a reasonable person in the position of the insured would have known, but what the insured *actually did know*. Certainly, if the insured knows that he is liable or even that he will possibly be held liable, or that others claim that he is at fault, an untimely delay in notification of the insured is a delay without good faith.

The good faith test is phrased in the conjunctive: both knowledge *and* the deliberate decision not to notify must be met for lack of good faith to be shown.

Great American II, 315 N.C. at 719-20, 340 S.E.2d at 747 (emphasis in original) (footnotes omitted). If the insured's good faith delay is shown, then the burden of proof shifts to the insurer to show that it was prejudiced by the delay in notification. *Great American II*, 315 N.C. at 718, 340 S.E.2d at 746. The *Great American I* Court listed certain factors relevant to the determination of material prejudice to the insurer:

the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of the delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence

. . .

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

Proof of existence of any of the above factors is not determinative; the insurer must also show that the changed circumstance materially impairs his ability to investigate the claim or defend and, thus, compare a viable defense. Often, proof of the changed circumstance itself will give rise to an inference of prejudice; for example, proof of an unavailability of a sole independent eyewitness.

We do not intend the above list of factors to be exclusive. 303 N.C. at 398-99, 279 S.E.2d at 776.

The first step of the *Great American* three-part test is clearly met in this case since there was a significant delay of fifteen months between the time the underlying suit was filed against Duke and the time Duke notified St. Paul of the suit. With respect to the "good faith" portion of the test, the trial court separately discussed two periods of the fifteen month delay. First, the trial court found Duke did not purposely and knowingly fail to notify St. Paul between 2 July 1980 (the date of the underlying lawsuit) and 1 June 1981 (the date CCC advised Duke of St. Paul's possible liability) since Duke was not aware until the latter date that defense of the underlying action was covered by St. Paul's general liability policy. The trial court was clearly correct in finding the first period of delay was in good faith based on the evidence before it. The record contains absolutely no evidence that Mr. Potter, Duke's counsel in charge of these matters, was aware the general liability policy might cover the underlying suit until notified by CCC. Since the test is subjective, Duke's delay until 1 June 1981 was in good faith. As to the delay between 1 June 1981 and the date Duke notified St. Paul on 15 September 1981, the trial court found Duke did not deliberately fail to notify St. Paul, and therefore the delay occurred in good faith. We likewise believe on these facts that Duke's delay after CCC advised it of St. Paul's possible liability was also in good faith since the delay was attributable to Duke's quarterly system of reporting claims to its insurers. While such a system may be unwise or negligent, reliance on that system does not constitute a deliberate failure to notify the insurer under *Great American II*.

The final step of the test reveals St. Paul failed its burden to show Duke's good faith delay materially prejudiced St. Paul's duty to defend the underlying suit. While Duke had incurred substantial legal expenses by the time it notified St. Paul, the underlying

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

action had not been settled or otherwise determined at that time. St. Paul stated in its interrogatories that it was aware of no negligence in the handling of the underlying suit by Duke's attorneys. St. Paul's brief simply points to the "possibility" that it would have settled the case sooner had it been notified. That possibility is present in every suit arising from an insured's delay in notifying its insurer. St. Paul concedes that Duke's attorneys were competent to handle this matter and that St. Paul had employed the same attorneys in other cases. Furthermore, St. Paul did not attempt to involve itself in the settlement negotiations in any way after it learned of the underlying lawsuit.

St. Paul complains that Duke's total legal expenses of almost \$50,000 exceeded by several thousand dollars the amount for which it settled the underlying lawsuit. However, based on this erroneous analysis, Duke's attorneys would not be paid at all if their settlement of the underlying lawsuit required Duke to pay nothing. Given the fact there were numerous corporate and individual defendants involved, we fail to see why Duke's eventual settlement of a \$3,000,000 lawsuit for approximately \$40,000 materially prejudiced St. Paul. We consequently hold St. Paul failed to carry its burden to show it was materially prejudiced by Duke's delay. We therefore affirm the trial court's refusal to dismiss the action on that ground.

III

Duke appeals the trial court's failure to make certain additional findings as well as those parts of the amended judgment that: (A) disallow Duke's recovery of legal expenses occurring in connection with its counterclaims and defense against injunctive relief in the underlying action, and (B) credit St. Paul with the \$20,000 settlement Duke received from CCC. Since we are vacating the trial court's judgment and remanding for new findings on the limitations issue, we are not required to address Duke's objections to the adequacy of the trial court's findings. However, we will address those objections since they are highly likely to occur again on remand.

A

[5] We believe the trial court correctly disallowed Duke's legal expenses incurred in connection with the prosecution of its counterclaims. *See generally* 7C J. Appleman, *Insurance Law and Practice* Sec. 4681, at 7 (1979). We believe the correct rule on this issue has been stated by the following commentator:

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

An insurer, being obligated only to defend claims brought 'against' the insured, is not required to bear the cost of prosecuting a counterclaim on behalf of the insured. Because of the compulsory counterclaim rule, however, the insurer should not be allowed to direct the counsel that it hires on behalf of the insured to ignore the existence of counterclaims. The assumption of the insured's defense necessarily entails an obligation not to conduct the defense in a manner that will prejudice the insured's rights. Failure to advise the insured of the existence of a counterclaim that, if not asserted, will be lost should constitute a breach of that obligation.

As a practical matter, therefore, when hiring defense counsel, the insurer should advise counsel that it will not bear the costs of prosecuting a counterclaim, but it should not attempt to limit the attorney in connection either with investigating and evaluating possible counterclaims or with giving the insured advice with respect to such claims. If it does, it should be deemed to have breached its duty to defend and, assuming the insured had a meritorious compulsory counterclaim that was lost as a result of the insurer's action, the insurer should be liable for the value of the barred claim.

A. Windt, *Insurance Claims and Disputes* Sec. 4.39 (1982). Since the St. Paul policy only obligates St. Paul to defend suits "against" Duke, and as there is no assertion by Duke that St. Paul attempted to limit Duke's prosecution of its counterclaims, we hold the trial court correctly refused to award Duke the legal fees it incurred in connection with prosecuting its counterclaims.

However, the trial court erred in disallowing Duke's recovery of legal expenses incurred in connection with its defense against injunctive relief. Since St. Paul's policy only obligates it to defend Duke against suits for "damages," it is true that a suit for purely injunctive relief would not obligate St. Paul to defend against the injunctive action. 7C Appleman, *Insurance Law and Practice* Sec. 4685, at 120-21. However, when the action is for both injunctive relief and compensatory damages, the insurer refuses to defend the action at its peril. *Id.*; see also *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 n. 2, 340 S.E.2d 374, 377 (1986) (insurer has duty to defend if complaint describes a "hybrid" of covered and non-covered claims). The complaint filed in the underlying action requested both injunctive relief and com-

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

pensatory damages; therefore, St. Paul is liable for Duke's legal fees incurred in connection with the injunction proceedings.

B

[6] The trial court also found that, of the \$22,888.83 in defense costs incurred, Duke had recovered a \$20,000 compromise payment from CCC "in reimbursement for *such* defense costs." (Emphasis added.) The trial court then concluded St. Paul was entitled to a credit or setoff in the amount of that \$20,000 payment: "To rule otherwise would permit plaintiff to make a double recovery." Duke contends the trial court's findings do not permit adequate appellate review of the trial court's construction of its settlement agreement with CCC. Duke further contends that crediting St. Paul with the \$20,000 settlement payment is a windfall to St. Paul since the CCC payment was reimbursement for legal fees that were not covered by the St. Paul policy.

We first note that St. Paul has no statutory right to contribution under Section 1B-4(1), which provides that a release or covenant not to sue given to a person liable *in tort* reduces the claim against other tort-feasors. N.C.G.S. Sec. 1B-4(1) (1983). By its terms, Chapter 1B applies only in tort actions, not contract actions. *Holland v. Edgerton*, 85 N.C. App. 567, 569, 355 S.E.2d 514, 516 (1987).

However, the general rule as to avoidable consequences applicable in contract actions is stated as follows:

[D]efendant in an action for breach of contract is entitled to show any matters which go to reduce the amount of loss actually suffered by plaintiff, provided such matters have a proximate relation to the contract Payment of compensation . . . to plaintiff by a third party on the same cause of action, or partial satisfaction from a third person against whom a claim for damages is made with respect to the same subject matter may be shown in reduction of damages for breach of contract.

25 C.J.S. *Damages* Sec. 97, at 1003-005 (1966) (footnotes omitted). In discussing fire insurance, the same treatise states that "where a property owner is entitled to protection against loss . . . under two contracts, one of which is a fire insurance policy, and . . . the owner recovers a portion of his loss from one, he can only recover the remainder of his loss from the other, and if he has been fully compensated by one he is not entitled to recover from

DUKE UNIVERSITY v. ST. PAUL MERCURY INS. CO.

[95 N.C. App. 663 (1989)]

the other." 25 C.J.S. *Damages* Sec. 99(2), at 1016 (footnotes omitted). This analysis is consistent with case law in this state. *Cf. Nebel v. Nebel*, 223 N.C. 676, 686, 28 S.E.2d 207, 214 (1943) (plaintiff may prove equitable contribution where he has paid more than fair share of common debt burden); *Bumgardner v. Tomblin*, 63 N.C. App. 636, 643, 306 S.E.2d 178, 184 (1983). Thus, we conclude St. Paul was legally entitled to credit from the CCC settlement payment to the extent the \$20,000 settlement covered the same legal expenses awarded against St. Paul.

Since the trial court reduced its award by the amount of legal fees incurred as result of Duke's counterclaims and injunctive relief defense, Duke argues St. Paul received a windfall because the settlement payments were intended to cover the legal costs of the counterclaims and injunctive relief proceedings. However, we cannot determine from the record on appeal whether the legal fees awarded against St. Paul duplicate the legal fees paid by CCC since the settlement agreement has not been included in the record on appeal. Furthermore, we cannot determine from the trial court's findings the extent to which its award against St. Paul duplicates legal fees CCC has already paid. As we are remanding the case to correct the trial court's erroneous application of the statute of limitations as well as its disallowance of the injunctive relief fees, we also remand so that the trial court may enter new findings on the issue of Duke's possible double recovery. To the extent CCC's settlement payment covered the prosecution of Duke's counterclaims, St. Paul was not entitled to any setoff since we have held St. Paul is not liable for the legal fees incurred in prosecuting Duke's counterclaims. Similarly, St. Paul is not entitled to a credit to the extent the settlement monies cover legal fees which Duke cannot recover from St. Paul as a result of the statute of limitations. Accordingly, the trial court's judgment as amended is vacated and remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges ARNOLD and LEWIS concur.

STATE v. HINTON

[95 N.C. App. 683 (1989)]

STATE OF NORTH CAROLINA v. JESSE RAY HINTON

No. 887SC1263

(Filed 3 October 1989)

1. Criminal Law § 62— evidence of stress evaluation test — curative instruction given—no prejudice

Defendant was not entitled to a mistrial after a State's witness testified on direct examination that he had administered a psychological stress evaluation test to defendant and the court failed to give a curative instruction before excusing the jury for an overnight recess, since no evidence of any results was given at trial; no reference was made to the nature of the test or any questions which might have been asked; the trial judge, even in the absence of an objection or motion to strike, immediately cautioned the jury to disregard the witness's initial statement regarding the test and called the attorneys to the bench; in chambers the judge offered to recast the instruction and to allow defense counsel to cross-examine the witness concerning the test; defense counsel preferred that a cautionary instruction be given at the end of trial along with the other instructions, which was done; and any prejudice which might have inured to defendant was removed by his cross-examination of the witness.

2. Rape and Allied Offenses § 5— first degree sexual offense— use of croquet stick to force victim to submit—sufficiency of evidence

There was no merit to defendant's contention that he hit the victim with a croquet stick because he was angry at the thought that she may have had sex with someone else rather than for the purpose of forcing her to have sex with him, and the trial court therefore did not err in submitting the charge of first degree sexual offense to the jury, since it was clear that defendant's beating of the victim with the croquet stick had the effect of putting the victim in fear for her life and thereby forcing her to submit to defendant.

3. Rape and Allied Offenses § 5— second degree rape — attempted second degree rape — alternative instructions given — sufficiency of evidence

There was sufficient evidence to support alternative jury instructions for both second degree rape and attempted sec-

STATE v. HINTON

[95 N.C. App. 683 (1989)]

ond degree rape, and the trial court did not err in refusing to arrest judgment on the verdict of attempted second degree rape where the prosecuting witness testified that she was raped by defendant in his bedroom, and at other points in her testimony described only an attempt to rape her, and the jury was free to believe some but not all of her testimony.

APPEAL by defendant from *Watts, Thomas S., Judge*. Judgment entered 9 June 1988 in Superior Court, NASH County. Heard in the Court of Appeals 23 August 1989.

Defendant Jesse Ray Hinton was charged with incest, rape, two counts of first-degree sexual offense, and two counts of sexual activity by a substitute parent. On 9 June 1988, after a jury trial, defendant was found not guilty of incest, and guilty of the following offenses: attempted second-degree rape, second-degree sexual offense, first-degree sexual offense, and two counts of sexual activity by a substitute parent. After a sentencing hearing defendant was sentenced to an active prison term of three years for attempted second-degree rape, twenty years for second-degree sexual offense, a life sentence for first-degree sexual offense, and nine years for the sexual activity by a substitute parent conviction. All sentences were consecutive except for the three-year attempted rape sentence which is to run concurrently with the nine-year sexual activity by a substitute parent sentence. Defendant gave notice of appeal to this Court in apt time.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mable Y. Bullock, for the State.

Perry and Brown, by Cedric R. Perry, for defendant-appellant.

JOHNSON, Judge.

Defendant's convictions arise out of events which allegedly occurred on 28 November 1987 between defendant and his then fourteen-year-old stepdaughter (hereinafter referred to as the "child," the "witness," or the "minor witness") who lived in the same residence in Nash County. The State's evidence, by way of the minor witness's testimony, tended to show the following: On the morning of 28 November, defendant's wife, who is also the natural mother of defendant's stepdaughter, had left for work when defendant awakened the child at about 10:00 a.m. and pulled her into his bedroom and put her on the bed.

STATE v. HINTON

[95 N.C. App. 683 (1989)]

Defendant proceeded to remove his clothes and also the child's night clothes. The child testified at trial that defendant attempted to have intercourse with her but that she pushed him away. Defendant then grabbed her by the throat and had oral sex with her. She also claimed that he also succeeded in having vaginal intercourse with her. During this time defendant asked the child whether she had ever had sex with anyone else.

Defendant and the child then went into different bathrooms and the child dressed herself and sat on the bed in her own room. Defendant entered holding a croquet stick in his hand. Defendant hit the child on the head and back with the stick eight times. He repeated his question to the child as to whether she had had prior sexual activity. Defendant undressed the child and forced her to have oral sex with him again. The witness testified that the defendant then stated that "[h]e was going to kill me and if I tried to put him in jail one more time, after he got out he was going to come back and kill me."

Defendant later voluntarily gave a statement to a deputy sheriff that he had molested the child over a period of several years. The child testified at trial to similar occurrences.

Defendant's trial testimony concerning the 28 November incidents was that he was approached by his stepdaughter who was wearing only underwear, and that she promised to have oral sex with him if defendant would persuade his wife to allow the child to visit a certain friend. Defendant stated that the child performed oral sex on him, and he "reached down and felt of her." Defendant denied ever having intercourse with the child. He also stated that he asked the child if she had had a prior sexual experience and became angry when she admitted to one. Defendant testified that he hit the child with the croquet stick because he was enraged about her prior sexual experience.

[1] By his first Assignment of Error, defendant contends that the trial court committed reversible error by denying his motion for a mistrial after State's witness, Detective Larry Antill, testified on direct that he had administered a psychological stress evaluation or "PSE" test to defendant, and the court failed to give a curative instruction before excusing the jury for an overnight recess.

The following reference to the PSE test occurred after Detective Antill had just read a statement which the minor witness had

STATE v. HINTON

[95 N.C. App. 683 (1989)]

given to him in 1986 in which she claimed defendant had molested her. This statement, which the child later recanted, was introduced for the purpose of showing defendant's state of mind.

Q. And subsequent to that, did [the minor witness] come in and take those things back?

A. Yes, sir, she did.

Q. Did she ever tell you why she had done that?

A. Yes, sir, she did.

Q. What did she say? Why did she say she did?

A. Mr. Hinton was also questioned and brought in and took a PSE test . . .

THE COURT: This statement, ladies and gentlemen of the jury, don't consider that statement by the witness.

Let me see you all up here a minute.

(Both counsel approached the bench and conferred with the court out of the hearing of the jury.)

THE COURT: Ask you [sic] next question.

Q. Did you administer any tests to the defendant?

A. I did not.

THE COURT: You're referring to 1986 now?

A. Yes, sir.

Q. Did you yourself offer any tests to the defendant?

A. I offered the tests to the defendant.

Mr. Perry [Defense counsel]: I didn't understand the question or the answer. What was your answer?

A. I offered it to the defendant.

THE COURT: Members of the jury, step to your room for just a few minutes. Please don't talk about this case while you're out there and I'll send for you as soon as I can.

Defendant cites us to cases in which reference was made to polygraph tests. Defendant is correct that polygraph evidence is

STATE v. HINTON

[95 N.C. App. 683 (1989)]

inadmissible in any trial in North Carolina even if the parties stipulate to its admissibility. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). Our Supreme Court has also stated, however, that not every reference to a polygraph test will necessarily result in prejudicial error. *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977); *State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976). The question of whether to grant a mistrial is addressed to the sound discretion of the trial court, and is proper "only when there are such serious improprieties as to make it impossible to attain a fair and impartial verdict." *State v. Harris*, 323 N.C. 112, 125, 371 S.E.2d 689, 697 (1988). The references in the instant case to the PSE test did not deprive defendant of a fair and impartial verdict. We uphold the court's denial of defendant's motion for mistrial.

No evidence of any results was given at trial. Also, no reference was made to the nature of the test or any questions which might have been asked. *Montgomery, supra*. Further, the able trial judge, even in the absence of an objection or motion to strike, immediately cautioned the jury to disregard the witness's initial statement regarding the test and called the attorneys to the bench. In chambers the judge offered to recaution the jury and to allow defense counsel to cross-examine the witness concerning the PSE test. Defense counsel preferred that a cautionary instruction be given at the end of trial along with the other instructions. This request was granted.

Significantly, any prejudice which might have inured to defendant was removed by his cross-examination of the witness. Defense counsel elicited from Detective Antill that defendant took a PSE test in 1986 in regard to allegations of molestation made by the minor witness, and that when the child learned that defendant had taken the test, she refused to take the test herself. The result of this may well have been to damage the child's credibility and actually improve defendant's position. At any rate it cured any possible prejudice to defendant. This assignment is overruled.

[2] By his second Assignment of Error, defendant argues that the court erred in denying his motion to dismiss the first-degree sexual offense charge which related to events in the minor witness's bedroom because, he claims, only second-degree sexual offense, at best, is supported by the evidence.

STATE v. HINTON

[95 N.C. App. 683 (1989)]

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

. . . .

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; . . .

G.S. sec. 14-27.4(a).

Specifically, defendant contends that the reason he struck the victim with the croquet stick in her bedroom was because he was angry with her for having sex with someone else, rather than for the purpose of forcing her to have sex with him. The argument is that defendant employed the weapon for a purpose other than to force the child to engage in sexual activity with him and that therefore the first-degree sexual offense statute does not apply. We disagree.

Our Supreme Court, in analyzing G.S. sec. 14-27.4(a)(2)(a), has observed that the first-degree rape statute, G.S. sec. 14-27.2, uses identical language to G.S. sec. 14-27.4(a)(2)(a). *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). Therefore, in an extensive analysis of the statutory phrase in G.S. sec. 14-27.4(a)(2)(a), "[e]mploys or displays a dangerous or deadly weapon," the Court in *Whittington* relied on analysis of the same phrase in first-degree rape cases. One such case cited in *Whittington*, *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981), stated in footnote 1, the following:

We perceive that the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed.

Sturdivant, 304 N.C. at 299, 283 S.E.2d at 725.

Applying this logic to the instant case, we find ample evidence to support the jury's finding that defendant "[e]mploy[ed] or display[ed] a dangerous or deadly weapon" in the commission of the first-degree sexual offense. The evidence showed that defendant

STATE v. HINTON

[95 N.C. App. 683 (1989)]

was holding the croquet stick up in the air when he entered the child's bedroom and began hitting her. While in the process of hitting the child, he asked her if she had had sex with someone else. Defendant then forced the child to have oral sex with him.

It is clear that defendant's use of the croquet stick had the effect of putting the victim in fear for her life and thereby forcing her to submit to the defendant. The fact that defendant initially became angry at the thought that the victim may have engaged in sexual activity with someone else is of no significance. Defendant's use of the stick enabled him to perpetrate the crime and the trial judge properly submitted the charge of first-degree sexual offense to the jury. This assignment is overruled.

[3] Last, defendant contends that the court erred in submitting the charge of attempted second-degree rape to the jury and not arresting judgment on the verdict of guilty of attempted second-degree rape. Defendant argues that all the evidence showed either that a rape occurred (the child's testimony) or it did not (defendant's testimony), and that there was no evidence of attempted rape.

We first note that "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection." Rule 10(b)(2), N.C. Rules App. Proc. (as amended 1981). In the jury charge conference, defense counsel, far from objecting to the inclusion of an instruction on attempted rape, gave the following response to the court's query:

[The Court:]

Now on 3453, that will be the second degree rape. Do you suggest any lessor included on that, Mr. Perry?

Mr. Perry [Defense counsel]: Based on the testimony, I think that would be appropriate.

THE COURT: What do you say, Mr. Caudle?

Mr. Caudle [State's Attorney]: There is some evidence of attempted.

THE COURT: There is some evidence that if the act was not consummated there was, at least, an attempt. So on that one, 3453, the verdict form would be guilty of second degree rape;

STATE v. HINTON

[95 N.C. App. 683 (1989)]

or, number 2, guilty of attempted second degree rape or, number 3, not guilty.

Defendant did not except to the court's decision to instruct on attempted rape and is precluded at this stage from raising an objection to the instruction.

Due to the seriousness of the charge involved we have, however, in our discretion, examined the record concerning the merit of defendant's contention. Defendant was charged with second-degree rape, or in the alternative with attempted second-degree rape. He was found guilty of attempted second-degree rape. Defendant argues that under *State v. McNicholas*, 322 N.C. 548, 369 S.E.2d 569 (1988), no instruction on attempted rape should have been given. In *McNicholas*, the trial court had refused to instruct on attempted rape and defendant was subsequently convicted of first-degree rape. On appeal, the Supreme Court held that the trial court was correct in refusing to instruct on attempted rape since all the evidence showed that either a rape was committed or it was not, and that there was no evidence of attempted rape. *Id.*

We find *McNicholas* distinguishable from the instant case because in this case there was sufficient evidence to support an instruction on attempted rape. Although the prosecuting witness did testify that she was raped by defendant in his bedroom, at other points in her testimony she described only an attempt to rape her. On direct examination the witness stated the following:

Q. What happened then after he pulled all his clothes off?

A. He tried to put his penis inside of me and have sex with me, but I would not let him and then I pushed him away and that's when he grabbed me by my throat and he was choking me and I couldn't breathe and then I got up and I was putting on my clothes and that's when he made me suck on his penis.

On cross-examination the witness was questioned further about her statement:

Q. Going back to when the State first started, you say Jesse came into your room and pulled you to your mother's bedroom and I heard you say that he tried to put his penis in and you wouldn't let him, is that what you said?

A. Yes.

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

Q. Did you cross your legs at that time? You said you kept him off of you, how did you keep him off?

A. I tried to push him away from me with my hands.

Q. So actually what happened, he tried to put his penis in, but he couldn't do it, is that right?

A. Yes.

In its entirety the minor witness's testimony concerning her alleged rape was somewhat unclear. There appear to be some conflicts as to the sequence of events and also whether, as quoted above, defendant actually raped her or only attempted to do so. The jury was, of course, free to believe or disbelieve the witness's testimony as it saw fit. In finding defendant guilty of attempted second-degree rape, the jury acted within its prerogative in choosing to believe some, but not all, of her testimony.

In our view there was sufficient evidence to support alternative jury instructions for both second-degree rape and attempted second-degree rape and the court did not err in refusing to arrest judgment on the verdict.

We conclude that defendant received a fair trial free of prejudicial error.

No error.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. STERLING PAYTON HARRIS ALIAS DAVY
RAY BOLDER

No. 8818SC1295

(Filed 3 October 1989)

1. Searches and Seizures § 12— frisking of person at scene of drug arrest—search and seizure not unlawful

A search of defendant and seizure of a gun from his person was not unlawful under the Fourth Amendment where it was based upon officers' reasonable suspicion that the occupants

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

of a motel room were armed or within reach of weapons; officers knew the subject of their search warrant and knew he was wanted on drug related charges; officers knew there had been significant traffic in and out of the motel room and suspected it was related to drug dealing of some kind; at least two of the detectives involved believed that weapons would be found on or near persons in this type of drug situation based upon their previous experiences that weapons were found in at least 85% of similar situations; and the police officers were acting in a swiftly developing situation where it was mandatory for the safety of the officers and others that the room, people inside the room, and people in immediate proximity to the room be secured.

2. Criminal Law § 75.7— question during frisking procedure—no custodial interrogation—Miranda warnings not required

Defendant's statement to officers in response to their question during a frisking procedure that he had a gun in his pocket did not amount to an involuntary confession given in the absence of Miranda warnings, since the officers' question was prompted by a concern for the public safety and was not designed solely to elicit testimonial evidence from a suspect which would have required Miranda warnings.

APPEAL by defendant from *Helms (William H.)*, Judge. Judgment entered 7 July 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 August 1989.

Defendant was charged under G.S. 14-415.1 and 14-7.1 with one count each of felony possession of a firearm by a felon and as a habitual felon. Defendant's motion to suppress certain evidence pertaining to the charges was heard on 6 July 1988.

The State's evidence upon *voir dire* tended to show that on 8 April 1988 at approximately 12:05 a.m., Officer R. J. Tolley and Detective Gary Evers of the Greensboro Police Department obtained a search warrant authorizing a search of room 145 at the Howard Johnson Motel for an individual named Bernard Hobson, who had been observed entering that room.

After receiving the search warrant, Officer Tolley and Detective Evers and at least three other members of the Greensboro Police Department stationed themselves in the room directly opposite room 145, and decided they would enter room 145 the next

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

time the door to that room opened. Approximately five minutes later, defendant opened the door to room 145 and attempted to exit. All the detectives except Officer Tolley and Detective Pearman entered room 145 to secure the room. Officer Tolley and Detective Pearman secured defendant and frisked him for weapons for safety reasons. The frisk occurred outside room 145 approximately two feet from the door.

Officer Tolley and Detective Pearman pushed defendant down to frisk him, and Detective Pearman held his knee in defendant's back. Prior to pushing defendant to the ground, Officer Tolley had her gun drawn but reholstered it when defendant was secured on the ground. Both Officer Tolley and Detective Pearman frisked defendant by patting him down beginning with defendant's shoulder area. Detective Pearman asked defendant if he had a weapon, and defendant answered, "yes," and told him that it was in his [defendant's] right coat pocket. The initial frisk did not include searching defendant's pockets. Defendant was arrested, handcuffed and taken into custody after the weapon was found. Detective Pearman stated that he would have completed his frisk of defendant even if defendant had not told him where to find the weapon.

Thereafter, Officer Tolley and Detective Pearman entered room 145 to assist in securing the other people in the room, including Bernard Hobson, the subject of the search warrant. Detective Evers and Officer Tolley then returned to the Magistrate's office to obtain an additional search warrant to search room 145 because detectives observed drugs and drug paraphernalia in plain view. The officers subsequently executed the search warrant.

Officer Tolley and Detectives Evers and Pearman testified at *voir dire* that based upon their past experiences as police officers, many subjects involved with drugs or dealing in drugs carry weapons. Detective Evers testified that Bernard Hobson was in fact being sought for drug charges.

Detectives Evers and Pearman stated that based upon their observation of room 145 and their knowledge that several persons were inside the room, including Bernard Hobson, they believed that drugs were either being used or sold. They further testified that they believed they would find weapons on the premises or on persons in room 145. They based their beliefs on their experiences that in 85 to 98 percent of the narcotics searches in which they participated, weapons were found on individuals or in close proximity

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

ty. The State's evidence further tended to show that it is standard police procedure to frisk individuals found on premises being searched for drugs.

Defendant testified that he had been handcuffed prior to telling Officer Tolley and Detective Pearman that he had a gun. He also stated that a police officer held a gun pointed at him during the entire frisk, and that he was "real scared." On cross-examination, defendant acknowledged his prior convictions for larceny and breaking and entering in 1980 and in 1983, and for possession of stolen goods in 1986.

Walter Scales, who was present during defendant's arrest on 8 April 1988 and who was also arrested with defendant, testified and corroborated defendant's testimony.

At the close of *voir dire*, the trial court entered an order which allowed the State to introduce into evidence the weapon found on defendant and defendant's statement that he had been carrying a weapon. In its order, the court made findings of fact consistent with the State's evidence.

Based upon the trial court's findings of facts, it concluded the following as a matter of law:

1. That Officers Tolley and Pearman were among a group of officers executing a warrant directing them to search the premises or to search premises not generally open to the public, and at that time it was reasonably necessary for them to detain the defendant so that the warrant could be served or executed without incident.
2. That Officers Tolley and Pearman reasonably believed that their safety required them to search defendant for a dangerous weapon by externally patting his clothes.
3. That at the time Officer Pearman asked the defendant if he had a weapon that the defendant was not under investigation by the police and he was not being interrogated by them; the question asked of the defendant did not seek to elicit a response from him that could be used at a subsequent trial of him but rather its purpose was to insure the safety of the officer executing the warrant.

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

4. That the defendant was being detained at the time that the pat-down search and question was asked of him and that the detention was reasonable in all aspects.

5. That Officer Pearman would have continued his pat-down search of the defendant even if he had not been told by the defendant that he did have a weapon. (T pp 65 and 66).

Defendant pleaded guilty to all charges on 7 July 1988 and was sentenced to 14 years in prison. From the order denying defendant's motion to suppress the evidence of his statement to police that he had a weapon and evidence of the weapon, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

ORR, Judge.

[1] Although defendant entered a guilty plea to both charges for possession of a firearm by a felon and habitual felon, he preserved his appeal under G.S. 15A-979(b) from the denial of his motion to suppress the evidence of the seizure of the gun from his person and his statement to police officers that he had a gun. Defendant contends that the trial court erred in denying his motion to suppress because the gun and his statement were obtained through an unlawful search and seizure, thereby violating his rights under the Fourth and Fourteenth Amendments to the United States Constitution and under the North Carolina Constitution. We find no error.

In support of his argument, defendant cites *Ybarra v. Illinois*, 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 (1979), *reh'g denied*, 444 U.S. 1049, 62 L.Ed.2d 737, 100 S.Ct. 741 (1980). In *Ybarra*, police officers searched Ybarra, a patron in a public tavern, pursuant to a search warrant issued to search the premises and the bartender named "Greg." The officers found drugs in Ybarra's pocket. The Supreme Court overturned Ybarra's conviction on the basis of absence of probable cause to search any patron, and stated that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91, 62 L.Ed.2d at 245, 100 S.Ct. at 342. The Court explained that the *Ybarra* search was unlawful because "[it] was not supported by a reasonable belief

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

that he was armed and presently dangerous." *Id.* at 92-93, 62 L.Ed.2d at 246, 100 S.Ct. at 343. In *Ybarra*, there was no suspicion that defendant Ybarra was anything more than a patron in a public place.

In the case *sub judice*, it is clear that the Greensboro police officers had "reasonable belief" that persons in room 145 may have been armed and dangerous. Detectives Evers and Pearman testified that based upon their professional experiences, weapons are found on persons or on the premises in at least 85 percent of the searches they conduct when drugs are involved. Moreover, they testified that they knew the subject of their search warrant was in room 145, the subject was wanted on drug related charges, and that there had been several persons entering and leaving room 145 on the night of 7 April 1988, which indicated to them that a drug transaction may have transpired.

We now turn to whether the search and seizure of defendant in the case before us was in fact lawful under the Fourth Amendment.

The Fourth Amendment allows reasonable searches and seizures based upon probable cause. In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), the Supreme Court made clear delineations between a "seizure" (arrest) and a "stop" and between a "frisk" and a "search." In *Terry*, the Court created a narrow exception to the probable cause requirement which allows a law enforcement officer, for his own protection and safety, to conduct a pat-down (or "frisk") to find weapons he reasonably believes or suspects are then in the possession of the person he "stopped." *Id.* The officer conducting the search must be able to articulate specific facts, which combined with rational inferences therefrom, reasonably warrant the intrusion. *Id.* at 27, 20 L.Ed.2d at 909, 88 S.Ct. at 1883.

The *Terry* exception was allowed based upon police necessity to act quickly to insure that the person stopped is not armed with a weapon that would be used against the police or others in close proximity. The scope of this exception confines itself to an intrusion reasonably designed to discover weapons or other items that could be used as weapons. *Id.* at 30, 20 L.Ed.2d at 911, 88 S.Ct. at 1884. The Court justified this by stating, "it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24, 20 L.Ed.2d at 908, 88 S.Ct. at 1881.

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

Since *Terry*, there have been a number of cases testing the limits of *Terry*. See *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), and *Michigan v. Summers*, 452 U.S. 692, 69 L.Ed.2d 340, 101 S.Ct. 2587 (1981). Many courts, in evaluating the reasonableness of a search and seizure or stop and frisk, have emphasized their need to consider "whether the police are acting in a swiftly developing situation and not indulge in unrealistic second-guessing." *United States v. Sharpe*, 470 U.S. 675, 686, 84 L.Ed.2d 605, 616, 105 S.Ct. 1568, 1575 (1985).

In this State, the courts have followed these principles to the letter, and have found that it is well within the law to conduct a frisk of a defendant for weapons when it is strictly limited to determination of whether that defendant was armed. See *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982), and *State v. Long*, 37 N.C. App. 662, 246 S.E.2d 846, *disc. rev. denied and appeal dismissed*, 295 N.C. 736, 248 S.E.2d 866 (1978). Applying these rules of law to the case before us, we find that the Greensboro police officers acted in compliance with the standards articulated above.

First, the evidence tended to show that the officers and detectives involved had reasonable suspicion that the occupants of room 145 were armed or within reach of weapons. The officers knew the subject of the search warrant, Bernard Hobson, and knew he was wanted on drug-related charges. The police officers also knew that there had been significant traffic in and out of room 145, and they suspected the traffic was related to drug dealing of some kind.

Second, the evidence established that at least two of the detectives involved believed that weapons would be found on or near persons in this type of suspected drug situation, based upon their previous experiences that weapons were found in at least 85 percent of similar situations. These are exactly the kinds of "reasonably articulated facts combined with rational inferences therefrom" that *Terry* allows.

Third, the Greensboro police officers acted in a "swiftly developing situation." The door to room 145 opened, and it was mandatory for the officers' safety and others that the room, persons inside the room, and persons in immediate proximity to the room be secured to find Bernard Hobson. Although it may have been clear to at least one police officer that defendant was not Mr. Hobson,

STATE v. HARRIS

[95 N.C. App. 691 (1989)]

it was not necessarily clear to Officer Tolley and Detective Pearman. Moreover, even if it had been clear to them that defendant was not Mr. Hobson, under *Terry* and other cases cited, they were within the limits of the law to stop and frisk defendant. They had no way of knowing whether defendant would leave the premises or perhaps turn around and start shooting.

[2] Defendant next argues that his statement to Officer Tolley and Detective Pearman was involuntary and therefore should be suppressed under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). We disagree.

In *New York v. Quarles*, 467 U.S. 649, 81 L.Ed.2d 550, 104 S.Ct. 2626 (1984), the Supreme Court made a public safety exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. In *Quarles*, a police officer apprehended and frisked a rape suspect. Upon discovering that the suspect wore an empty shoulder holster, the officer handcuffed the suspect and asked him where the gun was. The suspect responded, "[t]he gun is over there." *Id.* at 652, 81 L.Ed.2d at 554, 104 S.Ct. at 2629.

The Supreme Court stated that *Miranda* warnings are not required in a situation where "police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656, 81 L.Ed.2d at 557, 104 S.Ct. at 2631.

In the case *sub judice*, we find that Detective Pearman's question to defendant falls squarely within the *Quarles* exception. Detective Pearman was frisking defendant when he asked the question. It was clearly a question "prompted by a concern for the public safety" and not a question protected by *Miranda*, one "designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-59, 81 L.Ed.2d at 559, 104 S.Ct. at 2633.

For the reasons set forth above, we affirm.

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE v. KNOX

[95 N.C. App. 699 (1989)]

STATE OF NORTH CAROLINA v. JAMES KNOX, JR.

No. 8926SC57

(Filed 3 October 1989)

1. Constitutional Law § 28— two crimes arising from same transaction— indictment for second not product of prosecutorial vindictiveness— no formal plea offer by prosecution

In a prosecution of defendant for attempted robbery with a dangerous weapon and robbery with a dangerous weapon, there was no merit to defendant's contention that the second indictment was the product of prosecutorial vindictiveness where defense counsel knew of the second pending complaint; the two complaints arose from the same criminal transaction but involved different victims; and there was never a formal plea offer by the prosecution to indicate any motive for actual prosecutorial vindictiveness.

2. Criminal Law § 35— evidence that victims confused defendant and his brother—evidence properly excluded

In a prosecution for attempted armed robbery of restaurant employees, the trial court did not err in excluding testimony as to whether any of the employees had confused defendant with his brother where there was no proof that another person was even remotely connected with the crime; defendant did not seek to offer evidence that another person had committed the crime; defendant sought instead to introduce evidence that there was probably someone in the community who might have resembled defendant and thereby caused the witnesses all to make an error in their identification; and, based on the extensive identification testimony given by the victims and the lack of evidence linking another person to the crime, the evidence tendered by defendant was pure conjecture.

APPEAL by the defendant from *Allen (C. Walter), Judge*. Heard in the Court of Appeals 30 August 1989.

On 7 March 1988, the Mecklenburg County grand jury returned an indictment charging the defendant, James Knox, with attempted robbery with a dangerous weapon in 87CRS78819. On 31 May 1988, the Mecklenburg County grand jury returned an indictment charging defendant with robbery with a dangerous

STATE v. KNOX

[95 N.C. App. 699 (1989)]

weapon in 88CRS37886. Prior to trial, defendant moved to dismiss the indictment in 88CRS37886 on the grounds that it was the product of prosecutorial vindictiveness. The trial judge denied defendant's motion to dismiss. On 19 August 1988, a jury found defendant guilty of both charges. On 19 August 1988, Judge Allen imposed consecutive sentences of fourteen years imprisonment. Defendant entered notice of appeal on 19 August 1988.

The State's evidence at trial showed the following:

At about 7:45 p.m. on 30 October 1987, Maria Housiadas and Brenda Koutroulakis were working in a restaurant in Charlotte. A regular customer, Mr. Broome, was also present. Mrs. Housiadas noticed that a person was standing outside the door for three or four minutes and mentioned it to Koutroulakis and Broome. The man then entered the restaurant and pointed a sawed-off shotgun at her and demanded her money. When she replied that she did not have a key to the register, the man cursed her and placed the shotgun against Mrs. Koutroulakis' head. She screamed that she was pregnant and grabbed the gun, shoving it upwards. As they struggled over the weapon, it discharged and struck the ceiling. Mrs. Koutroulakis ran to the back of the store. The witness next observed the man point his gun at the customer and demand the customer's wallet.

Mrs. Housiadas described the man's physical appearance in detail. The man was approximately thirty to thirty-five years old, five feet and eleven inches tall and weighed one hundred seventy-five pounds. The witness further noted that she recognized the man as being a former customer. In addition, the witness related that the man appeared to have a few days' growth of facial hair. He also appeared to be intoxicated. Mrs. Housiadas testified she had seen this same man as a customer in her restaurant at least once a week for two or three years. During the entire incident, the witness was only two or three feet from the man. The restaurant was well lighted.

Following the incident, the witness was asked by a police investigator to review some photographs to see if she recognized anyone. The witness selected a picture of the defendant as the man who attempted to rob the restaurant. She noted that on the night of the incident the man looked older than he did in the photograph. The witness later observed a second set of photo-

STATE v. KNOX

[95 N.C. App. 699 (1989)]

graphs and she again selected a picture of the defendant as the man who was in the restaurant.

On 11 July 1988, Mrs. Housiadas viewed an in person lineup and selected defendant as the person who attempted to rob her.

Brenda Koutroulakis corroborated the above testimony. She had also seen the man who entered the restaurant on several prior occasions. He was further described as looking similar to a "street person." She also identified the defendant in a photographic lineup as well as an in person lineup as the man who had tried to rob the restaurant on 30 October 1987.

Kenneth Broome, the customer, was also called as a witness. He added that after the man put the gun to the employee's head and the gun fired, the man pointed the shotgun at him. After the perpetrator demanded money, the man grabbed the victim's wallet and took about \$106.00. Mr. Broome's description was consistent with the prior testimony of the other eyewitnesses. In cross-examination the witness stated that the defendant looked like the man who robbed him, but he could not be "absolutely positive."

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

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

LEWIS, Judge.

Defendant makes two assignments of error. First, defendant contends that the trial court erred in denying his motion to dismiss his 31 May 1988 indictment for robbery with a dangerous weapon of Kenneth Broome. Secondly, defendant contends that the trial court erred in sustaining the prosecutor's objections concerning whether any of the employees of the restaurant had confused the defendant with his brother and in sustaining the prosecutor's objections to defense counsel asking defendant's brother whether there was anyone else who resembled the defendant.

I

[1] Defendant argues that the defendant's second indictment for the robbery of Kenneth Broome was the product of prosecutorial vindictiveness.

STATE v. KNOX

[95 N.C. App. 699 (1989)]

Prior to trial, the court conducted a hearing on defendant's motion to dismiss. Defendant called James Gronquist, the Assistant Public Defender who had first represented the defendant on the two charges. Mr. Gronquist stated that there had been no plea offer by the prosecution. On cross-examination he admitted that prior to a plea conference on the first indictment, the prosecutor informed him of the possibility of a second indictment. During the conference on 4 May 1988, the judge indicated the sentence that likely would be imposed and defense counsel requested a continuance to consider a possible plea. On 16 June, the defendant rejected the offer. When asked if defendant had accepted the judge's offer, would defense counsel have insisted that the prosecution not seek an indictment on the other charge of armed robbery, Mr. Gronquist replied that since defendant had not been indicted, "it would probably not have been a formal part of the agreement. But I think it certainly would have been understood."

On 16 May 1988, Mr. Gronquist sent a letter to Ms. Ponder, the former Assistant District Attorney assigned to prosecute the defendant, requesting additional information in order to complete preparation for trial. Ms. Ponder responded by letter of 19 May 1988 in which she stated, "I am sending another count of robbery with a dangerous weapon to the grand jury on May 31, 1988, due to your indication in your letter that you are preparing for trial." Ms. Ponder testified that she knew "that we would need to try to join all related incidents, and I wanted to go ahead and have them together." Defendant argues that obtaining an additional indictment based on facts known to the prosecutor prior to the time of the original indictment constitutes vindictive prosecution in violation of defendant's right to due process of law. We disagree.

In *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed. 2d 74 (1982), the defendant was initially charged with several federal misdemeanors and petty offenses. At first, the defendant expressed a desire to engage in plea bargaining regarding these charges. *Id.* at 371, 73 L.Ed. 2d at 79. However, the defendant later refused to plead guilty to the charges and requested a jury trial. Approximately six weeks later, the prosecutor sought and received an indictment including one felony count arising out of the same facts which constituted the lesser offenses. The jury convicted the defendant on the felony count and the defendant moved to set aside the verdict on the ground of prosecutorial

STATE v. KNOX

[95 N.C. App. 699 (1989)]

vindictiveness. *Id.* In declining to apply a presumption of vindictiveness or make a finding of it, the court recognized that

'additional' charges obtained by a prosecutor could not necessarily be characterized as an impermissible 'penalty.' Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a 'benefit' to the defendant—changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.' An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forego legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.

457 U.S. 380, 73 L.Ed. 2d 84 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L.Ed. 2d 604, 98 S.Ct. 663 (1978)). We find the present case controlled by *Goodwin*, *supra*. Defendant failed to show any actual prosecutorial vindictiveness on the part of the State. Here, the defense counsel knew of the second pending complaint. The two complaints arose from the same criminal transaction but involved different victims. Furthermore, and most significantly, there was never a formal plea offer by the prosecution to indicate any motive for actual prosecutorial vindictiveness. Absent any actual vindictiveness, "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted." (Emphasis original), 457 U.S. at 384, 73 L.Ed. 2d at 87. We find no error.

II

[2] Defendant argues that the trial court erred by sustaining the prosecutor's objections concerning whether any of the employees of the restaurant had confused defendant with his brother. The record reflects that during the direct examination of Joe Knox, defendant's brother, by defense counsel the witness was asked:

Q. Have you ever had any incidence where anyone has confused you with anyone else over there?

STATE v. KNOX

[95 N.C. App. 699 (1989)]

MR. WOLFE: Object.

COURT: Objection sustained.

Q: What about the women who work there, do you talk to them?

A: Yea, all of, all the women; I always talk to the women there.

Q: Do you know them?

A. Yea, I don't know them by name exactly, but I know them.

Q: And have you ever had, have they ever told you who they thought you were?

MR. WOLFE: Object.

COURT: Objection sustained.

Q: Have they ever confused you with any of your brothers?

MR. WOLFE: Object.

COURT: Objection sustained.

As the testimony above indicates, the questioning called for hearsay responses; and therefore, the objections were properly sustained pursuant to G.S. Section 8C-1, Rules 801 and 803.

Defendant also has excepted to the trial court's rulings which sustained the objections to defense counsel asking David Knox, brother of defendant, whether there was anyone else who resembled defendant. Following an offer of proof in which the witness testified that there was another man who looked similar to defendant, the trial court excluded the evidence.

This case is indistinguishable from *State v. Allen*, 80 N.C. App. 549, 342 S.E.2d 571, *disc. rev. denied*, 317 N.C. 707, 347 S.E.2d 441 (1986). The defendant was convicted of robbery with a dangerous weapon. The defendant argued that evidence that another robbery perpetrated by a man resembling defendant and utilizing an almost identical *modus operandi* was directly and substantially relevant to the sole issue in dispute, i.e., the identity of the perpetrator of the robbery. The court excluded the evidence, finding that there was no evidence which pointed directly to another person's guilt: "Therefore, the proffered evidence could do nothing more than create an inference or conjecture as to another's guilt of the crime charged and it was therefore properly excluded." 80 N.C. App. at 551, 342 S.E.2d at 573; *see, also, State v. Cotton*, 318 N.C. 663,

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

667, 351 S.E.2d 277, 279 (1987) (“[e]vidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard.”). In the present case there was no proof that another person was even remotely connected with the crime. Defendant did not seek to offer evidence that another person had committed the crime. Instead, he sought to introduce evidence that there was possibly someone in the community who might have resembled the defendant and thereby caused the witnesses all to make an error in their identification. Based upon the extensive identification testimony given by Mrs. Housiadas and Mrs. Koutroulakis and the complete lack of any other evidence linking another person to the crime, the evidence tendered by the defendant is pure conjecture and was properly excluded by the trial court.

No error.

Chief Judge HEDRICK and Judge ORR concur.

LORMIC DEVELOPMENT CORPORATION AND SOUTH ISLAND PROPERTIES,
A MICHIGAN GENERAL PARTNERSHIP, PLAINTIFFS v. NORTH AMERICAN ROOF-
ING CO., INC., AND DIVERSITECH GENERAL, INC., DEFENDANTS

No. 8926SC23

(Filed 3 October 1989)

**1. Uniform Commercial Code § 10— installation of roof— warranty
—notice of defects unnecessary until after execution of warranty**

In an action for breach of warranty in the installation of a roof, the parties intended for the provisions of a manufacturer's sample warranty to ultimately govern defendant installer's obligation, but the parties did not intend for the provisions contained in the sample warranty to take effect until after the warranty was actually executed by defendant; therefore, plaintiffs owed defendants no duty to formally notify them of any defects in the roofing system until the warranties were actually executed, and a genuine issue of material fact existed as to whether plaintiffs timely gave defendants notice of the defects within 30 days after their discovery once the warranties were executed.

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

2. Uniform Commercial Code § 12— implied warranty of merchantability— disclaimer in warranty

In an action for breach of implied warranty of merchantability, the trial court properly entered summary judgment for defendant where the sample warranty attached to the contract and the actual warranty as later executed both effectively disclaimed the warranty of merchantability. N.C.G.S. § 25-2-314.

3. Negligence § 29.3— installation of roof— system free from foreseeable defects— jury question

The trial court erred in entering summary judgment against plaintiffs on the issue of negligence in the installation of a roof where, according to South Carolina law which applied in this case, defendant as supplier of the roof had a duty to provide plaintiffs with a roofing system free from foreseeable defects, and there were genuine issues of fact as to the cause of the leaking in plaintiffs' shopping center, the quality and type of material used, and the degree of care used in the installation of the roofing system.

APPEAL by plaintiffs from *Snepp (Frank W., Jr.)*, Judge. Order entered 11 August 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1989.

On 22 February 1984 plaintiff South Island Corporation entered into a contract with defendant North American Roofing Co., Inc. ("North American") to provide labor and materials necessary to construct a roofing system on a shopping center known as South Island Square in Hilton Head, South Carolina. The contract provided, in part, as follows:

The contractor shall perform all the work required by the contract documents for roofing and sheet metal . . . supply and install General Tire EPDM Ballasted Roof System to General Tire specifications in order for the building owner to receive a ten year labor and a fifteen year material warranty from General Tire and Rubber Company. SAMPLE ATTACHED. . . . WARRANTY: It is understood that said roof is to be completed as aforesaid and warrantied for a period of ten/fifteen years, warrantied by General Tire and Rubber Company, in accordance with General Tire Warranty attached.

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

A sample warranty was attached to the contract and provided:

The General Tire and Rubber Company ("General") warrants to the commercial building owner named below ("owner") subject to the terms, conditions, and limitations set forth herein, that the roofing membrane described below is free from defects in workmanship and materials. . . .

Defendant Diversitech General, Inc. ("Diversitech") sold the flexible sheet roofing system (General Tire EPDM ballasted roof system) to North American. The flexible roof system consisted of a rubber membrane, adhesive, caulk, and ballast, applied over a substrate. The contract provided that the roofing system would be installed over polystyrene insulation boards.

The roof was finished by North American on or about June 30, 1984. However, after its installation the plaintiffs discovered numerous leaks and other defects in the roofing system. Plaintiffs discussed these problems with defendants North American and Diversitech from the time the leaks began through 1987.

On February 27, 1985 plaintiffs paid North American the final retainage due under the contract. Although Diversitech was required under the contract to issue its warranties at this time, Diversitech failed to issue any warranties until 25 February 1986. Defendant Diversitech represented to plaintiffs that the delay in issuing the warranties was due to Diversitech's dissatisfaction with the workmanship and the materials used in the roofing system. Diversitech told plaintiffs it was attempting to resolve these questions with North American before issuing any warranties. When the warranties were issued, the plaintiffs believed that whatever problems existed had been resolved to the satisfaction of both defendants. The "Materials and Workmanship" warranty provided that Diversitech warranted to plaintiffs as follows:

Diversitech . . . warrants to the commercial building owner . . . subject to the terms, conditions, and limitations, set forth herein that for the period in which this . . . Warranty is effective (as shown on the last line hereof), the . . . systems installed on Owner's building . . . shall be free from defects in materials supplied by Diversitech and free from defects in workmanship by the roofing contractor named below.

Under the heading "Terms, Conditions, and Limitations," the warranty further provided:

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

Owner shall provide Diversitech with written notice of any defect or leak in the roof and of any claim under this warranty within . . . 30 days of the discovery of the defect or leak in the roof. Such notice shall be given by registered mail.

The final sentence in the warranty stipulated that the warranty would be effective from 13 February 1986 to 13 February 1996. The Limited Membrane warranty stipulated that the roofing membrane would be free from cracks for the designated period and also contained a 30-day notice provision, a limited remedy provision, and a disclaimer of warranties provision. The last sentence stipulated that this warranty would be effective from 13 February 1990 to 13 February 2001.

Sometime after issuance of the warranties by Diversitech, the roof began leaking again. In November 1986 the plaintiffs formally notified Diversitech of the leaks and demanded that Diversitech honor the warranties. Diversitech, however, declined to honor their warranties and plaintiffs filed suit on 21 May 1988 in Superior Court against the defendants for breach of express and implied warranties and for negligence. Defendant Diversitech moved for summary judgment on all claims asserted against it and this motion was granted. Plaintiffs appeal and we affirm in part and reverse in part.

Underwood, Kinsey & Warren, P.A., by William L. Sitton, Jr., for plaintiffs-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and Mika Z. Savir, for defendant-appellee Diversitech General, Inc.

LEWIS, Judge.

Plaintiffs assert that the trial court erred in granting defendant Diversitech's motion for summary judgment on all of plaintiffs' claims. Summary judgment is a drastic measure which should be used with caution since no person should be deprived of a trial on a genuine issue of material fact. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979), see also *Sauls v. Charlotte Liberty Mutual Insurance Co.*, 62 N.C. App. 533, 303 S.E.2d 358 (1983). In considering a motion for summary judgment a trial court is bound to view all the evidence and the inferences therefrom in the light most favorable to the nonmovant. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 641, 281

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

S.E.2d 36, 40 (1981). "The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). A review of the evidence contained in the record reveals several issues of material fact exist as to plaintiffs' claims entitling them to a trial on the merits.

[1] Addressing first plaintiffs' claim on the breach of express warranty, we find that a genuine issue of material fact exists as to whether plaintiffs gave defendants proper notice of the defects in the roofing system. Neither party denies that they agreed from the outset that warranties would be issued on the materials and workmanship performed in constructing and installing the roofing system. However, plaintiffs contend that they were unaware of any 30-day notice provision contained in Diversitech's warranties until after the warranties were actually issued on 25 February 1986. Alternatively, they argue that the duty to notify Diversitech in writing of any defects within 30 days did not arise until the warranties were actually issued in February 1986.

The "Sample" warranty attached to the original contract made no reference to Diversitech whatsoever, and all other pertinent data, such as the date, the signature of the Diversitech representative, the type of roofing membrane the warranty covered, and the dates for which the warranty was effective were absent on the sample warranty. Furthermore, the sample warranty carried the letterhead of "General Tire Building Products Company" and the terms of the sample warranty only referenced General Tire, whereas the warranties signed and issued by Diversitech carried their own letterhead and specifically referenced Diversitech's duties and obligations under the warranty.

We find as a matter of law that the parties did intend for the provisions of the General Tire sample warranty to ultimately govern Diversitech's obligations under the issued warranty. Paragraph five of the contract specifically references the General Tire warranty attached to the contract as the provisions which would govern the parties' rights and liabilities. Diversitech, as supplier of General Tire's roofing system, simply substituted its letterhead and name in the executed warranty. However, it is clear from the absence of specific data in the sample warranty that the parties did not intend for the provisions contained in the sample warranty to take effect until after the warranty was actually executed in February 1986. Until the warranties were actually exe-

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

cutted, plaintiffs owed defendants no duty to formally notify them of any defects in the roofing system. This being so, a genuine issue of material fact exists as to whether plaintiffs timely gave defendants notice of the defects within 30 days after their discovery once the warranties were executed.

The evidence is unclear as to whether the leaking problems were temporarily corrected by North American and Diversitech before they issued the warranties in February and then, at some point prior to plaintiff's November 1986 letter, the leaking started once again. If this is indeed what happened, a jury could find that plaintiffs did in fact give defendants timely notice of the defects within thirty days of their discovery after the warranties went into effect. Resolving any doubts in favor of the plaintiffs, we hold that the trial court erred in granting summary judgment on this issue.

[2] Plaintiffs further assign as error the entry of summary judgment on the issue of breach of implied warranty of merchantability. Paragraph six of both the sample General Tire warranty attached to the 22 February 1984 contract, as well as the Diversitech warranty issued on 25 February 1986, conspicuously recite: "Except as stated herein, there are no warranties, express or implied, including warranties of merchantability or fitness for a particular purpose." Under our U.C.C. 2-314, sellers of goods who enter into a contract for the sale of goods are deemed to warrant that the goods are merchantable unless the contract of sale contains an effective disclaimer of this warranty. G.S. 25-2-314. Since we have found that the parties agreed that the terms and conditions of the sample warranty would ultimately govern the rights and liabilities of the parties after its execution, we find that once Diversitech executed its warranty in February 1986, the implied warranty of merchantability was effectively disclaimed. We affirm the trial court's ruling in favor of the defendant on this issue.

[3] Finally, the plaintiffs assign as error the entry of summary judgment against them on the issue of negligence. Because we adhere to the *lex loci delicti* rule in determining conflicts of laws issues in tort, South Carolina tort law governs the determination of this issue. *Childress v. Johnson Motor Lines*, 235 N.C. 522, 524, 70 S.E.2d 558, 560 (1952); *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988) ("[f]or actions sounding in tort, the state where the injury occurred is considered the situs of the

LORMIC DEVELOPMENT CORP. v. NORTH AMERICAN ROOFING CO.

[95 N.C. App. 705 (1989)]

claim. Thus, under North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs. . . ."). In the present case, the injury to plaintiffs' shopping center occurred in South Carolina, therefore, South Carolina law governs plaintiffs' negligence claim.

Under South Carolina law, product suppliers owe a duty to foreseeable users of their products to exercise reasonable care to provide products that are reasonably fit for their intended use. *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985), *appeal dismissed*, 286 S.C. 127, 332 S.E.2d 102 (1985).

The affidavits submitted by plaintiffs' expert reveals that at least part of the damage was due to the failure to provide an underlayment board. Use of an underlayment board in the installation of insulation for this type of roofing system is generally accepted industry practice and is recommended by most, if not all, manufacturers of such insulation. Plaintiffs' expert also determined that the leaking was caused by improper installation in violation of the manufacturer's specifications.

It is apparent from studying the record and the various affidavits from both parties that the cause of the leaking in plaintiffs' shopping center, the quality and type of materials used, and the degree of care used in the installation of the roofing system are all vigorously disputed. Diversitech, as supplier of the roof, had a duty to provide plaintiffs with a roofing system free from foreseeable defects. *See JKT Co., Inc. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980) (verdict against defendant manufacturer/seller affirmed in action based on negligence for leaking roof where defendant used defective materials in the installation of plaintiffs' roofing system).

We find that there are genuine issues of material fact on the issue of defendant's negligence.

Affirmed in part, reversed in part.

Chief Judge HEDRICK and Judge ORR concur.

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

RUSSELL PRICE AND WIFE, JUDY M. PRICE v. FLEMING E. WALKER AND WIFE, VICTORIA NORRIS WALKER; OWEN GERALD WILLIAMS AND WIFE, CARRIE WILLIAMS; AND JERRY EVERETT CAPPS

No. 8911SC26

(Filed 3 October 1989)

1. Dedication § 2.2— easement by dedication— express reference to map showing pathway

An easement by dedication may be made by express language, reservation, or by conduct showing an intention to dedicate, and conduct showing an intention to dedicate may be found where a plat is made showing streets and the land is sold either by express reference to such plat or by a showing that the plat was used and referred to in negotiations for sale. In this action to close a portion of a pathway crossing plaintiffs' property the evidence was clear that both conveyances from the original owner to plaintiffs' and defendants' predecessors in title were made by express reference to the map of all of the original owner's property, and the map clearly showed the road in question.

2. Dedication § 2— land sold in reference to map—dedication not formally accepted—purchasers who rely on map acquire easement

Where land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those rights of ways.

3. Easements § 3— easement appurtenant created

Defendants' easement was not in fact a true dedication but was closer to an easement appurtenant which is created when the purchaser whose transaction relies on a plat is conveyed the land.

4. Easements § 5— no easement of ingress and egress established—language in deed as notice that easement existed

The language "subject to" found in plaintiffs' deed did not create an easement of ingress and egress over their land, since the easement itself was created by dedication, but the

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

language was important because it notified any purchaser or subsequent purchaser that an easement existed across the tract.

5. Easements § 5— no easement by necessity— removal of necessity did not eliminate easement

There was no merit to plaintiffs' contention that any easement across their property was an easement by necessity, that defendants had alternative routes of ingress and egress, and that the easement should therefore be eliminated, since the existence of the easement across plaintiffs' property was not dependent on the dominant tenement owners requiring an access to their property but instead rested on the expectation and reliance created when the original owner divided and platted the tracts of land and sold the land while referring to a map showing the easement.

APPEAL by plaintiffs from *Bowen, Judge*. Order entered 12 October 1988 in Superior Court, HARNETT County. Heard in the Court of Appeals 29 August 1989.

In this civil action plaintiffs seek to close a section of a pathway that crosses their property. Defendants own portions of an adjacent tract of land through which the pathway also crosses. Plaintiffs filed suit 25 March 1988 under the Uniform Declaratory Judgment Act (N.C.G.S. § 1-253 through 1-267, Article 26), asking the court to construe the deeds referred to in plaintiffs' complaint and determine the rights, status and/or other legal relations of plaintiffs and defendants herein. At trial, counsel for plaintiffs and defendants stipulated and agreed that the court consider the pleadings and exhibits and reach its decision without either party offering other evidence. The court accepted this stipulation and concluded that plaintiffs held their tract of land subject to an easement of ingress and egress for the reasonable use and benefit of defendants. From this order, plaintiffs appealed. We find no error.

The record before us discloses the following facts: all the property in question here was at one time owned by Erwin Mills, Inc., of Erwin, North Carolina [Erwin Mills]. Plaintiffs now own and possess as tenants by entirety a parcel of land referred to as Tract No. 4 on a map designated as Map 1 of the Erwin Mills Property [Erwin Mills Map]. This map is recorded at Plat Book 7, Page 2 of the Harnett County Registry. The map shows six large tracts of land ranging in size from sixty-two to seventy-seven

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

acres that are situated parallel to each other between State Road No. 1769 and the Cape Fear River. Plaintiffs became owners of Tract No. 4 through conveyances from the descendants of D. B. Johnson. Johnson had purchased Tract No. 4 from Erwin Mills under a deed dated 23 January 1954 that is recorded in Plat Book 352, Page 78, Harnett County Registry.

Defendant Fleming E. Walker was conveyed Tract No. 5, an adjacent tract to Tract No. 4, on the same date Tract No. 4 was conveyed to D. B. Johnson, 23 January 1954. The deed from Erwin Mills to Walker is recorded in Plat Book 352, Page 77, Harnett County Registry. The other defendants own land that originally made up Tract No. 5. They acquired their respective parcels from Walker or through subsequent purchasers of Walker.

The deeds from Erwin Mills to D. B. Johnson and from Erwin Mills to Fleming Walker are identical except that one deed conveys Tract No. 4; the other, Tract No. 5. Neither deed provides a metes and bounds description of the tracts sold, but instead refers to the properties conveyed as Tracts No. 4 and No. 5 "as shown on" the Erwin Mills Map. No other description of the dimensions or location of the tracts conveyed is provided in the deed. Also both deeds contain the same conditions, restrictions, and reservations of easements.

The narrow path or roadway in question here is known as the "Pump Station Road," and the road is referred to both in the deeds described above and on the Erwin Mills Map. The map clearly shows that the Pump Station Road begins at State Road No. 1769, which forms the northern border of these tracts, extends south along the dividing line between Tracts No. 3 and No. 4, and then turns east crossing Tracts No. 4, No. 5, and No. 6.

Plaintiffs on appeal contend the trial court erred in concluding that plaintiffs took Tract No. 4 subject to the right-of-way easement known as Pump Station Road, and that plaintiffs are not entitled to close, obstruct, or interfere with travel through said road. We disagree with plaintiffs and affirm the court's decision for defendants.

McLeod, McLeod, and Hardison, by J. Michael McLeod, for appellants.

Vernon K. Stewart for appellees.

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

ARNOLD, Judge.

[1] The law governing the methods to establish an easement by dedication is well settled. A dedication may be made by express language, reservation, or by conduct showing an intention to dedicate. Conduct indicating the intention to dedicate may be found where a plat is made showing streets and the land is sold either by express reference to such a plat or by a showing that the plat was used and referred to in negotiations for the sale. *Houghton v. Woodley*, 67 N.C. App. 475, 478, 313 S.E.2d 225, 227 (1984); *Green v. Barbee*, 238 N.C. 77, 79, 76 S.E.2d 307, 309 (1953). In this case, the evidence is clear that both conveyances from Erwin Mills to D. B. Johnson and from Erwin Mills to Walker Fleming were made by express reference to the Erwin Mills Map.

[2, 3] Furthermore, where land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those right-of-ways. *Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964). In this situation, three categories of persons are affected: the purchasers within the platted area, purchasers outside the area designated, and the general public. Plaintiffs and defendants in this case, owners of Tracts No. 4 and No. 5, are purchasers within the area platted because they took their property through deeds that specifically referred to the Erwin Mills Map. The interest created by purchasers within the platted area as to right-of-ways shown on the plat is not strictly speaking a true dedication. A dedication must be made to the public at large, not part of the public, and before a dedication can take effect, it must be accepted by the appropriate authorities. *Land Corp. v. Styron*, 7 N.C. App. 25, 28, 171 S.E.2d 215, 217 (1969); see *Houghton*, 67 N.C. App. at 478, 313 S.E.2d at 227. Instead, the defendants' easement in this case is closer in nature to an easement appurtenant, and it is created when the purchaser whose transaction relies on the plat is conveyed the land. *Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967). No further action by the purchaser, vendor, or public authorities is necessary to preserve the easement rights of the purchaser.

Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished or diminished except by agreement

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. (Citations omitted.)

Realty Co., 261 N.C. at 421, 135 S.E.2d at 36.

The general public, on the other hand, only acquires rights in a dedication upon acceptance of the dedication. *Houghton*, 67 N.C. App. at 478, 313 S.E.2d at 227. The reason such a dedication is not complete until acceptance is to prevent landowners, simply by executing a deed, from compelling the authorities to assume the burdens of maintaining or repairing property offered for dedication. *Id.* Purchasers of parcels of land located outside the boundaries of the area platted and recorded acquire the rights of the general public, not the rights of the purchaser within the area. *Id.*

[4] Plaintiffs argue that language in D. B. Johnson's deed from Erwin Mills was insufficient to create an easement of ingress and egress over Tract No. 4. We disagree with plaintiffs' analysis on the effect of this language.

Plaintiffs rely on *Mason v. Andersen*, 33 N.C. App. 568, 235 S.E.2d 880 (1977), where this Court held the following language was insufficient to convey an easement to a purchaser for the privilege of using a lake located in a subdevelopment: "This deed is delivered and accepted subject to those restrictions [which were recorded in a plat book]." *Id.* at 571, 235 S.E.2d at 882. It is true that language in a deed stating a parcel of land is transferred "subject to" several restrictions on its use cannot also be construed to transfer to the owner of the same parcel an easement in the use of other land—in the *Mason* case, the right to use a lake. Plaintiffs, however, have misapplied the *Mason* case here. The issue in the present case is not whether the plaintiffs, the owners of Tract No. 4, have an easement across another landowner's property, it is whether the plaintiffs purchased Tract No. 4 *subject to* an easement held by the defendants. The *Mason* case in fact demonstrates that plaintiffs took Tract No. 4 *subject to* such an easement.

An easement is "[a] right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972). The property receiving the benefit of an easement is known as the dominant land; the burdened land is the servient

PRICE v. WALKER

[95 N.C. App. 712 (1989)]

estate. Language such as "subject to" in a deed relegates property in question to the status of a servient estate concerning any restrictions placed on transferred property. *Mason*, 33 N.C. App. at 572, 235 S.E.2d at 882. Likewise, in the case at bar, the language "subject to" found in plaintiffs' deed indicates plaintiffs' property is the servient estate as to the section of the Pump Station Road that crosses through Tract No. 4. We agree with plaintiffs that the language "subject to" in their deed does not create the easement. As explained above, the easement itself was created by dedication. The language in plaintiffs' deed, however, is important because it notifies any purchaser or subsequent purchaser that an easement exists across Tract No. 4. Defendants, as owners of the dominant estate in this case, possess the privilege to reasonably use the easement across the servient land for the purposes of ingress and egress.

[5] Plaintiffs also argue that if an easement across Tract No. 4 in fact exists, it is an easement by necessity. They contend the easement should now be eliminated because the defendants have alternative routes of ingress and egress. Defendants' easement created by the Erwin Mills deeds and map, however, is not an easement by necessity. The existence of the easement across Tract No. 4 is not dependent on the dominant tenement owners requiring an access to their property, rather it rests on the expectation and reliance created when Erwin Mills divided and platted the tracts of land and sold the land while referring to the map showing the Pump House Road.

Finally, plaintiffs argue without supporting citations that the Tract No. 4 deed from Erwin Mills to D. B. Johnson failed to create an easement because of "the lack of specific description of the alleged easement." As stated above, however, the easement here was created by selling the divided tracts while relying on the Erwin Mills Map. The map is the key to the existence of the defendants' easement in this case, and it clearly shows the road.

Therefore, the plaintiffs are legal owners of Tract No. 4 subject to an easement of ingress and egress for the reasonable use and benefit of the defendants in this matter. The order of the trial court is

Affirmed.

Judges BECTON and COZORT concur.

STATE v. MOORE

[95 N.C. App. 718 (1989)]

STATE OF NORTH CAROLINA v. LEE HAMILTON MOORE

No. 893SC71

(Filed 3 October 1989)

**Narcotics §§ 1.3, 5— sale and delivery of controlled substance—
two offenses—only one punishment permitted**

A single defendant may be charged with and convicted for sale of a controlled substance and delivery of the same substance, since the two crimes are separate and distinct offenses; however, in light of the legislative intent of N.C.G.S. § 90-95(a)(1), defendant may be punished for only one of those offenses where they involve the same transaction.

APPEAL by defendant from *Small, Judge*. Judgments entered 29 September 1988 in Superior Court, PITT County. Heard in the Court of Appeals 31 August 1989.

Defendant was indicted on two bills, each charging the following three counts: possession of a controlled substance with intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance in violation of N.C.G.S. § 90-95(a)(1). Defendant was found guilty on the first bill of possession of a controlled substance (a lesser included offense), sale of a controlled substance, and delivery of a controlled substance. On the second bill, defendant was found guilty of possession of a controlled substance with the intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance.

This case involves two purchases of the hallucinogenic mushroom, psilocyn, a Schedule I controlled substance by an undercover deputy sheriff, T. G. Shane, from the defendant, Lee Hamilton Moore. Both purchases were executed between the undercover deputy sheriff and the defendant, with Robert William Dorney, a confidential police informant acting as an intermediary.

In September of 1987, Robert Dorney began working as a paid informant relaying information about drug activity in the Pitt County area to the Greenville Police Department. Sometime during that month, Dorney gave the defendant a specimen of psilocyn mushrooms and told the defendant that he could grow additional mushrooms from the specimen. Defendant took the mushrooms and succeeded in propagating and growing more mushrooms in a con-

STATE v. MOORE

[95 N.C. App. 718 (1989)]

tainer in the closet of his bedroom. On 16 October 1987, the defendant was contacted by the informant, Dorney, and told that he had someone who was interested in making a purchase of psilocyn from Moore. Defendant later met with the informant and the undercover officer, at which time the defendant sold to the officer a five-gram packet of psilocyn for \$35. Approximately a month later on 15 November 1987, the informant and the undercover officer went to the defendant's residence where Officer Shane purchased from the defendant another ten grams of psilocyn mushrooms for \$70.

Defendant was arrested 13 January 1988 and charged under N.C.G.S. § 90-95(a)(1) which reads in pertinent part:

Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance; . . .

* * * *

(3) To possess a controlled substance.

Defendant pleaded not guilty to the charges, stood trial, and was found guilty by a jury on all counts, except on the first bill the defendant was found guilty of the lesser included offense of possession of psilocyn instead of possession with intent to sell or deliver. The court consolidated each three-count indictment into one judgment, sentenced the defendant to six years on each bill for a total of twelve years, and the defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

Blount & Fornes, by Robin L. Fornes, for defendant appellant.

ARNOLD, Judge.

We find merit in only one assignment of error. Defendant contends that it was improper for the trial court to issue separate sentences for both the sale of a controlled substance and the delivery of the same controlled substance. Under both indictments the jury found Moore guilty of selling psilocyn and guilty of delivering the same material. The first indictment stemmed from the events on 16 October 1987 when Moore sold and delivered a 5-gram package containing psilocyn to the undercover officer. The second indict-

STATE v. MOORE

[95 N.C. App. 718 (1989)]

ment resulted from a nearly identical transaction involving 10 grams of psilocyn that occurred on 15 November 1987.

All of the charges involved are Class H felonies with the exception of the simple possession charge, which is a Class I felony. N.C.G.S. § 90-95(b)(1), (d)(1). All the offenses carry a presumptive sentence of three years for each count, except possession of psilocyn carries a presumptive sentence of two years. N.C.G.S. § 15A-1340.4(f)(6) and (7). The trial court consolidated the three-count indictments into one judgment, sentencing the defendant to six years on each bill. It is clear from the following comments that the defendant was sentenced consecutively for both the sale and delivery of the same contraband in each transaction:

THE COURT: Before I enter judgment, I have one question of counsel for the State and for the defendant. Do either of you have any citation indicating that for the purpose of punishment the sale merges with the delivery charge?

MR. HAIGWOOD (District Attorney): Judge, they are separate charges and there is a case that says that.

THE COURT: Separate charges?

MR. HAIGWOOD: Yes, sir. There is a Court of Appeals case, and it will take me a few minutes but I can get it for you.

THE COURT: That is my recollection. I would like to see that case, if not tonight, in the morning. I am going to go ahead and enter judgment because I think that's the law. I was just trying to reaffirm by opinion.

The trial court erred in punishing the defendant for both the sale and delivery in this situation. We do not believe the Legislature intended to impose consecutive sentences for both the offense of sale of a controlled substance and delivery of the same contraband when one individual has made the transfer.

It is clear that sale and delivery of a controlled substance are separate offenses. *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976); see *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985); accord, *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985). "A sale is a *transfer* of property for a specified price payable in money." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28. Delivery, in the context of the controlled substance statutes, means the "actual, constructive, or attempted transfer from one person to an-

STATE v. MOORE

[95 N.C. App. 718 (1989)]

other of a controlled substance." N.C.G.S. § 90-87(7). To prove delivery, the State is not required "to prove that defendant received remuneration for the transfer." *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E.2d 135, 137, *cert. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982). It was proper to charge Moore separately on each bill of indictment with sale of psilocyn and delivery of the same controlled substance. This conforms with the above holdings and advances the intent of the controlled substance statute—to stop drug transfers of all kinds. *See Creason*, 313 N.C. at 129, 326 S.E.2d at 28. A jury should have the option after hearing the evidence of finding a defendant guilty of a sale, a delivery or of both offenses. Evidence may be presented that is insufficient to prove a sale occurred, but would support a conviction for delivery of the controlled substance. Nevertheless, while it is appropriate to separate these offenses for the purpose of charging a defendant, we do not believe the Legislature intended to punish a defendant twice for one transfer of the same contraband.

The intent of the Legislature controls the interpretation of a statute. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). In *Creason*, the Supreme Court examined the portion of N.C.G.S. § 90-95(a)(1), which makes possession "with intent to sell or deliver a controlled substance," a criminal offense. *Creason*, 313 N.C. at 122, 326 S.E.2d at 24. That court determined the intent of the Legislature in adopting subdivision (a)(1) of N.C.G.S. § 90-95 was two-fold: (1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another. *Creason*, 313 N.C. at 129, 326 S.E.2d at 29; *see* N.C.G.S. § 90-95. Other courts have found similar intent: "The gist of both offenses [sell and deliver], the act which the General Assembly intended to punish, is the transfer of controlled substances." *State v. Rozier*, 69 N.C. App. 38, 45-46, 316 S.E.2d 893, 898, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

By criminalizing the sale or delivery of a controlled substance, the Legislature sought to prevent all attempts to place drugs into commerce by any act of transfer. *See Creason*, 313 N.C. at 129, 326 S.E.2d at 29. To expedite this purpose the more inclusive word "delivery" was used in the statute. The only difference in the terms "sell" and "delivery" is that money changes hands in a sale; otherwise, the terms in this context are the same. *See Creason*, 313 N.C. at 129, 326 S.E.2d at 29.

STATE v. MOORE

[95 N.C. App. 718 (1989)]

It is an overreading of the statute to conclude that the Legislature intended to punish a defendant twice for one drug transaction. The purpose of the statute is to prevent drug transfers, a double punishment for a single transaction violates this legislative intent and accomplishes nothing short of placing defendant in double jeopardy.

Our analysis of N.C.G.S. § 90-95(a)(1) is buttressed by *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). In *Perry*, the defendant was convicted of larceny and possession of the same stolen goods that were the subject matter of his larceny. The judge sentenced the defendant to three to six years imprisonment on the larceny conviction and two years imprisonment on the possession conviction. *Id.* at 227, 287 S.E.2d at 812. The court stated unequivocally that the offenses of larceny and possession of property that was the subject of the larceny were two separate and distinct offenses. *Id.* at 233, 287 S.E.2d at 815. Nevertheless, the court held that the individual could not in that situation be punished for both offenses. The court stated: "The fact that larceny and possession of property stolen in that larceny are two separate and distinct offenses, for which a defendant *may be* punished does not mean however that he is so punishable under our statutes." *Id.* at 234, 287 S.E.2d at 816.

In summary, a prosecutor may of course go to trial against a single defendant on charges for the sale of a controlled substance and the delivery of the same substance. These two crimes are separate and distinct offenses. However, in light of the legislative intent of the statute, we hold that the defendant may be punished for only one of those offenses where they involve the same transaction. See *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581, *cert. denied*, 459 U.S. 946, 103 S.Ct. 263, 74 L.Ed.2d 205 (1982).

For purposes of sentencing in this case, the convictions against defendant for delivery of psilocyn on each bill of indictment are merged into the charges for selling the drug. A new sentencing hearing is ordered. We also find no prejudice as to defendant's other assignments of error and no error in defendant's trial.

Modified and remanded for sentencing.

Judges BECTON and COZORT concur.

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

MARTHA SUE SNEAD v. ANGELIA MARIE FOXX AND JAMES EDWARD PAYNE

No. 8818SC1345

(Filed 3 October 1989)

Rules of Civil Procedure § 4.1 — service of process by publication — no obligation to mail to address where party does not reside

Under N.C.G.S. 1A-1, Rule 4(j1) there no longer exists an obligation to mail a copy of the "notice of service of process by publication" to an address where the party sought to be served no longer resides.

APPEAL by plaintiff from *Mills (F. Fetzer)*, Judge. Order entered 17 June 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 June 1989.

Joel N. Oakley for plaintiff-appellant.

Henson Henson Bayliss & Teague, by Perry C. Henson and Lisa M. Pendergrass, for defendant-appellee Foxx.

GREENE, Judge.

The plaintiff appeals from an order entered by the trial court dismissing its claim against defendant Angelia Marie Foxx.

In this civil action, the plaintiff filed a complaint against defendant James Edward Payne, the owner of the vehicle, and defendant Angelia Marie Foxx, the driver of the vehicle. Defendant Payne was personally served with a copy of the summons and complaint and defendant Foxx was served by publication. The claim arises out of an automobile collision which occurred on 16 July 1984. The complaint was filed on 16 June 1987, and civil summonses were issued against both defendants on that date. Defendant Payne was served on 18 June 1987, and defendant Foxx's summons was returned with the sheriff's endorsement that someone else had lived at the address shown on the summons of 2610 Phillips Avenue, Greensboro, North Carolina for over a year, and that person did not know the defendant Foxx. Notice of service of process by publication was first published in the Greensboro News and Record on 16 September 1987. On 12 November 1987, the attorney for the plaintiff filed the following affidavit:

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

JOEL N. OAKLEY, being duly sworn, deposes and says:

1. Plaintiff issued a summons and complaint to be served on defendant, Angelia Marie Foxx on June 16, 1987 at approximately 4:05 P.M.

2. An agent of the Sheriff of Guilford County attempted service on the defendant at 2610 Phillips Avenue, Greensboro, North Carolina.

3. The service was returned, stating that the defendant did not live there, that she has not been there in over a year, and that the residents did not know the defendant.

4. 2610 Phillips Avenue is the last address of the defendant of which the plaintiff has knowledge.

5. 2610 Phillips Avenue is still listed by the North Carolina Department of Motor Vehicles as the defendant's address.

6. That the defendant was allegedly a college student at the time of the accident, July 16, 1984.

7. The undersigned attorney has inquired as to the defendant's location but has not been able to receive any information.

8. The codefendant's attorney has stated his client has no knowledge of the defendant's whereabouts.

10. [sic] Therefore, plaintiff has attempted service by publication by placing an ad in the Greensboro Daily News, which is published in areas where the accident happened and where the defendant's address is located by the Department of Motor Vehicles.

On 1 December 1987, defendant Foxx answered the complaint and alleged as a defense that:

. . . the affidavit of the plaintiff's attorney shows on its face that Rule 4, Rules of Civil Procedure, was not complied with, and there has been a discontinuance of the action as to the defendant Angelia Marie Foxx and the defendant Angelia Marie Foxx pleads the failure of the plaintiff to comply with the provisions of Rule 4, Rules of Civil Procedure, the provisions of G.S. Sec. 1-597 and G.S. Sec. 1-598 and failure to comply with the provisions of G.S. Sec. 1-75.10(2), and the defendant Angelia Marie Foxx pleads the three year statute

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

of limitations in bar of any recovery by the plaintiff in this action.

Defendant Foxx's plea in bar came on for hearing before the trial court on 22 June 1988, and the trial court entered an order which in pertinent part reads as follows:

it appearing to the court from the affidavit of counsel that the last known address of the defendant Angelia Marie Foxx was 2610 Phillips Avenue, Greensboro, North Carolina 27405, and the Court being of the opinion that the plaintiff did not comply with Rule 4(j), Rules of Civil Procedure, or G.S. Sec. 1-75.10(2) and failed to mail the defendant Angelia Marie Foxx notice of service of process by publication or of mailing to the defendant a copy of the summons and the complaint and the Court being of the opinion that service of process on the defendant by publication was deficient and that there has been a discontinuance of this action and that the action against the Defendant Angela [sic] Marie Foxx is barred by the three-year statute of limitation.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED . . . that the motion of the defendant Angelia Marie Foxx for the entry of an order that there has been a discontinuance of this action shall be and the same is hereby allowed; and it is further ordered that the action against Angelia Marie Foxx is barred by the three-year statute of limitations and the action against Angela Marie Foxx shall be and the same is hereby dismissed.

The only issue presented by this appeal is whether plaintiff's affidavit of publication sufficiently complies with N.C.G.S. Sec. 1A-1, Rule 4(j1) (1983).

I

Rule 4(j1) provides in pertinent part:

A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by pub-

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

lication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there should be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2), the circumstance warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C.G.S. Sec. 1A-1, Rule 4(j1) (1983). N.C.G.S. Sec. 1-75.10 (1983) provides in pertinent part:

Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows: . . .

2. Service of Publication.—In the case of publication, by the affidavit of the publisher or printer, or his foreman, or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require made by the person who mailed the same.

The defendant argues the failure of the plaintiff to mail a copy of the “notice of service of process by publication” to the last known address of the defendant is fatal to the plaintiff’s service by publication. We disagree.

N.C.G.S. Sec. 1-98.4(b) repealed by 1971 N.C. Sess. Laws, ch. 1093, Sec. 19, provided in pertinent part:

(b) Where [service of process by publication] is to be had upon a natural person, the verified pleading or affidavit must state:

(1) The name and residence of such person, or if they are unknown, that diligent search and inquiry have been made to discover such name and residence, and that they are set forth as particularly as it is known to the applicant

N.C.G.S. Sec. 1-99.2(c), repealed by 1971 N.C. Sess. Laws, ch. 1093, Sec. 19, provided in pertinent part:

The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence . . . appear in the verified pleading or affidavit. . . . Such copies shall be sent via ordinary mail, addressed to each

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

party at the address of such party's residence . . . as set forth in the verified complaint or affidavit. . . .

Sections 1-98.4 and 98.2(c) were construed by our Supreme Court to require the mailing of the "notice of service by publication" to the defendant's "last known address." *Harrison v. Hanvey*, 265 N.C. 243, 255, 143 S.E.2d 593, 602 (1965).

The question now presented is whether Rule 4 which requires mailing of a "copy of the notice of service of process by publication" to the "party's post-office address" requires the mailing of the notice to the last known address of the defendant. In adopting Rule 4(j1), the General Assembly deleted the requirement of Section 98.2 that the "residence" of the person sought to be served by publication be set forth in the affidavit "as particularly as is known" to the attorney requesting the service by publication. Furthermore, the adoption of Rule 4(j1) and the repeal of Section 98.4 omitted the requirement that the clerk mail a copy of the notice "to each party whose name and residence or place of business appear in the verified pleading or affidavit."

Rule 4 requires the attorney seeking service by publication to mail a copy of the notice of service of process by publication to the party which is the subject of service by publication if "the party's post-office address is known or can with reasonable diligence be ascertained." Here, the plaintiff's attorney's affidavit avers, without dispute, that defendant's last known address was 2610 Phillips Avenue, Greensboro, North Carolina 27405, and that defendant did not live there and had not lived there in over a year. While the defendant questioned the sufficiency of the evidence in the affidavit, the defendant offered no evidence. Therefore, based on the only evidence before the court, the affidavit, there is no evidence plaintiff's attorney knew of defendant's "post-office address," and the affidavit reveals that plaintiff's attorney made a reasonably diligent effort, without success, to discover defendant's address.

Arguably, the goal of notifying a defendant of a pending suit would be well served by requiring that a plaintiff mail copies of the summons and notice by publication to the defendant's last known address or to any other address where the defendant might reasonably be found or from which the notice might reasonably be forwarded to the defendant. "As every practicing attorney and law enforcement officer knows, there are among certain classes

SNEAD v. FOXX

[95 N.C. App. 723 (1989)]

those persons who would feel an obligation to forward or deliver a letter to one being sought, but who would feel obliged to give a lawyer or a deputy sheriff no information whatever as to the whereabouts of the one sought." *Harrison*, 265 N.C. at 255-56, 143 S.E.2d at 602. However, here we are constrained by the language of Rule 4(j1). We determine that under Rule 4(j1) there no longer exists an obligation to mail a copy of the "notice of service of process by publication" to an address where the party sought to be served no longer resides. Accordingly, the trial court erred in dismissing the complaint against defendant Foxx.

II

The defendant additionally argues the order of dismissal is correct because the action was "discontinued prior to the time the plaintiff-appellant attempted to serve defendant Foxx by publication." Specifically, the defendant argues the plaintiff's failure to secure an endorsement or to obtain an alias or pluries summons within ninety days after the issuance of the original summons, caused the action to discontinue. N.C.G.S. Sec. 1A-1, Rule 4(e) (1983). We do not address this argument as the record does not show the issue was raised in the trial court. *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972). The answer of the defendant and the order of the trial judge both indicate that the basis of the motion to dismiss, and the order to dismiss, was a failure of the plaintiff's attorney to comply with Rule 4(j1) and consequent failure to mail to defendant a copy of the notice of service of process by publication. Further, the record does not reflect any oral argument made by the defendant in support of her motion to dismiss.

Reversed.

Judges JOHNSON and COZORT concur.

FISHER v. MELTON
[95 N.C. App. 729 (1989)]

HENRY E. FISHER, SUBSTITUTE TRUSTEE UNDER THE LAST WILL AND TESTAMENT
OF R. B. MELTON, PLAINTIFF v. LILLIE P. MELTON, ET AL., DEFENDANTS

No. 897SC20

(Filed 3 October 1989)

Wills § 36.2— assets of trust to last of trustees to survive

The trial court properly determined that, pursuant to the provisions of testator's will, the assets of a trust should go to the sole and exclusive devisee of the last of three trustees to survive, subject to the beneficial interest therein of testator's wife, since, in the absence of an express intention to the contrary, the estate in the trustees vested at the time of death of the testator, and these vested remainders were subject to be divested under the provisions of the will upon the death or deaths of any of the trustees until there remained only one survivor.

Judge LEWIS dissenting.

APPEAL by defendants from *Barefoot, Judge*. Judgment entered 10 October 1988 in Superior Court, NASH County. Heard in the Court of Appeals 28 August 1989.

This is a declaratory judgment proceeding wherein plaintiff, trustee, seeks to have the court declare the rights, status and interest of the parties under a trust created by the last will and testament of R. B. Melton, deceased. Defendant Lillie Melton filed a motion for summary judgment on 6 September 1988. At the hearing on the motion, defendants Pattie Lou Smith and Lucinda Fulghum also made motions for summary judgment. The trial court denied defendant Lillie Melton's and defendant Pattie Lou Smith's motions, and granted summary judgment for defendant Lucinda Fulghum. Defendants Lillie Melton, Pattie Lou Smith, Julie Batts, Christy Ann Batts, Linda K. Batts, and Will H. Lassiter, guardian ad litem for all unknown and unborn heirs of R. B. Melton and Mavis Melton Bell, and all unknown and unborn beneficiaries of the trust of R. B. Melton appealed.

No counsel for plaintiff, Henry E. Fisher, trustee.

Valentine, Adams, Lamar, Etheridge & Sykes, by L. Wardlaw Lamar, for defendant Barbara F. Collins, individually and as executrix of the estate of Lucinda D. Fulghum, appellee.

FISHER v. MELTON

[95 N.C. App. 729 (1989)]

Battle, Winslow, Scott & Wiley, P.A., by Robert M. Wiley, and John E. Cargill, for defendant Lillie P. Melton, appellant.

Fields, Cooper, Henderson & Cooper, by Leon Henderson, Jr., for defendant Pattie Lou Smith, appellant.

Hunter, Wharton & Lynch, by V. Lane Wharton, Jr., for defendants Julie, Ann, and Linda K. Batts, appellants.

Keel, Lassiter & Duffy, by Will H. Lassiter, III, for guardian ad litem.

HEDRICK, Chief Judge.

The pertinent parts of R. B. Melton's last will and testament provide:

8(g) Upon the death of my daughter and my wife, if she then be my widow, the trust herein created shall be terminated and I give, devise and bequeath to the said Thomas O. Fulghum, W. B. Melton and Addison Hoyt Smith, or the survivor or survivors of them all of my estate, real, personal and mixed, in equal shares in fee simple.

8(h) For their services, said trustees shall from time to time be paid such reasonable compensation, to be taken out of the funds of this trust, as may be approved by the court to which they make their report, taking into account that they are also devisees under this my last will and testament.

8(i) In the event that any of said trustees should die or resign, or be unable to act before this trust is fully administered, then and in that event, the remaining trustees shall have all of the rights, powers and authority, and duties herein given the original three trustees.

An unnumbered paragraph following Paragraph 8(j) states:

I am setting up the foregoing trust for the benefit of my wife and my only child, Mavis Melton, and devising my property upon the termination of said trust to the three named trustees for the services heretofore rendered to me and to be hereafter rendered in my behalf, not from any lack of love or affection for any of my nieces and nephews not named herein but because I have heretofore already given them money or other property which I think sufficient under the circumstances.

FISHER v. MELTON

[95 N.C. App. 729 (1989)]

The trial court made the following pertinent findings of fact: The beneficiaries under the trust are the testator's daughter, Mavis Melton, who died on 26 December 1968 and the testator's wife, Dorothy Melton, who currently resides in Salisbury, N.C. and has not remarried. The three trustees under the will are deceased. Thomas O. Fulghum, deceased husband of Lucinda D. Fulghum, was the last survivor of the three trustees named under the will of R. B. Melton.

Of contention between the parties in this case is the interpretation of Paragraph 8(g) of the late R. B. Melton's will. In construing a will, the court must consider the entire instrument and seek to ascertain from it the testator's intent. *Moore v. Tilley*, 15 N.C. App. 378, 190 S.E.2d 243, cert. denied, 282 N.C. 153, 191 S.E.2d 758 (1972); *Jernigan v. Lee*, 279 N.C. 341, 182 S.E.2d 351 (1971).

We cannot improve on the judgment and opinion authored by Judge Barefoot construing R. B. Melton's will, and we "adopt and affirm" the same as our own. Judge Barefoot's opinion states:

4. "Survivor" is one who survives another or one who outlives another or one of two or more persons who lives after the death of the other or others. (Citations omitted).

5. The word "survivor" as used in paragraph 8(g) of the last will and testament of R. B. Melton means the last to die of Thomas O. Fulghum, Willie Bob Melton and Addison Hoyt Smith, trustees. (Citations omitted).

6. At the time of death of Willie Bob Melton, the fee of Thomas O. Fulghum was no longer defeasible because there was no possibility that any of the other two could survive him. "When the event upon which the fee is to be defeased becomes impossible the fee becomes a fee simple absolute." (Citations omitted).

7. Upon the prior deaths of Addison Hoyt Smith and Willie Bob Melton, Thomas O. Fulghum became the "survivor," referred to in said Item 8(g). As such, he took the assets of the trust established under the will of R. B. Melton, subject to the beneficial interest therein of Dorothy Melton, the present beneficiary of said trust.

8. The Court is of the opinion that the will of R. B. Melton, read from its four corners, established a clear intent to create

FISHER v. MELTON

[95 N.C. App. 729 (1989)]

in each of said trustees a present vested estate of inheritance in the assets of the trust established by R. B. Melton.

9. The will of R. B. Melton contains no limitation over in the event of death of the said trustees; consequently, in the absence of an express intention to the contrary, the estate in the trustees vested at the time of death of the Testator. However, these vested remainders were subject to be divested under the provisions of said will upon the death or deaths of any of the trustees, until there remained only one "survivor." (Citations omitted).

10. Because of the Testator's obvious intent that the trustees should have a vested interest subject to divest, even in the event that no trustee survived the two life tenants, the assets of the trust, subject to the beneficial interest therein of the present beneficiary, became the property of Thomas O. Fulghum on the date of death of W. B. Melton on December 20, 1985.

11. Because the defendant Lucinda D. Fulghum is the sole and exclusive devisee under the will of Thomas O. Fulghum, deceased, she took all his property at the time of his death in 1987, and is entitled to all of the remaining assets of the trust established by R. B. Melton subject, of course, to the beneficial interest therein of Dorothy Melton.

12. The defendant Lucinda D. Fulghum is vested of fee simple absolute title to all the remaining assets of the trust of R. B. Melton, Deceased, subject to the beneficial interest therein of Dorothy Melton.

Affirmed.

Judge ORR concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I dissent.

This is a matter of interpretation of the intent of the Testator to be drawn from the four corners of the will.

FISHER v. MELTON

[95 N.C. App. 729 (1989)]

There are several references which I believe indicate that the Testator created an indefeasible vested remainder in all three trustees and thus to their present heirs. The relevant references are:

8(g) . . . I give, devise and bequeath to the said Thomas O. Fulghum, W. B. Melton and Addison Hoyt Smith, or the survivor or *survivors* . . . in *equal* shares in fee simple.

8(h) . . . compensation, to be taken out of the funds of this trust . . . , taking into account that *they* are also devisees.

. . .

Later, Mr. Melton explained that he had already provided for his nieces and nephews and "devising my property upon the termination of said trust to the *three* named trustees for the services heretofore rendered to me and to be hereafter rendered in my behalf. . . ." Had he intended to provide only for the trustee who outlived the others, it could have been easily stated.

I find *Moore v. Tilley*, 15 N.C. App. 378, 190 S.E.2d 243, *cert. denied*, 282 N.C. 153, 191 S.E.2d 758 (1972) distinguishable. There it is stated in one of four paragraphs, "I will in case of the death of either of the first named in this will [of whom there were three] that their interest and responsibility above named go to the other two or if two of them die to the one living." The only expressed intent there was for her three sighted children to care for her four blind children for as long as possible. In this case, Mr. Melton clearly stated two objectives; first, to provide for his wife and daughter and second, to reward and compensate his three trusted friends and business associates of long standing.

I believe all three were intended to share equally and their heirs should inherit, per stirpes.

STATE v. ANNADALE

[95 N.C. App. 734 (1989)]

STATE OF NORTH CAROLINA v. JOSEPH DAVID ANNADALE

No. 8814SC1362

(Filed 3 October 1989)

**Criminal Law § 75.2— defendant's hope of leniency for girlfriend—
no promises or inducements made to defendant—confession
voluntary**

The trial court properly determined that no promises, offers of reward, or inducements to make a statement were made to defendant by law enforcement officers, and the fact that defendant may have made inculpatory statements with the hope of leniency for his girlfriend did not render his statement involuntary.

APPEAL by defendant from *Brannon, Anthony M., Judge*. Judgment entered 5 July 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 August 1989.

Defendant appeals from his conviction of seven counts of robbery with a dangerous weapon, pursuant to G.S. sec. 14-87(a). For these convictions, he received an active prison sentence of sixty years.

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

Gary K. Berman for defendant-appellant.

JOHNSON, Judge.

The pertinent facts of this case are as follows: A series of armed robberies occurred in Durham and Orange Counties between 2 April 1987 and 13 February 1988. An investigation was conducted by Detective Eric Hester of the Durham Police Department. As a result of the investigation, Joseph David Annadale was arrested in Orange County on 18 February 1989 and subsequently charged with seven counts of robbery with a dangerous weapon. Six of the seven counts allegedly occurred in Durham County and one count allegedly occurred in Orange County.

Upon defendant's arrest, he was advised of his constitutional rights, as prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and declined to make a statement. However, less than three hours later, defendant told Detective

STATE v. ANNADALE

[95 N.C. App. 734 (1989)]

Hester that he would make a statement concerning the armed robberies, provided he was permitted to spend five minutes with his girlfriend, Shelby Riddle. Ms. Riddle was also in police custody in connection with the robberies. Detective Hester agreed. Shortly thereafter, defendant and Ms. Riddle met.

After speaking to Ms. Riddle, defendant was transported to the Detectives Bureau in Durham County and was once again advised of his rights. Defendant indicated that he understood his rights and signed a waiver form. Prior to making a statement, Detective Hester informed defendant that the police had evidence "that was leading her [Ms. Riddle] into the armed robberies themselves." Detective Hester later testified that he told defendant that "if he was willing to discuss it, I didn't have the authority to make any deals or bargains, but I would be willing to discuss it [Ms. Riddle's case] with the District Attorney who did have the power to make the bargain." Thereafter, defendant made inculpatory statements to Detective Hester, which were tape recorded and later transcribed. The statements contained detailed accounts as to defendant's involvement in the armed robbery of the seven pizza and sandwich restaurants as so charged.

On 4 May 1988, defendant filed a motion to suppress the inculpatory statements of 19 February 1988. The motion was denied by the Honorable Wiley F. Bowen, on 6 May 1988. The order denying the motion was signed on 31 May 1988.

On appeal, defendant brings forth two questions for the Court's review. In his first assignment of error, defendant contends that the trial court erred by: (1) concluding that no promises, offers of reward, or inducement to make a statement were made to the defendant by law enforcement officers, and (2) denying the defendant's motion to suppress the inculpatory statements. The defendant also assigns as error the trial court's imposition of judgment against him.

With respect to assignment of error one, it is a well-settled and frequently stated principle that "a confession cannot be received in evidence where the defendant has been influenced by any threat or promise; . . . a confession obtained by the slightest emotions of hope or fear ought to be rejected." *State v. Booker*, 306 N.C. 302, 307, 293 S.E.2d 78, 81 (1982). *Accord, State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1826); *State v. Church*, 68 N.C. App. 430, 433, 315 S.E.2d 331, 333 (1984). "When a defendant properly

STATE v. ANNADALE

[95 N.C. App. 734 (1989)]

objects to the admission of the confession or moves to suppress same, the trial judge should conduct a preliminary inquiry to determine whether the confession is voluntary." *Id.* at 308, 293 S.E.2d at 81. The determination of whether a confession was voluntary and thus admissible, is made by viewing the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983). "In making this determination, the trial judge must find facts; and when the facts are supported by competent evidence, they are conclusive on the appellate court. However, the conclusions of law drawn from the findings of fact are reviewable by the appellate courts." *Booker, supra* at 308, 293 S.E.2d at 81.

In the case *sub judice*, the trial court concluded as a matter of law that the defendant's confession was freely, voluntarily and understandingly given. The defendant contends, however, that such conclusion was erroneous. He contends that this confession was involuntary; that he was induced to make the statements by law enforcement officers; and that he would not have made the statements absent either an expectation of benefit or in the minimum, a hope of benefit in exchange for his confession. The expectation of benefit or hope of benefit was that of leniency for Ms. Riddle.

The law in this state is quite clear with respect to improper inducements. The Supreme Court has recognized that "the inducement to confess whether it be a promise, a threat or mere advice must relate to the prisoner's escape from the criminal charge against him." *State v. Hardee*, 83 N.C. 619, 623 (1880). The Court further recognized that:

[A] promise of some merely collateral benefit or boon, as for instance a promise to give the prisoner some spirits or to strike off his handcuffs or to let him see his wife, will not be deemed such an inducement as will authorize the rejection of a confession made in consequence. *Id.* (*quoting* 1 Taylor Ev., sec. 803).

In the case before us, the statement of the interrogating officer was not related to defendant's escape from the charges against him, but referred to a collateral advantage. The promise by the officer to "discuss it [a deal] with the District Attorney" was not related to the defendant's escape from the charges against him. It merely referred to a collateral advantage which was unrelated to the possible punishment defendant might receive. Detective Hester merely informed the defendant that he would talk with the Dis-

STATE v. ANNADALE

[95 N.C. App. 734 (1989)]

trict Attorney if the defendant made a statement admitting his involvement. We find that this statement by Detective Hester could not have aroused in the defendant, a 26-year-old man with a high school equivalent education, any reasonable hope of reward if he confessed. Instead, we think that "any suspect of similar age and ability would expect that the substance of any statement he made would be conveyed to the District Attorney in the course of normal investigative and prosecutorial procedures." *Church* at 435, 315 S.E.2d at 334.

The fact that the defendant may have made the inculpatory statements with the hope of leniency for his girlfriend does not render his statement involuntary. *State v. Cannady*, 22 N.C. App. 53, 54, 205 S.E.2d 358, 359, *cert. denied*, 285 N.C. 664, 207 S.E.2d 763 (1974). It has been generally recognized that

Confessions or admissions have not been held inadmissible in evidence merely because the accused in making the confession or admission was motivated by a desire to protect a relative threatened with arrest or in custody when such motivation originated with the accused and was not suggested by law enforcement officials. *State v. Branch*, 306 N.C. 101, 108, 291 S.E.2d 653, 658 (1982).

The record in the present case reveals that the defendant initiated the terms of the confession. The record further reveals that at no point did Detective Hester indicate that defendant's girlfriend would be arrested or further investigated if defendant failed to confess or that she would not be arrested or further investigated if defendant did confess. Based upon these facts in the record, we conclude that any motivation or desire that the defendant may have had to protect his girlfriend from arrest was not suggested by law enforcement officials but, instead, originated with the defendant. The resulting statements are not within the underlying principles articulated in *Booker, supra*. Accordingly, the trial court appropriately found and concluded that no promises, offers of reward or inducements to make a statement were made to the defendant by law enforcement officers. The order denying the defendant's motion to suppress the inculpatory statements was properly rendered.

Finally, defendant contends that the trial court committed prejudicial error in denying the motion to suppress. Having found no

BARROW v. MURPHREY

[95 N.C. App. 738 (1989)]

merit to defendant's first contention, we find no need to address this issue. We therefore find

No error.

Judges EAGLES and GREENE concur.

M. BAILEY BARROW AND W. W. KENNEDY v. DORIS MURPHREY

No. 898SC70

(Filed 3 October 1989)

Contracts § 24— contract with defendant's husband — defendant not liable on contract

The trial court properly entered summary judgment for defendant in an action to recover on a contract where plaintiffs entered into the contract with defendant's husband who subsequently died; plaintiffs did not bring an action against the husband's estate to enforce their contract; defendant was not a party to the contract; and plaintiffs did not perform their obligation under the contract within the allotted time.

APPEAL by plaintiffs from *Phillips (Herbert O.)*, Judge. Order entered 29 September 1988 in Superior Court, GREENE County. Heard in the Court of Appeals 11 September 1989.

On 7 August 1986, plaintiffs filed a complaint against defendant alleging breach of contract and requested that the trial court order defendant to render an accounting of the sales and expenses of the properties covered by the contract and pay plaintiffs two-thirds of the surplus proceeds of the sales of said property. Defendant generally denied the allegations, denied that she was a party to the contract, and raised the affirmative defense that plaintiffs materially breached the contract through nonperformance.

On 7 July 1987, treating defendant's first defense as a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the trial court entered an order denying the motion.

Defendant filed a motion for summary judgment on 9 September 1988, asserting that she was not a party to the contract in ques-

BARROW v. MURPHREY

[95 N.C. App. 738 (1989)]

tion and that there was never any enforceable contract between plaintiffs and defendant. Defendant subsequently filed affidavits and other evidence to support her motion.

Plaintiffs also filed personal affidavits and a motion for summary judgment, and defendant filed an objection and motion to strike all reference in these affidavits to "oral communications" between plaintiffs and Loys L. Murphrey, defendant's deceased husband. On 26 September 1988, the trial court granted defendant's motion to strike and motion for summary judgment and entered such order on 29 September 1988. From this order, plaintiffs appeal.

Harrison and Simpson, P.A., by Fred W. Harrison, for plaintiffs-appellants.

Ward and Smith, P.A., by Robert D. Rouse, Jr. and Donalt J. Eglinton, for defendant-appellee.

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in granting summary judgment in defendant's favor, effectively finding that defendant was not, as a matter of law, personally liable on the contract in question.

On 18 January 1983, plaintiffs and defendant's husband, Loys L. Murphrey (now deceased, hereinafter Murphrey), entered into a written contract relating to the development and sale of real property known as Buccaneer Bay. Murphrey purchased the property on the same date from developers Bernice C. and Jack N. Nobles for \$550,000.00 of which plaintiffs received a \$50,000.00 commission for arranging the sale.

The pertinent provisions of said contract related to the development and sale of Buccaneer Bay, whereby Murphrey agreed to pay plaintiffs compensation if plaintiffs sold "all of the property" and upon Murphrey recovering his entire investment, plus interest. It further provided that plaintiffs hold a public auction to sell the property on or before 1 May 1983. If the auction proceeds were insufficient to fully indemnify Murphrey, then plaintiffs agreed to sell all of the property within five years of 18 January 1983 at their own expense. If plaintiffs were unable to perform within the time period, then they would not be entitled to any compensation.

BARROW v. MURPHREY

[95 N.C. App. 738 (1989)]

Plaintiffs conducted the auction pursuant to the contract. Proceeds from the auction totaled \$317,200.00, almost \$200,000.00 less than Murphrey's investment. Although plaintiffs attempted to sell some of the property until 31 December 1983, no actual sales occurred.

On 24 December 1984, Murphrey died, leaving the Buccaneer Bay property to defendant (his wife). Proceeds from the sale of said property did not equal Murphrey's investment until 2 June 1986. Sales and maintenance between March 1984 (the first sale after the auction) and 1986 were handled by developers Bernice and Jack N. Nobles at defendant's request.

Neither of the plaintiffs have ever had a written or oral contract with defendant concerning the sale or development of said property. Further, plaintiffs have never completed any sales of said property since September 1983 pursuant to their contract with Murphrey.

However, since 2 June 1986, there have been additional sales in Buccaneer Bay. Plaintiffs commenced this action for an accounting of these sales and a percentage of the surplus proceeds.

A motion for summary judgment under G.S. 1A-1, Rule 56(c) "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."

In a summary judgment proceeding, the trial court's role is to determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party. *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), *disc. rev. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 303 S.E.2d 358 (1983) (citations omitted).

In support of her motion for summary judgment, defendant argues that she was never a party to the contract between her hus-

BARROW v. MURPHREY

[95 N.C. App. 738 (1989)]

band and plaintiffs. Therefore, plaintiffs have no claim against defendant. We agree.

The contract in question states that it "is binding on the parties, their heirs, successors and assigns." We have found no authority in this State to indicate that this language found in a contract effectively binds the heirs and beneficiaries *personally* to the contract. We read this language to mean that Murphrey's estate was bound to compensate plaintiffs should they perform their obligations under the contract after Murphrey's death.

Whether or not there is language in a contract to the contrary, the general rule in this State is that contractual liability incurred prior to one's death, which survives, becomes an estate obligation. The obligation is the responsibility of the executor or administrator of the estate in his official capacity. *Hall v. Trust Co.*, 200 N.C. 734, 738, 158 S.E. 388, 390 (1931).

In the case *sub judice*, defendant was appointed executrix of Murphrey's estate. At no time while defendant performed her duties as executrix did plaintiffs make a claim on Murphrey's estate to enforce the contract. We also note that plaintiffs continue to ignore the fact that they never performed their obligations under the contract within the allotted time frame.

Plaintiffs then brought this action alleging defendant's personal liability, although defendant was not a party to the contract. "It is a fundamental principle of contract law that parties to a contract may bind only themselves and . . . *may not bind a third person who is not a party to the contract in absence of his consent to be bound*" (emphasis added). *Insurance Co. v. Chantos*, 293 N.C. 431, 438, 238 S.E.2d 597, 602-03 (1977), *citing* 17A C.J.S., *Contracts* sec. 520 at 999.

Because plaintiffs did not bring an action against Murphrey's estate to enforce their contract, because defendant was not a party to the contract, and because plaintiffs did not perform their obligation under the contract within the allotted time, we find that the trial court did not err in granting defendant's motion for summary judgment.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

FORSYTHE v. INCO

[95 N.C. App. 742 (1989)]

HERBERT T. FORSYTHE, FATHER AND NEXT OF KIN OF VICKY FORSYTHE,
DECEASED, EMPLOYEE; PLAINTIFF v. INCO, EMPLOYER; LIBERTY MUTUAL
INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 8910IC312

(Filed 3 October 1989)

**Master and Servant § 55.5— workers' compensation—employee
choking on sandwich—no injury arising out of employment**

The trial court properly concluded that an employee's death from choking while eating a peanut butter sandwich on her employer's premises did not arise out of her employment, since she was not subjected to any greater risk from eating her food than would have been the case if she had taken her lunch at home or elsewhere; furthermore, the fact that the employee was mentally retarded had no bearing on whether her employment created a greater risk of her choking.

APPEAL by plaintiff from opinion filed 13 December 1988 by the North Carolina Industrial Commission. Heard by the Full Commission on 7 December 1988 on an appeal by plaintiff from an opinion by Deputy Commissioner Lawrence J. Shuping denying the claim. Heard in the Court of Appeals 21 September 1989.

Vicky Forsythe was a forty-six-year-old woman who was mentally retarded from birth as a result of a congenital defect. She lived at a group home for the mentally retarded in May 1985. She had been employed at the defendant INCO's sheltered workshop in Henderson, North Carolina since September 1980. INCO's program was offered to service the needs of mentally and physically handicapped individuals with vocational training and provided sheltered, paid employment to adults with developmental disabilities.

Employees of INCO's workshop brought food from home, but were required to remain on the premises during lunch and breaks. Ms. Forsythe was on her lunch break on 2 May 1985 and was eating a peanut butter sandwich which she had brought in the defendant's lunchroom when she began choking at approximately 12:15 p.m. Employees of the defendant, who were on duty in the lunchroom to supervise the employees, immediately noticed Ms. Forsythe's difficulty and attempted to assist her, without success.

Ms. Forsythe was transported to Maria Parham Hospital in Henderson by employees of the defendant, where she was admitted

FORSYTHE v. INCO

[95 N.C. App. 742 (1989)]

to the emergency room at 12:25 p.m. Hospital personnel removed a "big blob" of peanut butter sandwich which was covering Ms. Forsythe's pharynx. She suffered severe brain damage from a lack of oxygen and died on 7 May 1985.

The death of the plaintiff's intestate was directly and proximately caused by her aspirating and choking on the peanut butter sandwich, which caused a lack of oxygen and death.

At the time of her death, the plaintiff's intestate was an employee of the defendant, INCO, and covered by defendant Liberty Mutual Insurance Company's policy of workers' compensation.

Zollicoffer & Zollicoffer, by Nicholas Long, Jr., for the plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Reid Russell, for defendant-appellees.

LEWIS, Judge.

Under the Workers' Compensation Act, plaintiff's right to recover for the death of his daughter depends upon whether it resulted from an "accident arising out of and in the course of the employment." G.S. 97-2(2); *Bartlett v. Duke University*, 284 N.C. 230, 232, 200 S.E.2d 193, 194 (1973). "Arising out of the employment" refers to the origin or cause of the accidental injury; "in the course of employment" refers to the time, place and circumstances under which an accidental injury occurs. The two phrases involve two ideas and two conditions, both of which must be met to sustain an award. *Sweatt v. Rutherford County Board of Education*, 237 N.C. 653, 657, 75 S.E.2d 738, 742 (1953); *Harless v. Flynn*, 1 N.C. App. 448, 454, 162 S.E.2d 47, 52 (1968).

Conceding, *arguendo*, that plaintiff's intestate was in the course of her employment while she was eating her lunch, the determinative question is whether a causal connection existed between her choking on the peanut butter sandwich and her employment. *Bartlett, supra* at 233, 200 S.E.2d at 195.

We find that the facts in this case are analogous to the *Bartlett* case, cited above. In *Bartlett*, plaintiff's decedent was employed by Duke University as a construction administrator. Duke sent him to Washington, D.C., to recruit a maintenance engineer. As the trip required an overnight stay, Bartlett arranged to stay with

FORSYTHE v. INCO

[95 N.C. App. 742 (1989)]

some friends in the Washington area. At approximately 6:30 p.m., Bartlett and his hostess went out to eat at a nearby restaurant. Bartlett had concluded his job-related duties for the day. While eating dinner, Bartlett aspirated a chunk of meat and immediately became unconscious. He subsequently died from the ensuing complications. His widow filed a workers' compensation claim. *Id.*

Citing various cases, the court noted the general standard for determining whether an injury arises out of one's employment:

The term 'arising out of the employment' is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment, 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.'

To have its origin in the employment an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test 'excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'

284 N.C. at 233, 200 S.E.2d 195 (citations omitted).

Applying the foregoing test, the court concluded that there was no causal relationship between Bartlett's employment and his aspiration of the meat. The court noted:

The risk that Commander Bartlett might choke on a piece of meat while dining at the Orleans House was the same risk to which he would have been exposed had he been eating at home or at any other public restaurant in the Washington area. Whether employed or unemployed, at home or traveling on business, one must eat to live. In short, eating is not peculiar

FORSYTHE v. INCO

[95 N.C. App. 742 (1989)]

to traveling; it is a necessary part of daily living, and one's manner of eating, as well as his choice of food, is a highly personal matter.

284 N.C. at 234, 200 S.E.2d 195.

The reasoning in *Bartlett* is applicable to the facts before us. Although Ms. Forsythe was injured on her employer's premises, the fact that she ate lunch on the premises did not subject her to any greater risk from eating her food than would have been the case if she had taken her lunch at home, or anywhere else for that matter.

The fact that the accident occurred on the employer's premises is not sufficient, in and of itself, to warrant a finding that Ms. Forsythe's injury arose out of her employment. The North Carolina Supreme Court has stated:

When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment. *In such a situation the fact that the injury occurred on the employer's premises is immaterial.*

Cole v. Guilford County and Hartford Acc. and Indem. Co., 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963) (citations omitted) (emphasis added). We find *Tscheiller v. National Weaving Co.*, 214 N.C. 449, 199 S.E. 623 (1938) distinguishable. In *Tscheiller*, claimant suffered food poisoning from eating a spoiled sandwich sold to her by her employer. Ms. Forsythe's sandwich was neither prepared nor provided by INCO. Rather, it was prepared at the group home and brought to work by Ms. Forsythe herself.

Plaintiff has put forth no evidence that her death arose out of her employment. Her employment at INCO created no greater risk of injury or death by choking than the risk one must take every time food is ingested. Plaintiff contends that the defendant owed a higher duty of care to its employees because they were mentally retarded. This argument is better suited to a negligence action where duty and foreseeability are required to be proven in order for the plaintiff to recover. This, however, is a workers' compensation claim where fault has been eliminated and the worker may recover without proving negligence if the injury arises out

DAILY v. MANN MEDIA, INC.

[95 N.C. App. 746 (1989)]

of and in the course of employment. *Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 94, 318 S.E.2d 534, 539 (1984), *cert. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). The fact that the plaintiff's intestate was mentally retarded has no bearing on whether her employment created a greater risk of her choking. Accordingly, we

Affirm.

Judges PHILLIPS and COZORT concur.

DENNIS D. DAILY v. MANN MEDIA, INC.

No. 8818SC1307

(Filed 3 October 1989)

1. Rules of Civil Procedure § 12— motion to strike defense untimely—consideration by trial court proper

Although plaintiff's motion to strike defendant's defense, filed more than a year after service of the defendant's answer, was untimely, the trial court's consideration of the motion was permissible, since N.C.G.S. § 1A-1, Rule 12(f) provides that the trial court may strike material from the pleadings on its "own initiative at any time."

2. Master and Servant § 9— severance pay—defense of termination for cause—action not barred

In an action to recover severance pay provided for in the parties' employment agreement, the trial court did not err in striking defendant's defense that plaintiff was terminated for cause and his action was therefore barred since (1) the defense was irrelevant and immaterial, having no possible bearing upon the litigation, in that any answer to the first issue agreed to by the parties, whether defendant contracted with plaintiff to pay plaintiff severance pay of \$100,000 as alleged in the complaint, would resolve the dispute between the parties; and (2) the defense was legally insufficient in that the terms of the parties' agreement in no way intimated that plaintiff forfeited payment if the termination was for cause.

DAILY v. MANN MEDIA, INC.

[95 N.C. App. 746 (1989)]

APPEAL by defendant from *Freeman (William H.)*, Judge. Judgment filed 30 June 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 June 1989.

Bell, Davis & Pitt, P.A., by William Kearns Davis and J. Dennis Bailey, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Douglas E. Wright, for defendant-appellant.

GREENE, Judge.

Pursuant to a jury verdict, the trial court entered a judgment for plaintiff in the amount of \$114,156. Defendant appeals.

In this civil action, plaintiff alleged and defendant denied that defendant employed plaintiff and that "it was agreed that plaintiff would be paid the sum of one hundred thousand dollars (\$100,000) as severance pay upon the termination of his employment at the request of defendant Mann." The complaint incorporated a letter of agreement attached to the complaint as an exhibit, which contained the following provision: "The intention of both parties is to enter into a long-standing relationship. In the event [sic], the relationship ends at the request of Mr. Mann, a severance of \$100,000 is to be paid." Defendant denied any contractual obligation in its answer, but alleged in the alternative a "FIFTH DEFENSE." The "FIFTH DEFENSE" set forth the affirmative defense that plaintiff was terminated for cause, pled in bar of plaintiff's action.

The answer was filed on 26 January 1987, and served by mail on plaintiff's attorney on 23 January 1987. The court conducted a pre-trial conference on 27 June 1988, the date of the trial. At that conference, plaintiff moved to strike defendant's "FIFTH DEFENSE." The trial court allowed plaintiff's motion and ordered that defendant's Fifth Defense be stricken and that defendant could not offer evidence in support of defendant's Fifth Defense on the issue of whether plaintiff was terminated for cause.

At the pre-trial conference, plaintiff contended that the only issue for the jury was:

Did the defendant contract with the plaintiff to pay the plaintiff severance pay of \$100,000.00 as alleged in the complaint?

The defendant contended that the issues for the jury were:

DAILY v. MANN MEDIA, INC.

[95 N.C. App. 746 (1989)]

1. Did the defendant contract with the plaintiff to pay the plaintiff severance pay of \$100,000.00 as alleged in the complaint?

2. If so, was the plaintiff's employment terminated for cause?

The trial court submitted the single issue proposed by plaintiff and the jury answered the issue for plaintiff.

The only issue presented on this appeal is whether the trial court erred in striking defendant's "FIFTH DEFENSE." Although defendant made four additional Assignments of Error, defendant failed to enumerate bases for error in the trial court's actions, and we will not consider these assignments on appeal. North Carolina Rules of Appellate Procedure, Rule 10(c) (1984).

N.C.G.S. Sec. 1A-1, Rule 12(f) (1983) provides:

Motion to strike—Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

[1] We first determine plaintiff's motion to strike was not timely filed. The motion was filed more than a year after service of the defendant's answer. Furthermore, plaintiff was permitted no responsive pleadings, as defendant's answer set forth no counterclaim, no cross-claim, no third-party complaint, nor defense of contributory negligence. N.C.G.S. Sec. 1A-1, Rule 7(a) (1983). Rule 12(f) requires that a motion to strike be filed within 30 days after service of the pleading if no responsive pleading is permitted. However, because the statute clearly states that the trial court may strike materials from the pleadings on its 'own initiative at any time,' we determine that the trial court's consideration of the motion was permissible despite the untimeliness of plaintiff's motion to strike. *Accord* 2A Moore's Federal Practice Sec. 12.21[1] at 12-165, 12-166 (2d ed. 1987).

In considering a motion to strike pleadings under Rule 12(f), "[g]enerally, well-pleaded facts are accepted as true . . . and matters outside the pleadings will not be considered . . ." *Id.*, Sec. 12.21[3] at 12-184 (1985). Rule 12(f) motions are "viewed with disfavor

DAILY v. MANN MEDIA, INC.

[95 N.C. App. 746 (1989)]

and are infrequently granted.” 5 C. Wright & A. Miller, *Federal Practice and Procedure*: Sec. 1380 p. 783 (1969). However, if it is clear that the pleading “has no possible bearing upon the litigation[.]” the pleadings should be stricken. *Shellhorn v. Brad Ragan, Inc., et al.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108, *rev. denied*, 295 N.C. 735, 249 S.E.2d 804 (1978). “If there is any question as to whether an issue may arise, the motion should be denied.” *Id.*

[2] We first determine that defendant’s “FIFTH DEFENSE” had ‘no possible bearing upon the litigation.’ Any answer to the single issue that plaintiff proposed and the trial court accepted resolved the dispute between these parties: whether they actually agreed to the provisions of the contract as alleged in the complaint. The issue was:

Did the defendant contract with the plaintiff to pay the plaintiff severance pay of \$100,000.00 as alleged in the complaint?

Either of the answers to this question would totally resolve the controversy. A negative answer to the question would end the lawsuit in defendant’s favor. An affirmative answer to the question would be a determination that plaintiff and defendant had agreed that plaintiff would be paid the sum of \$100,000.00 upon termination of [plaintiff’s] employment at the request of Mann.

Defendant next contends that termination for cause vitiates an employer’s obligation to pay severance payments to an employee, without regard to the employment contract terms. N.C.G.S. Sec. 1A-1, Rule 12(f) (a trial court may strike an “insufficient defense”). We determine that defendant’s defense of termination for cause is ‘legally insufficient’ in light of the terms of the agreement. A termination for cause, “if founded in fact, would, *except for the contract provisions*, relieve the employer of any obligation to pay [severance].” *Briggs v. American & Eford Mills, Inc.*, 251 N.C. 642, 645, 111 S.E.2d 841, 844 (1960) (emphasis added). We find the facts of this case similar to those in *First-Citizens Bank and Trust Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284-86 (1975). In that case, this court held that the trial court properly struck defendant’s defense of plaintiff’s failure to first pursue remedies against another. The court held that the defense was ‘legally insufficient’ when the terms of the guaranty agreement made defendant directly and unconditionally liable.

The language of the provision in this agreement is inclusive, clear and unambiguous and in no way intimates that plaintiff forfeited

AMERICAN MULTIMEDIA, INC. v. FREEDOM DISTRIBUTING, INC.

[95 N.C. App. 750 (1989)]

payment if the termination was for cause. When a contract is clear and unambiguous, we must "give effect to its terms, and we will not, under the guise of construction, insert what the parties elected to omit." *Olive v. Williams*, 42 N.C. App. 380, 383, 257 S.E.2d 90, 93 (1979) (citation omitted). Accordingly, this court will not insert into the agreement a 'termination for cause' provision. We note that the record indicates there was no dispute between the parties that plaintiff was terminated at the request of Bernard Mann, president of defendant corporation.

Accordingly, the trial court committed no error in striking defendant's "FIFTH DEFENSE," on the grounds that the defense was irrelevant and immaterial, having 'no possible bearing upon the litigation,' and because the defense was legally insufficient.

No error.

Judges JOHNSON and COZORT concur.

AMERICAN MULTIMEDIA, INC., PLAINTIFF v. FREEDOM DISTRIBUTING, INC.,
DEFENDANT

No. 8915SC78

(Filed 3 October 1989)

Limitation of Actions §§ 13, 14— contract to reproduce tapes—letter not acknowledgment of debt—statute not tolled—partial payment—action barred anyway

In an action to recover on a contract for the reproduction of cassette tapes, statements by defendant that "we plan to pay" \$15,000 every month up to June 1985 and "we expect to pay the balance" failed to show the nature and amount of the debt, at best demonstrated a willingness to pay based on defendant's ability to make the monthly payments, and was insufficient to toll the statute of limitations; furthermore, even if defendant's partial payment of \$10,000 on 20 December 1984 was sufficient to start the statute of limitations running anew, the statute had run by the time plaintiff's action was filed on 27 January 1988, and the action was therefore barred.

AMERICAN MULTIMEDIA, INC. v. FREEDOM DISTRIBUTING, INC.

[95 N.C. App. 750 (1989)]

APPEAL by plaintiff from *Allen (James B., Jr.), Judge*. Order entered 24 September 1988 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 September 1989.

Plaintiff is in the business of reproducing cassette tapes. From January 1984 through June 1984 plaintiff produced approximately 200,000 cassette tapes for defendant which were not paid for.

On 18 June 1984 plaintiff refused to process any further orders for the defendant. Negotiations ensued, and on 30 October 1984 the parties signed an agreement whereby defendant was to pay plaintiff the sum of \$172,068.14. On 14 December 1984 defendant sent plaintiff a letter, which read in pertinent part:

We are budgeting our payment schedule now and plan to pay you \$15,000.00 this month and every month up to June of 1985 of which we expect to pay the balance. Please review this statement and if you should have any questions do not hesitate to call me.

Payment of \$10,000 was made on 20 December 1984 but no other payments were forthcoming.

On 27 January 1988, plaintiff filed its complaint for breach of contract. Defendant made a motion to dismiss pursuant to Rule 12(b)(6) on the grounds that the applicable statute of limitations had run on plaintiff's claim. Defendant's motion was granted and plaintiff appeals.

Mary K. Nicholson and Robert H. Hood, III for plaintiff-appellant.

Casstevens, Hanner, Gunter & Gordon, P.A., by Marc R. Gordon, for defendant-appellee.

LEWIS, Judge.

Plaintiff argues that the trial court erred in dismissing its complaint on the grounds that the statute of limitations had run. The statute of limitations for breach of contract actions in North Carolina is three years. G.S. 1A-1-52. Plaintiff raises for the first time in its brief the applicability of the four-year statute of limitations afforded under Article 2 of the North Carolina Uniform Commercial Code. G.S. 25-2-725. Since plaintiff failed to raise this issue on its motion to dismiss, this issue is not properly before us. *Allred v. Tucci*, 85 N.C. App. 138, 144, 354 S.E.2d 291, 295, *disc. rev.*

AMERICAN MULTIMEDIA, INC. v. FREEDOM DISTRIBUTING, INC.

[95 N.C. App. 750 (1989)]

denied, 320 N.C. 166, 358 S.E.2d 47 (1987). *Tallent v. Blake*, 57 N.C. App. 249, 252, 291 S.E.2d 336, 339 (1982) ("the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court" quoting, *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)). Therefore, we do not address the issue of whether reproduction of cassette tapes falls within the ambit of Article 2.

Applying the three-year statute of limitations to this case, the pleadings reveal that the statute of limitations has run.

Plaintiff contends that defendant's 14 December 1984 letter acted as an acknowledgment of the debt owed to plaintiff and thus served to toll the statute of limitations. G.S. 1-26 provides, "no acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitation ran, unless it is contained in some writing signed by the party to be charged thereby. . . ." Case law construing this statute has made it clear that the promises must be in writing and must manifest a definite and unqualified intention to pay the debt in order for the writing to effectively toll the statute of limitations. *Smith v. Gordon*, 204 N.C. 695, 698, 169 S.E. 634, 635 (1933). The 14 December 1984 letter merely states that "we plan to pay" and "we expect to pay" the debt. These conditional expressions of defendant's willingness to pay the plaintiff are not sufficiently precise to amount to an unequivocal acknowledgment of the original amounts owed. *See Cooper v. Jones*, 128 N.C. 40, 38 S.E. 28 (1901) (A writing stating "I am going to pay it as soon as I can" was conditioned upon ability to pay and was insufficient to toll the statute of limitations.).

In *Faison v. Bowden*, 72 N.C. 405 (1875), the debtor told his creditor, "I can't pay you what I owe you, but I will pay you soon, or next winter." Finding this to be insufficient to toll the statute of limitations, the court stated:

The rule to be gathered from the numerous cases to which we were referred by the counsel, may be thus expressed. The new promise must be definite, and show the nature and amount of the debt; or must distinctly refer to some writing, or to some other means, by which the nature and amount of it can be ascertained. Or, there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied.

CUMBERLAND ASSOCIATES v. SCOTTO'S PIZZA OF N.C.

[95 N.C. App. 753 (1989)]

Id. at 407. In the present case, the statements by defendant that "we plan to pay" \$15,000 every month up to June 1985 and "we expect to pay the balance" fail to show the nature and amount of the debt and at best demonstrate a willingness to pay based on defendant's ability to make the monthly payments. This promise is insufficient to repel the statute of limitations.

Partial payment, intended to acknowledge the underlying debt, will also toll the statute of limitations on the original cause of action. The plaintiff alternatively argues this was the effect of the 20 December 1984 payment. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Here, even if defendant's partial payment served to toll the three-year statute of limitations on the underlying debt, it began to run again from 20 December 1984. *Pickett v. Rigsbee*, 252 N.C. 200, 205, 113 S.E.2d 323, 327 (1960) (partial payments made by defendant on six notes owned by plaintiff started the statute of limitations running anew from the date of each payment). Since plaintiff's complaint was not filed until 27 January 1988, the statute of limitations had run on the action and plaintiff's claim is therefore barred.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

CUMBERLAND ASSOCIATES, PLAINTIFF v. SCOTTO'S PIZZA OF NORTH
CAROLINA, INC., DEFENDANT

No. 8912DC287

(Filed 3 October 1989)

**Landlord and Tenant § 18— termination for nonpayment of rent—
tendering of delinquent payment not timely**

The trial court properly entered summary judgment for plaintiff in an action to recover leased premises upon termination of a written lease for nonpayment of rent, and there was no merit to defendant's argument that it properly cured its default by tendering its delinquent rent payment within

CUMBERLAND ASSOCIATES v. SCOTTO'S PIZZA OF N.C.

[95 N.C. App. 753 (1989)]

15 days of receipt of notice of default, since the lease unambiguously stated that all notices provided for in the lease were to be deemed as given when sent, and payment was not tendered within 15 days after notice was mailed to defendant.

THIS is an action in summary ejectment pursuant to G.S. Section 42-26(2) to recover possession of certain leased premises upon termination of a written lease for nonpayment of rent. Summary judgment was rendered in favor of plaintiff by *Keever (A. Elizabeth), Judge*, 21 October 1988 in District Court, CUMBERLAND County. Heard in the Court of Appeals 21 September 1989.

The facts are not in dispute: Cumberland Associates is the owner of Cross Creek Mall, Fayetteville, Cumberland County, North Carolina. On 20 September 1985 Cumberland and defendant-appellant, Scotto's Pizza of North Carolina, Inc. ("Scotto's") executed a Lease Agreement (the "Lease") for a retail store facility (the "Premises") for Scotto's at Cross Creek Mall. The Lease provided for a ten-year term. Minimum rent and related charges were due under the Lease on or before the first day of each month.

The Lease further provided in Paragraph 16 as follows:

If the Tenant shall continue in default in the payment of any rental or other sum of money becoming due hereunder for a period of fifteen (15) days after notice of such default has been given to Tenant, . . . then in any such event the party not in default shall have the right to terminate and cancel this Lease Agreement.

With respect to notices, the Lease provided in paragraph 23 that: "All notices provided for in this Lease Agreement shall be in writing and shall be deemed to be given when sent by prepaid, registered or certified mail. . . ."

Scotto's failed to pay rent and related charges for the month of August 1988 on or prior to the 1 August 1988 due date. By reason of such failure, Scotto's was in default in the payment of rental due under the Lease. Cumberland, by registered or certified mail, gave written notice of default and demanded payment from Scotto's within fifteen days from the date of the letter. Cumberland further advised that it would terminate the Lease. Specifically, Cumberland's default notice to Scotto's stated that:

CUMBERLAND ASSOCIATES v. SCOTTO'S PIZZA OF N.C.

[95 N.C. App. 753 (1989)]

As provided in paragraph 4(e) of the Lease, interest at twelve percent (12%) per annum will be due on the August 6, 1988 rents from the date they were due, August 1, 1988, until the date payment is received in our offices. In addition, a late charge of \$118.80, equal to four percent (4%) of the monthly installment of Minimum Rental, will be due if the August rent is not received by August 10, 1988. Please be advised that we do not consider the date of the check or the date that the payment is mailed as the date of receipt.

Unless \$4,409.43, all interest and any late charges are received by us within fifteen (15) days from the date of this notice, we intend to terminate your lease and pursue the further remedies of default as outlined in Paragraph 16 and elsewhere of the Lease.

The Lease further provided that payment be made to the landlord at its Charlotte, North Carolina address. On 18 August 1988, no payment for August having been made, Cumberland notified Scotto's in writing that the Lease had been terminated and demanded that Scotto's vacate the premises:

On August 2, 1988, we notified you that you are in default of the Lease Agreement between Cumberland Associates and Scotto's Pizza of North Carolina, Inc. for non-payment of August 1988 Guaranteed Minimum Rental and related charges. By reason of your failure to cure this default within the period of time provided by the Lease, notice is hereby given, pursuant to Paragraph 16 of the Lease, that the Landlord has elected to terminate the Lease, effective today.

You are hereby directed to quit and surrender the Premises immediately, leaving the same neat, clean and in good order, condition and state of repair.

On 23 August 1988 Cumberland received a check from Scotto's sublessee for the accrued rent. The check was dated 20 August 1988 and was in an envelope postmarked 22 August 1988. Cumberland immediately returned the check to the sublessee and indicated that the Lease had been terminated on 18 August 1988 by written notice to Scotto's.

On 23 August 1988 Cumberland filed this suit in Cumberland County Magistrate's Court for possession of the Premises. Judgment was rendered for the defendant in small claims court and

CUMBERLAND ASSOCIATES v. SCOTTO'S PIZZA OF N.C.

[95 N.C. App. 753 (1989)]

the plaintiff appealed to the District Court for trial *de novo*. Plaintiff moved for summary judgment. Summary judgment was granted, and defendant appeals.

Rose, Ray, Winfrey & O'Connor, P.A., by Steven J. O'Connor, for plaintiff-appellee.

Jones and McGlothlin, by Larry J. McGlothlin, for defendant-appellant.

LEWIS, Judge.

The entry 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 judgment as a matter of law." G.S. 1A-1, Rule 56(c). Summary judgment should be looked upon with favor where no genuine issue of material fact is presented. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). We find no issue of material fact in this case.

Defendant argues that it properly cured its default by tendering its delinquent rent payment within fifteen days of receipt of Notice of Default. It argues that the fifteen-day time period did not begin to run until it received Notice of Default on 5 August 1988. However, paragraph 23 of the lease unambiguously states, "[a]ll notices provided for in this Lease Agreement shall be in writing and *shall be deemed to be given when sent.* . . ." (Emphasis added.)

Plaintiff mailed Notice of Default on 2 August 1988 by certified or registered mail. Defendant then had fifteen days from that date in which to mail its payment. "When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms. . . ." *Five Oaks Homeowners' Assoc., Inc. v. Efirds Pest Control Co.*, 75 N.C. App. 635, 637, 331 S.E.2d 296, 298 (1985). Defendant concedes that payment was not made until after 18 August 1988. Therefore, payment was not timely and summary judgment was proper.

Affirmed.

Judges PHILLIPS and COZORT concur.

STATE v. JOHNSON

[95 N.C. App. 757 (1989)]

STATE OF NORTH CAROLINA, PLAINTIFF v. JEROME JEWETT JOHNSON,
DEFENDANT

No. 8911SC262

(Filed 3 October 1989)

**1. Criminal Law § 148— judgment based on plea negotiation—
trial court's order vacating judgment appealable**

Defendant could properly appeal from the trial court's order vacating and setting aside an earlier judgment based on plea negotiation and directing that the case be tried, since a final judgment was entered when the trial judge sentenced defendant to probation on a number of special conditions in accordance with the terms of the negotiated plea agreement; the order affected defendant's substantial due process right not to have the State withdraw from a plea bargain arrangement after that plea had been accepted by the trial court; and defendant's constitutional right against double jeopardy was also at issue where defendant would be subjected to a second trial on the same charges.

**2. Criminal Law § 23.1— plea bargain—agreement binding on
assistant district attorney who signed it**

The trial court erred in finding that the assistant district attorney who negotiated the plea at issue in this case did not agree to forego prosecution of defendant for any drug offenses defendant may have committed prior to 8 November 1988, since the plea bargain agreement, signed by defendant, his attorneys, and the assistant district attorney, specifically stated to the contrary.

**3. Criminal Law § 23.1; Constitutional Law § 34— judgment
based on plea bargain—setting aside—violation of defendant's
right against double jeopardy**

The trial court erred in setting aside a judgment based on plea negotiation, since to do so would violate defendant's right against double jeopardy.

APPEAL by defendant from *Bowen (Wiley F.)*, Judge. Order entered 7 November 1988 in Superior Court, LEE County. Heard in the Court of Appeals 11 September 1989.

Pursuant to a negotiated plea accepted by the presiding judge on 8 November 1988, the defendant pled no contest to a charge

STATE v. JOHNSON

[95 N.C. App. 757 (1989)]

of possession with intent to sell and deliver a controlled substance and received the sentence to which he had agreed. On 10 November 1988, the presiding judge, on the State's motion over defendant's objections, entered an order vacating and setting aside that judgment and directing that these two indictments be returned to the trial calendar. The defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

Loflin & Loflin, by Thomas F. Loflin III, and Hoyle & Hoyle, by Kenneth R. Hoyle, for defendant-appellant.

LEWIS, Judge.

[1] The State moved to dismiss this appeal on the grounds that the appeal is premature, arguing (1) that no final judgment had been entered in this case and (2) that the trial judge's order was interlocutory and affected no substantial right. In fact, a final judgment was entered on 8 November 1988 when the trial judge sentenced the defendant to probation on a number of special conditions in accordance with the terms of the negotiated plea arrangement. This appeal is not interlocutory but is instead specifically allowed by G.S. 1-277(a) which permits an appeal from a judicial order which "affects a substantial right" or "grants . . . a new trial." This judgment affects the substantial due process right of the defendant not to have the State withdraw from a plea bargain arrangement after that plea has been accepted by the trial court. This is a substantial right. *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980). The defendant's constitutional right against double jeopardy is also at issue in this case where the defendant would be subjected to a second trial on the same charges. The effect of the trial judge's order vacating the judgment would be to grant the State a new trial on the same charges after an adjudication of guilty. The State's Motion to Dismiss the Appeal is denied.

[2] The defendant argues that the trial court erred on two counts. The trial court found as a fact that the assistant district attorney who negotiated the plea at issue in this case did not agree to forego prosecution of the defendant for any drug offenses the defendant may have committed prior to 8 November 1988. We find that such a conclusion is contrary to the evidence.

The plea bargain in this case states in unambiguous language in the first sentence of that agreement:

STATE v. JOHNSON

[95 N.C. App. 757 (1989)]

Upon tender and acceptance of this plea, the State agrees that it will dismiss all other pending charges and agrees not to prosecute or seek any forfeiture against the defendant for any drug offense which might have occurred prior to November 8, 1988.

The State wishes to vacate the finding of guilty and the sentence based on this plea bargain contending that "the underlying plea agreement was entered into upon a misapprehension of fact and does not accurately reflect the intentions of the state." This negotiated plea was signed by the defendant, two attorneys for the defendant and by the assistant district attorney who stated during the hearing on the motion to vacate:

I read the document over. I did not see the first sentence. . . . I didn't read that as carefully as I probably should have. . . . I went ahead and signed it. . . . I should have read [the plea agreement] more carefully than I did, but I failed to realize the full impact of what was in the first sentence. . . .

The assistant district attorney testified that he was present in the courtroom when the judge took the plea; he was present in the courtroom while the trial judge read the plea agreement out loud and he was aware that the trial judge was reading the agreement to the parties but did not listen to the judge because he "was involved in talking with the participants in [another] case." On cross-examination, he stated: "I looked at [the plea agreement] and I read it and thought that I understood it prior to the time I signed it." The evidence in this case does not support the contention that the State did not agree to forego prosecution of drug offenses prior to 8 November 1988.

The North Carolina Supreme Court case of *State v. Collins*, *id.*, is controlling. In an unanimous opinion, the Supreme Court stated: "The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant. . . ." *State v. Collins*, 300 N.C. at 148, 265 S.E.2d at 176. Citing *People v. Heiler*, 79 Mich. App. 714 at 721-22, 262 N.W.2d 890 at 895 (1977), the court stated that plea bargain arrangements "are not binding upon the prosecutor . . . until they receive judicial sanction. . . ." *State v. Collins*, 300 N.C. at 148-49, 265 S.E.2d at 176.

IN RE SCOTT

[95 N.C. App. 760 (1989)]

In *Collins*, the court noted that "a constitutional right to enforcement of plea proposals," according to the landmark United States Supreme Court decision, *Santobello v. New York*, 404 U.S. 257 (1971), derives from "two constitutional guarantees, namely, the right to fundamental fairness of substantive due process and the sixth amendment right to effective assistance of counsel." *State v. Collins*, 300 N.C. at 147, 265 S.E.2d at 175, quoting *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979).

[3] The right of a defendant in a criminal proceeding to be subjected to but one prosecution for the same offense would also be violated here if the original plea bargain were set aside. Double jeopardy is prohibited by the Fifth Amendment to the Constitution of the United States and by Article I, Section 19 of the Constitution of North Carolina. See *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977). The plea had been adjudicated and the sentence had been imposed. No valid reason has been offered by the State to set aside that plea and adjudication. Therefore, the defendant may not again be tried for the charges which underlie the indictments without twice being placed in jeopardy. The trial judge's setting aside the judgment of 8 November 1988 which had been entered on a negotiated plea agreement was error. It is reversed. The plea and the original sentence stand.

Reversed.

Chief Judge HEDRICK and Judge ORR concur.

IN RE: JAMES SCOTT, A MINOR CHILD

IN RE: JASON SCOTT, A MINOR CHILD

No. 8829DC1373

(Filed 3 October 1989)

Parent and Child § 1.6— termination of parental rights— mental capacity of mother— duration of incapacity— findings unsupported by evidence

The trial court's findings that respondent was mentally incapable of providing proper care and supervision to her minor

IN RE SCOTT

[95 N.C. App. 760 (1989)]

children and that such incapability would continue throughout the minority of the children were not supported by clear and convincing evidence as required by N.C.G.S. § 7A-289.32(3a).

APPEAL by respondent from *Warren, Judge*. Judgment entered 23 March 1988 in District Court, HENDERSON County. Heard in the Court of Appeals 18 September 1989.

This is a proceeding wherein petitioner, Henderson County Department of Social Services, sought termination of the rights of Cynthia McPherson Scott and Barry Norman Scott as the parents of the minor children, James Robert Scott and Jason Allen Scott. The trial judge made the following pertinent findings of fact:

3. The children are currently in the custody of the Henderson County Department of Social Services pursuant to an Order dated May 9, 1984. Both children have resided in foster care for a period in excess of 18 months next preceding the filings of the petitions.

...

7. That the natural mother of both children is Cynthia McPherson Scott, who is a resident of Henderson County, North Carolina.

...

10. That the parental rights of the respondent mother, Cynthia McPherson Scott, and of the father, Barry Norman Scott, should be terminated upon the following grounds for both children:

(a) As to the respondent mother, Cynthia McPherson Scott, the Court finds that she is incapable due to mental illness of providing for the proper care and supervision of the children, such that the children are dependent children as defined by North Carolina General Statute 7A-517(13), and there is a reasonable probability that such incapability will continue throughout the minority of the children. The Court finds that the mother's condition has improved since the institution of these juvenile actions, but has not improved to a sufficient extent to allow the respondent mother to be able to provide for the needs of the children. In particular, the Court finds that these children have special needs in that the requirements

IN RE SCOTT

[95 N.C. App. 760 (1989)]

for patience and consistency in a parent with these children is greater and also these children have a need for a parent to help them deal with their anger. The children need a permanent plan of care and the Court finds that the respondent mother, as a result of her mental illness, is incapable of providing that plan.

. . .

(d) The Court finds that both parents have previously been adjudicated as having neglected the minor children and that neglect is a ground for terminating parental rights. The type and nature of that neglect is established in the previous Order of this Court.

11. The Court finds that it is in the best interests of the minor children that parental rights of both parents be terminated and that custody be continued with the Department of Social Services of Henderson County pending placement for adoption by that Department.

From a judgment terminating the parental rights of the father, Barry Norman Scott, and the mother, Cynthia McPherson Scott, the respondent mother appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Lane Mallonee, for petitioner, appellee.

Brent Conner for respondent, appellant.

HEDRICK, Chief Judge.

Respondent asserts "the trial court erred in finding as a fact that respondent appellant suffered from a mental illness which made her incapable of providing proper care and supervision [to her] minor children and that there is a reasonable probability that such [illness] would continue throughout the minority of the children. . . ." Respondent contends this finding was not supported by the standard of proof required in G.S. 7A-289.32(3a) which provides:

The burden in [parental rights termination] proceedings shall be upon the petitioner to prove the facts justifying such termination by clear and convincing evidence.

"In cases involving a higher evidentiary standard, such as the case *sub judice*, we must review the evidence in order to determine

IN RE SCOTT

[95 N.C. App. 760 (1989)]

whether the findings are supported by clear, cogent, and convincing evidence, and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

In the present case, respondent concedes she suffers from a personality disorder. She argues, however, petitioner failed to prove by clear and convincing evidence that due to such mental illness, respondent was incapable of providing for the care and supervision of her children, and there was a reasonable probability that such incapability would continue throughout the minority of the children. We agree.

The only evidence offered by petitioner to show respondent was mentally incapable of caring for her children was the testimony of Dr. Kenneth Lenington, one of respondent's treating psychiatrists. Dr. Lenington, however, testified on cross-examination that the fact that someone carries a diagnosis of personality disorder "does not mean that they are incapable of raising children." Furthermore, he stated respondent's pattern of behavior by itself does not mean that she is incapable of taking care of her children. Dr. Lenington's testimony, taken as a whole, does not provide clear and convincing evidence to support the district court's finding on this point.

Petitioner also failed to show by clear and convincing evidence there was a reasonable probability that respondent's mental illness would continue throughout the minority of her children. Dr. Lenington stated, "[u]sually, these kinds of behavior patterns are very difficult to change over the long haul, although that can be done. I would find it very difficult to guess how things would go with Cindy." Dr. Lenington could not predict within a reasonable probability that respondent's mental illness would continue throughout the minority of the children. In fact, he testified that respondent was currently experiencing her longest sustained period of improvement, and she had dealt with the stress of the hearing in a positive manner.

"It should be noted that the court is not required to terminate parental rights under any circumstances." *Department of Social Services v. Roberts*, 22 N.C. App. 658, 660, 207 S.E.2d 368, 370 (1974). Our review of the record on appeal reveals that the district court's finding that respondent was mentally incapable of providing proper care and supervision to her minor children and such incapability would continue throughout the minority of the children was not supported by clear and convincing evidence as required

McMAHAN v. STOGNER

[95 N.C. App. 764 (1989)]

by G.S. 7A-289.32(3a), and was therefore contrary to law. Under these circumstances, we must reverse the decision of the district judge in terminating the parental rights of the appellant.

Reversed.

Judges ARNOLD and BECTON concur.

LOIE RAY McMAHAN v. MARCUS ALBERT STOGNER AND JEAN WISE STOGNER

No. 8818SC1425

(Filed 3 October 1989)

**Automobiles and Other Vehicles § 89.1— golf cart hit by car—
sufficiency of evidence of last clear chance**

In an action to recover for injuries sustained by plaintiff when he was hit by defendant's car as he drove his golf cart across a road, the trial court erred by failing to submit to the jury the issue of last clear chance where the evidence tended to show that defendant's sight distance between a curve in the road and the point of the accident was at least 200 feet, but defendant admitted that, though he saw plaintiff, he did not begin braking until he was only 40 feet from plaintiff's golf cart.

APPEAL by plaintiff from *Washington, Edward K., Judge*. Judgment entered 4 August 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 24 August 1989.

Plaintiff, Loie Ray McMahan, brought this action against defendants, Marcus Albert Stogner and Jean Wise Stogner, to recover damages for injuries he sustained due to the negligence of defendant Marcus Stogner.

On 21 May 1985 plaintiff and two friends were playing golf at Sedgfield Country Club. Plaintiff was operating a motorized golf cart and his friends, the Howie brothers, shared a second golf cart. As plaintiff attempted to cross North Carolina Rural Road 1373, also known as Gaston Road, where it intersected the

McMAHAN v. STOGNER

[95 N.C. App. 764 (1989)]

golf cart path, his golf cart was struck by an automobile, owned by defendant Jean Stogner and operated by her son, Marcus Stogner. Defendant Marcus Stogner was operating his mother's automobile in the westbound lane of Gaston Road. At the intersection where the accident occurred the road to the east of the cart path is straight with a slight uphill grade that goes into a curve. The accident occurred at approximately 3:30 in the afternoon.

At trial the jury found (1) that plaintiff was injured by defendant Marcus Stogner's negligence, and (2) that plaintiff was contributorily negligent. From judgment for defendants entered on the jury's verdict, plaintiff appealed.

Robert S. Cahoon for plaintiff-appellant.

Henson Henson Bayliss & Teague, by Perry C. Henson and Gary K. Sue, for defendant-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred by failing to submit to the jury the issue of last clear chance.

A plaintiff is entitled to an instruction on the doctrine of last clear chance when he establishes four essential elements: (1) that the plaintiff negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the defendant knew of, or by the exercise of reasonable care could have discovered, the plaintiff's perilous position and his inability to escape; (3) that the defendant had the time and means to avoid injury to the plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the plaintiff's perilous position and his inability to escape from it; and (4) that the defendant negligently failed to use the available time and means to avoid injury to the plaintiff, and for that reason struck and injured him. *Watson v. White*, 309 N.C. 498, 308 S.E.2d 268 (1983); *Schaefer v. Wickstead*, 88 N.C. App. 468, 363 S.E.2d 653 (1988).

There was conflicting evidence regarding the occurrence and sequence of events surrounding the accident. Plaintiff testified that he approached Gaston Road from the north and stopped at the edge of the cart path before attempting to cross. He looked both ways, saw nothing coming, and pulled into the road. Plaintiff also testified that he could see to the east for approximately 250 to 275 feet before the road curved out of sight. When plaintiff heard

McMAHAN v. STOGNER

[95 N.C. App. 764 (1989)]

his friend shout "look out" he saw defendant's car for the first time. Plaintiff thought he was nearly across Gaston Road when he was hit.

William Howie, a witness for the plaintiff, testified that he was approximately 30 feet behind the plaintiff operating his golf cart on the cart path when he glimpsed something out of the corner of his eye coming from the left [east]. He shouted to the plaintiff in an effort to warn him of the approaching car. William Howie further testified that when he first saw the defendant's car out of the corner of his eye, plaintiff was starting to pull out onto the road. William Howie estimated that at this point the defendant was approximately 225 to 240 feet from the intersection. Seconds later the collision occurred. William Howie also testified that plaintiff had looked both ways before crossing and that the cart was almost across the road when it was hit.

Ralph Howie, Jr. also testified for the plaintiff. He was a passenger in the golf cart driven by his brother, William. According to Ralph Howie's testimony he became aware of defendant's car approaching from the left when his brother shouted "look out" to the plaintiff. When he first saw the car it was approximately 200 feet away from the plaintiff. Ralph Howie also testified that two-thirds of the golf cart had crossed the center line before being hit; that when he looked up plaintiff had started into the street; the car locked its brakes and started sliding and, in a split second, impacted with the plaintiff's cart. Ralph Howie further testified that he heard the defendant tell the state trooper that he wasn't paying close attention.

State Trooper G. C. Grady, who investigated the accident, testified that defendant Marcus Stogner indicated to him that he was driving too fast, was going about 45 miles an hour, and was sorry the accident had happened.

Defendant Marcus Stogner testified that he told Trooper Grady that he knew he was going faster than he should have been and estimated his speed to be approximately 35 miles an hour. Defendant testified that when he rounded the curve to the east of the intersection he saw plaintiff for the first time. Defendant took his foot off the accelerator but did not brake at this time. Defendant testified that the distance between his car and the plaintiff when he rounded the curve was approximately 210 feet. Defendant further testified that plaintiff was not in the road at this point; that

JORGENSEN v. SEEMAN

[95 N.C. App. 767 (1989)]

plaintiff was looking straight ahead and did not look left or right before pulling onto the road. On direct examination defendant indicated that plaintiff did not stop before pulling onto Gaston Road. On cross-examination defendant indicated that plaintiff was stopped but getting ready to start in motion when defendant first saw him. Defendant also testified that when he was 40 feet from plaintiff he was prepared to brake. At this point plaintiff pulled out in front of him. Defendant applied brakes, but was unable to avoid a collision. Defendant testified that the collision occurred in the westbound lane.

On this evidence, a jury could draw the reasonable inference that after defendant Marcus Stogner discovered, or reasonably could have discovered plaintiff's peril, he had both the time and opportunity—that is, a last clear chance—to avoid the collision. The evidence is essentially undisputed that defendant's sight distance between the curve in the road and the cart path was at least 200 feet. Defendant admitted that he did not start braking until he was only 40 feet from plaintiff's golf cart. While the evidence was conflicting as to whether plaintiff "darted" in front of defendant or whether plaintiff was in the road when defendant rounded the curve, this only bears upon, but does not resolve, the question of last clear chance.

We hold that the trial court erred in not submitting this issue to the jury and therefore award a

New trial.

Judges PHILLIPS and PARKER concur.

DAN JORGENSEN, D/B/A DANCO ELECTRIC COMPANY, PLAINTIFF v. DANIEL SEEMAN AND ROBERTA SEEMAN, DEFENDANTS

No. 8926DC179

(Filed 3 October 1989)

Trial § 45— verdict unilaterally reduced by judge—abuse of discretion

The trial court abused its discretion by unilaterally reducing plaintiff's verdict where plaintiff sued for \$4,852.20; the

JORGENSEN v. SEEMAN

[95 N.C. App. 767 (1989)]

jury returned a verdict for plaintiff in the amount of \$2,426.10 against defendant husband and a verdict for plaintiff in the amount of \$2,426.10 against defendant wife; at the hearing on plaintiff's N.C.G.S. § 1A-1, Rule 60 motion for correction of judgment plaintiff proffered the testimony of the foreman of the jury along with his affidavit and the affidavits of the other jurors which affirmed the fact that the jurors intended to award plaintiff a total of \$4,852.20; and nothing in the record indicated that plaintiff ever consented to the remittitur of one-half the verdict.

APPEAL from *Cantrell (Daphene, L.), Judge*. Judgment entered 10 November 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 19 September 1989.

Plaintiff-appellant, Dan Jorgensen, d/b/a Danco Electric Company ("Danco"), brought this action against the defendant-appellees, Daniel Seeman and Roberta Seeman, to recover the value of services rendered pursuant to a contract.

The case was heard before Judge Cantrell and a jury at the 18 July 1988 session of the District Court of Mecklenburg County.

During 1984, plaintiff contracted with the defendants for electrical construction on defendants' residence. The plaintiff rendered labor and materials in the sum of \$4,852.20. The plaintiff submitted his statement but defendants refused payment.

On 12 September 1985, the plaintiff filed suit against the defendants alleging breach of contract, *quantum meruit* and unjust enrichment. After trial the jury awarded judgment against the defendant, Daniel Seeman, in the amount of \$2,426.10 and also judgment in the amount of \$2,426.10 against the defendant, Roberta Seeman; the total recovery being the precise amount of the prayer for relief, \$4,852.20.

On 12 August 1988, the trial court, on its own motion entered a judgment jointly and severally against the defendants in the total sum of \$2,426.10, thereby reducing the verdict by fifty percent. The plaintiff filed a motion for a correction of the judgment pursuant to Rule 60, offering affidavits from all jurors, and this motion was denied by the court on 10 November 1988.

From the order denying plaintiff's motion for correction of judgment and from the original judgment of 12 August 1988, the plaintiff appeals.

JORGENSEN v. SEEMAN

[95 N.C. App. 767 (1989)]

W. James Chandler for the plaintiff-appellant.

Defendants-appellees failed to file a brief on their behalf and were not before the Court.

LEWIS, Judge.

Plaintiff Danco contests the denial of its motion under G.S. 1A-1, Rule 60(b). Rule 60(b)(6) is equitable in nature. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 587 (1987). This section empowers the court with the authority to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances. *Id.* A motion for relief under Rule 60(b) of the North Carolina Rules of Civil Procedure is addressed to the sound discretion of the trial court and such a decision will be disturbed only for an abuse of discretion. *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E.2d 220 (1976); *Harrington v. Harrington*, 38 N.C. App. 610, 248 S.E.2d 460 (1978).

In order for a judgment to be set aside, plaintiff must show that (1) extraordinary circumstances exist and that (2) justice demands it. *Baylor v. Brown*, 46 N.C. App. 664, 670, 266 S.E.2d 9, 13 (1980). We find that these criteria have been met. The plaintiff sued for \$4,852.20. The jury returned a verdict for plaintiff in the amount of \$2,426.10 against defendant Daniel Seeman and a verdict for plaintiff in the amount of \$2,426.10 against defendant Roberta Seeman. At the hearing on plaintiff's Rule 60 motion, the plaintiff proffered the testimony of the foreman of the jury along with his affidavit and the affidavits of the other jurors which affirmed the fact that the jurors intended to award the plaintiff a total of \$4,852.20. Indeed, the trial court at the hearing on the motion indicated that the issues and instructions given to the jury were designed to make it clear to the jury that they could not render a verdict for the total prayer, \$4,852.20, against Mr. Seeman and then also award plaintiff the total prayer against Mrs. Seeman, resulting in double recovery of the contract price. Accordingly, the issues were presented to the jury in the following manner:

ISSUE IV: Did the Plaintiff, Dan Jorgensen d/b/a DANCO, render electrical services to the Defendant Daniel Seeman under such circumstances that the Defendant Daniel Seeman should be required to pay the Plaintiff, Dan Jorgensen d/b/a DANCO?

ANSWER: YES

JORGENSEN v. SEEMAN

[95 N.C. App. 767 (1989)]

ISSUE V: What amount is the Plaintiff, Dan Jorgensen d/b/a DANCO, entitled to recover of the Defendant Daniel Seeman as damages for the electrical services which the Plaintiff, Dan Jorgensen d/b/a DANCO, has rendered to the Defendant, Daniel Seeman?

ANSWER: \$2,426.10

ISSUE VI: Did the Plaintiff, Dan Jorgensen d/b/a DANCO, render electrical services to the Defendant Roberta Seeman in such circumstances that the Defendant Roberta Seeman should be required to pay the Plaintiff, Dan Jorgensen d/b/a DANCO?

ANSWER: YES

ISSUE VII: What amount is the Plaintiff Dan Jorgensen d/b/a DANCO, entitled to recover of the Defendant Roberta Seeman as damages for the electrical services which the Plaintiff, Dan Jorgensen d/b/a DANCO has rendered to the Defendant, Roberta Seeman?

ANSWER: \$2,426.10

Nowhere in these issues did the words "joint and several" appear. Nothing in the record indicates that the plaintiff ever consented to the remittitur of one-half the verdict. It was an abuse of discretion by the trial court to unilaterally reduce plaintiff's jury verdict. See *Pittman v. Nationwide Mut. Fire Ins. Co.*, 79 N.C. App. 431, 339 S.E.2d 441, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986) (trial courts have no authority to grant remittitur without the consent of the prevailing party). We reverse the denial of plaintiff's Rule 60 motion and remand for entry of judgment for plaintiff for \$2,426.10 against defendant Daniel Seeman and also judgment for plaintiff for \$2,426.10 against defendant Roberta Seeman; total recovery against both defendants being \$4,852.20.

Vacated and remanded.

Judges PHILLIPS and COZORT concur.

WINDLEY v. DOCKERY

[95 N.C. App. 771 (1989)]

WALTER H. WINDLEY, JR. v. CHARLES DOCKERY AND GASTON ROOFING
AND CONSTRUCTION

No. 8927DC216

(Filed 3 October 1989)

**Rules of Civil Procedure § 60— no notice that case was calendared—
case dismissed—duty of court to make findings**

The trial court erred in denying defendants' motion to obtain relief from a judgment of dismissal pursuant to N.C.G.S. § 1A-1, Rule 60(b) where the trial judge failed in his duty to make findings of fact relative to whether defendants had notice that the case appealed from the magistrate to the district court was on the calendar for disposition.

APPEAL by defendants from *Carpenter, Judge*. Judgment entered 14 November 1988 in District Court, GASTON County. Heard in the Court of Appeals 20 September 1989.

This is a civil action wherein plaintiff seeks to recover damages in the amount of \$950.00 from defendants based on a claim for breach of contract. The record discloses the following: Defendants were hired by plaintiff to repair a roof on plaintiff's property in Gaston County, North Carolina. Plaintiff was dissatisfied with defendants' work and filed this action in the Small Claims Division of the District Court of the General Court of Justice for Gaston County on 31 March 1988. Defendants were duly served with process on 7 April 1988. The case was heard on 18 April 1988 before Judge Beatty. Judgment was entered for plaintiff. Defendants gave written notice of appeal to the district court on 28 April 1988.

On 31 May 1988, the case appeared in district court on Judge Stevens' calendar, and neither plaintiff nor defendants appeared whereupon Judge Stevens entered the following order:

THIS CAUSE was regularly calendared for trial de novo before the undersigned Judge Presiding at the May 31, 1988, Civil Term of the District Court of Gaston County upon the defendant's appeal from the Judgment of the Magistrate entered on the 18th day of May, 1988.

The defendant was duly called to come into Court and prosecute his appeal, but failed to appear.

WINDLEY v. DOCKERY

[95 N.C. App. 771 (1989)]

IT IS THEREFORE, ORDERED, that the defendant's appeal be, and the same is hereby dismissed, and the Judgment of the Magistrate is affirmed.

On 15 September 1988, defendants filed a motion pursuant to Rule 60(b) for relief from judgment dated 10 June 1988. On 14 November 1988, District Court Judge Carpenter entered the following order:

. . . [T]he Court heard arguments of counsel and the Plaintiff, reviewed the file, and concludes as a matter of law that the Defendant's Motion pursuant to Rule 60 to set aside the Judgment should not be allowed.

THEREFORE, BASED UPON THE AFORESAID, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to set aside the Judgment be denied.

Defendants appealed from the order dated 14 November 1988 denying their motion made pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure.

Walter H. Windley, Jr., pro se, plaintiff, appellee.

Childers, Fowler & Childers, by Max L. Childers and David C. Childers, for defendants, appellants.

HEDRICK, Chief Judge.

The only question raised on this appeal is whether Judge Carpenter erred in entering the order dated 14 November 1988 denying defendants' Rule 60 motion. G.S. 7A-228(c) provides:

Whenever [an appeal from a magistrate] is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed.

The question before us is whether Judge Carpenter erred in denying defendants' motion to obtain relief from that judgment pursuant to their Rule 60(b) motion.

On their motion, defendants allege they had no notice that the case which they had appealed from the magistrate to the district court had been calendared for trial. Thus, the critical question before Judge Carpenter with respect to defendants' motion was

WINDLEY v. DOCKERY

[95 N.C. App. 771 (1989)]

whether defendants had notice, constructive or actual, to come in and prosecute their appeal.

Rule 60(b)(6) of the North Carolina Rules of Civil Procedure authorizes the court to grant relief to a party from a judgment for any other just cause. It is clear that the court may give relief from a judgment pursuant to Rule 60(b)(6) if the party making the motion has not had notice that the case was duly calendared. See *Hardware, Inc. v. Howard*, 18 N.C. App. 80, 196 S.E.2d 53 (1973). "It is the duty of the trial court in ruling on a 60(b) motion to make findings of fact and to determine from such facts whether the movant is entitled to relief from such judgment or order." *York v. Taylor*, 79 N.C. App. 653, 655, 339 S.E.2d 830, 832 (1986).

In the present case, it was the duty of the trial judge to make findings of fact relative to whether defendant had notice that the case appealed from the magistrate to the district court was on the calender for disposition. In the case *sub judice*, Judge Stevens found as a fact that the case had been duly calendared and that neither plaintiff nor defendants appeared. The only evidence before Judge Carpenter with respect to defendants' Rule 60(b) motion was that defendants had not received notice. Therefore, since the only evidence regarding the matter of whether defendants had received notice was in the negative, it was the duty of the trial judge to find as a fact defendants did not have notice and to allow defendants' motion entering an order vacating the judgment of 10 June 1988 and allowing the parties to proceed to proper disposition of the appeal.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

TATE v. TATE

[95 N.C. App. 774 (1989)]

BRIAN PAUL TATE, PLAINTIFF v. PATRICIA WOOD TATE, DEFENDANT

No. 8921DC233

(Filed 3 October 1989)

1. Divorce and Alimony § 24.5— accumulated child support arrearages—no authority of trial court to strike

The trial court had no authority to strike plaintiff's accumulated child support arrearages where plaintiff never made a motion for modification of the civil court order awarding child support. N.C.G.S. § 50-13.10.

2. Divorce and Alimony § 24.5; Social Services and Public Welfare § 2— child support arrearages stricken—standing

There was no merit to plaintiff's contention that Social Services had no standing to challenge the striking of child support arrearages, since Social Services provided support money, became the assignee of the right to child support payments, and thus had standing to contest the elimination of arrearages. N.C.G.S. § 110-137.

3. Garnishment § 2— child support arrearages—garnishment denied—erroneous finding as basis

The trial court erred in denying defendant's motion for garnishment of plaintiff's wages where the basis for the denial was its erroneous finding of fact that plaintiff made his child support payments in a timely manner. N.C.G.S. § 110-36(b1).

APPEAL by defendant from *Alexander, Judge*. Order entered 3 November 1988 in District Court, FORSYTH County. Heard in the Court of Appeals 20 September 1989.

This is a civil action wherein defendant seeks garnishment of plaintiff's wages to satisfy his existing child support obligations. By the terms of a consent order entered on 16 January 1981, plaintiff was required to pay defendant \$175.00 per month in child support. From 5 November 1980 to 30 June 1982, plaintiff paid only \$1,750.00 in child support, an amount \$1,575.00 less than he was obligated to pay during that period. As a result, defendant filed criminal charges against plaintiff for failure to provide child support in violation of G.S. 14-322. Plaintiff pled guilty and was given a six-month prison sentence suspended for five years on the condition that he pay defendant \$175.00 per month during that period. On

TATE v. TATE

[95 N.C. App. 774 (1989)]

28 January 1983, in response to plaintiff's motion for suspension of further payments, the court reduced the amount required under the criminal judgment to \$100.00 per month. On 5 April 1988, the district court ordered plaintiff to make all further child support payments to the Forsyth County Department of Social Services (hereinafter "Social Services") as agent for the North Carolina Department of Human Resources.

On 10 August 1988, by a motion to garnish plaintiff's wages and join plaintiff's employer as a third-party garnishee, Social Services sought to satisfy plaintiff's ongoing child support obligation and recover all existing child support arrearages.

From an order striking all existing arrearages and denying defendant's motion for wage garnishment, defendant appealed.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow, for plaintiff, appellee.

Bruce E. Colvin for defendant, appellant.

HEDRICK, Chief Judge.

[1] Appellant, Social Services, contends the trial court erred by striking plaintiff's accumulated child support arrearages. They claim plaintiff's failure to move the court for modification of the civil court order eliminated any opportunity for the district court to strike the arrearages thereunder. We agree. The district court judge's authority to reduce or strike a vested child support payment is controlled by G.S. 50-13.10 which provides in pertinent part:

(a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:

(1) Before the payment is due or

(2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before

TATE v. TATE

[95 N.C. App. 774 (1989)]

the payment is due, then promptly after the moving party is no longer so precluded.

In the present case, plaintiff never made a motion in the cause with respect to arrearages accumulated under the civil court order. As a result, the trial judge had no authority to strike them.

[2] In his brief, plaintiff argues that Social Services has no standing to challenge the striking of arrearages. G.S. 110-137 provides in pertinent part:

By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children *up to the amount of public assistance paid*. . . . (Emphasis added).

Plaintiff suggests that because the named defendant, Hattie Angel, provided support which plaintiff was legally obligated to provide from 5 November 1980 to 30 June 1982, only she has standing to challenge the striking of arrearages. The statute, however, clearly provides for assignment of the right to child support payments to the State or county to the extent that it provides support money. The fact that arrearages accumulated before Social Services rendered aid to defendant is of no legal significance. Thus, Social Services, as assignee of the right to child support payments, has standing to contest the elimination of arrearages.

[3] Appellant also complains that the district judge erred by denying its motion for garnishment of plaintiff's wages. G.S. 110-36(b1) allows the district court, in its discretion, to enter an order of garnishment when the supporting parent "is delinquent . . . or has been erratic in making child support payments. . . ." As a basis for denying defendant's motion, the district judge found as a fact that plaintiff "made his child support payments in a timely manner. . . ." This finding was clearly erroneous in light of our conclusion that the child support arrearages were improperly stricken. Thus, the district court must reconsider, in its discretion, whether wage garnishment is justified in this case.

For the reasons stated herein, the order of the district court is reversed as to the striking of plaintiff's child support arrearages,

HENSON v. HENSON

[95 N.C. App. 777 (1989)]

vacated with respect to the denial of defendant's motion for garnishment, and remanded for further proceedings consistent with this opinion.

Reversed in part; vacated and remanded in part.

Judges ARNOLD and BECTON concur.

RODNEY LYNN HENSON, PLAINTIFF v. SHERRY LYNN CHURCH HENSON,
DEFENDANT

No. 8919DC184

(Filed 3 October 1989)

Divorce and Alimony § 26— Tennessee child custody order— no notice given to defendant— Tennessee order not enforceable in N.C.

The trial court erred in enforcing a Tennessee child custody order where no attempt was made to serve defendant with notice and she in fact never received notice of the Tennessee hearing, and Tennessee therefore did not act substantially in conformity with the Uniform Child Custody Jurisdiction Act. N.C.G.S. § 50A-13.

APPEAL by defendant from *Long (V. Bradford)*, Judge. Order entered 29 December 1988 in District Court, RANDOLPH County. Heard in the Court of Appeals 19 September 1989.

Plaintiff and defendant were married on 5 November 1987 in Johnson County, Tennessee. Shortly after they were married, the parties moved to North Carolina. On 19 February 1988 a son, Brett McKinnley Henson, was born in Randolph County, North Carolina. The parties separated on 1 November 1988.

Shortly after the separation, plaintiff took the child from North Carolina to Tennessee. On 22 November 1988 the plaintiff filed an action in Johnson County, Tennessee seeking custody of the child and a restraining order prohibiting the defendant from removing the child from Tennessee. No notice was given to the defendant. Plaintiff was granted a restraining order and temporary custody of the child.

HENSON v. HENSON

[95 N.C. App. 777 (1989)]

Sometime after this order was entered, defendant without legal authority, regained custody of her son and returned to Randolph County, North Carolina. On 14 December 1988 plaintiff brought suit in Randolph County, North Carolina seeking enforcement of the Tennessee restraining order against the defendant. The court entered a temporary restraining order and directed the Sheriff to pick up Brett McKinnley Henson and return him to the custody of his father. The court also scheduled a hearing on the matter for 29 December 1988. Defendant received notice of the scheduled hearing and filed a response and complaint for custody.

In her answer, defendant challenged the jurisdiction of the Tennessee Court to enter any custody orders pertaining to Brett McKinnley Henson.

On 29 December 1988, Judge Long heard the matter and enforced the Tennessee decree.

From the order entered 29 December 1988 refusing to assert jurisdiction in North Carolina over this custody dispute, defendant appeals.

Plaintiff-appellee failed to file a brief on his behalf and was not before the Court.

Ottway Burton, P.A., by Ottway Burton, for defendant-appellant.

LEWIS, Judge.

Enforcement of out-of-state child custody orders is governed by the terms of the Uniform Child Custody Jurisdiction Act (UCCJA), N.C.G.S. 50A-1; *Copeland v. Copeland*, 68 N.C. App. 276, 314 S.E.2d 297 (1984). A court can enforce a child custody order only if the jurisdictional requirements of G.S. Section 50A-1 are met. *See* G.S. 50A-13 (North Carolina courts shall recognize only those out-of-state custody decrees which are in "substantial conformity" with the UCCJA).

We find that this case is controlled by our earlier holding in *Copeland, supra*. In *Copeland*, the plaintiff obtained a temporary custody order in Massachusetts. Defendant, a North Carolina resident, was not notified prior to entry of the order. *Id.* at 277, 314 S.E.2d 298. We reversed the entry of the North Carolina District Court order enforcing the Massachusetts court's temporary award of custody to plaintiff, stating:

HENSON v. HENSON

[95 N.C. App. 777 (1989)]

We find, however, that the Massachusetts court did not comply with the notice provisions of G.S. Sections 50A-4 and 5 and, therefore, did not obtain personal jurisdiction over defendant. Under G.S. Section 50A-4, '[b]efore making a decree under this Chapter reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child.' Defendant clearly had a right to notice under the Act before the Massachusetts court entered its temporary order. The Massachusetts order also fails to meet the requirements of G.S. Section 50A-5, which provides that the notice required under G.S. Section 50A-4, 'shall be given in a manner reasonably calculated to give actual notice and shall be served in the same manner as the manner of service of process set out in G.S. 1A-1, Rule 4. . . .' Plaintiff concedes that defendant was not served with process pursuant to Rule 4 of the Rules of Civil Procedure. It is clear that '[s]trict compliance with sections 4 and 5 is essential for . . . a custody decree[s] . . . recognition and enforcement in other states under sections 12, 13 and 15.'

Id. at 279, 314 S.E.2d 299.

Like the defendant in *Copeland*, defendant Sherry Lynn Church Henson was entitled to receive notice of the Tennessee temporary custody hearing. Because the record indicates that there was no attempt to serve her with notice and she in fact never received notice of the hearing, Tennessee did not act "substantially in conformity with" Chapter 50A, and we must reverse. G.S. 50A-13. Because we hold that the trial court's order must be reversed, we need not reach defendant's other assignments of error.

Reversed.

Judges PHILLIPS and COZORT concur.

RICHARDSON v. HIATT

[95 N.C. App. 780 (1989)]

RONALD RICHARDSON, PETITIONER APPELLEE v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT APPELLANT

No. 887SC1096

(Filed 3 October 1989)

Automobiles and Other Vehicles § 2.4— revocation of driver's license—case remanded for determination as to willfulness of refusal to submit to chemical analysis of blood

The opinion filed in this case on 15 August 1989 was in error in ordering that the cause be remanded to Nash County Superior Court for entry of an order affirming the revocation of petitioner's driver's license; instead the case is remanded to Superior Court for a new trial at which time petitioner will have an opportunity to present evidence, and the trial court can determine whether petitioner willfully refused to submit to a chemical analysis of his blood.

APPEAL by respondent from judgment of *Judge Napoleon Barefoot* entered 11 August 1988 in NASH County Superior Court. Heard in the Court of Appeals 19 April 1989.

Ralph G. Willey, III, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for respondent appellant.

COZORT, Judge.

Petitioner files a Petition for Rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure.

Upon review of the petition, this Court finds that the opinion filed in this case on 15 August 1989 was in error in ordering that the cause be remanded to Nash County Superior Court for entry of an order affirming the revocation of petitioner's driver's license. The proper resolution of the cause is to remand to Superior Court for a new trial. At a new trial, petitioner will have an opportunity to present evidence, and the trial court can determine whether the petitioner willfully refused to submit to a chemical analysis of his blood. *See Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553, *petition to rehear denied*, 279 N.C. 397, 183 S.E.2d 241 (1971).

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[95 N.C. App. 780 (1989)]

The petitioner's Petition for Rehearing is granted in order for this Court to modify its opinion of 15 August 1989 to provide that the trial court's judgment of 11 August 1988 is reversed in part, affirmed in part and the cause remanded for a new trial.

Reversed in part, affirmed in part and remanded.

Judges PHILLIPS and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 3 OCTOBER 1989

ADAMS v. TOWN OF ANDREWS No. 8830SC1316	Cherokee (88SP34)	Affirmed
BENBOW v. BENBOW No. 8821DC1240	Forsyth (84CVD4901)	Affirmed in part, reversed & remanded in part.
CARROLL v. EDDINS No. 8910SC72	Wake (87CVS8737)	No Error
EDWARDS v. CHUNN No. 8822SC1379	Davie (87CVS25)	No Error
FAISON v. ESC No. 8810SC1275	Wake (88CVS381)	Affirmed
IN RE ESTATE OF BRYANT No. 8921SC127	Forsyth (87E1296)	Affirmed
McLAUGHLIN v. MARTIN No. 8912SC74	Cumberland (87CVS2277)	No Error
MELTON v. TEXFI INDUSTRIES No. 888SC1371	Lenoir (86CVS1003)	Affirmed
PIERCY v. PHOENIX GROUP No. 8926DC214	Mecklenburg (87CVD1465)	No Error
PLEASANT v. PLEASANT No. 8811DC1285	Johnston (88CVD0134)	Affirmed
RUSSELL v. PRICE No. 8818DC1181	Guilford (86CVD4152)	No Error
STATE v. CLARK No. 8918SC253	Guilford (87CRS20607) (87CRS33849) (87CRS33850)	No Error
STATE v. DUCKETT No. 8919SC297	Cabarrus (88CRS852)	No Error
STATE v. MASON No. 8914SC490	Durham (88CRS210)	Affirmed
STATE v. MORGAN No. 8928SC286	Buncombe (87CRS17496)	No Error

STATE v. MOSELY No. 8930SC396	Haywood (88CRS2863) (88CRS2865)	No Error
STATE v. RAY No. 8912SC265	Cumberland (87CRS27857)	No Error
STATE v. TUCKER No. 8921SC242	Forsyth (87CRS27890)	Affirmed
STATE v. YOUNG No. 8922SC259	Iredell (88CRS6211)	No Error
STEVE DICKSON BUILDERS v. WHITTINGTON No. 8810SC1235	Wake (85CVD3577) (86CVS8761)	Affirmed
WEBBER v. ITHACA INDUSTRIES No. 8927SC419	Gaston (88CVS1582)	Affirmed

APPENDIX

**RULES FOR COURT-ORDERED
ARBITRATION IN NORTH CAROLINA**

ORDER ADOPTING
RULES FOR
STATEWIDE COURT-ORDERED, NONBINDING ARBITRATION

WHEREAS, the North Carolina General Assembly, by Ch. 301 of the 1989 Session Laws, authorized statewide court-ordered, non-binding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Court orders:

- (1) The program shall operate on a permanent basis in the Third, Fourteenth, and Twenty-Ninth Judicial Districts, and in all other judicial districts designated by the Administrative Office of the Courts, in consultation with local court officials, subject to the availability of funds appropriated for this purpose;
- (2) Effective immediately, the program shall operate pursuant to the attached "Rules for Court-Ordered Arbitration in North Carolina";
- (3) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina.

Done by the Court in conference this the 14th day of September, 1989.

WHICHARD, J.
For the Court

RULES FOR COURT-ORDERED ARBITRATION
IN NORTH CAROLINA

Arb. Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) Types of Actions; Exceptions.

All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding \$15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules, except actions:

- (1) Involving a class;
- (2) In which there is a substantial claim for injunctive or declaratory relief;
- (3) Involving:
 - (i) family law issues,
 - (ii) title to real estate,
 - (iii) wills and decedents' estates, or
 - (iv) summary ejectment;
- (4) Which are special proceedings;
- (5) In which a claim is asserted for an unspecified amount exceeding \$10,000 in compliance with N.C.R. Civ. P. 8(a)(2);
- (6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed \$15,000; or
- (7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) Arbitration by Agreement.

The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) Court-Ordered Arbitration in Cases Having Excessive Claims.

The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is \$15,000 or less, even though a greater amount is claimed.

(d) Exemption and Withdrawal From Arbitration.

- (1) The court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) \$15,000; (ii) the action is excepted from arbitration under Arb. Rule 1(a); or (iii) there is a strong and compelling reason to do so.
- (2) During the pilot arbitration program, the court shall exempt from arbitration a random sample of cases so as to create a control group of cases to be used for comparison with arbitrated cases in evaluating the pilot arbitration program.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to \$15,000. The \$15,000 jurisdictional limit by statute and Arb. Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is (are) based on a statute providing for multiple damages, e.g. N.C. Gen. Stat. §§1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has ultimate authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification under Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. §6-21.5 sanctions or State Bar disciplinary action.

“Family law issues” in Arb. Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are “special proceedings” or involve summary ejection, referred to in Arb. Rule 1(a), are actions so designated by the General Statutes.

Arb. Rule 1(b) allows binding or non-binding arbitration of any case by agreement and permits the parties to modify these rules for a particular case. Court approval of any modification will give a variant proceeding the court’s imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation by the parties. This rule was not intended to provide compensation from the limited funds available to the pilot courts for protracted or exceptional cases. Therefore, the court should review and approve any such extraordinary stipulations.

Arb. Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule does not require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Arb. Rule 1(c). See also the Comment to Arb. Rule 1(a).

Exemption or withdrawal may be appropriate under Arb. Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General’s office.

Arb. Rule 2

ARBITRATORS

(a) Selection.

The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court’s list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list.

(b) Eligibility.

An arbitrator shall have been a member of the North Carolina State Bar for at least five years and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service.

(c) Fees and Expenses.

Arbitrators shall be paid a \$75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding \$75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) Oath of Office.

Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. §11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Disqualification.

Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) Replacement of Arbitrator.

If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Under Arb. Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have the

burden of taking the initiative if they want to make the selection, and they must do it promptly.

Under Arb. Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb. Rule 3(n).

Payments and expense reimbursements authorized by Arb. Rule 2(c) are made subject to court approval to insure conservation and judicial monitoring of the funds available during the pilot program from the "private sources" specified in the enabling Act.

Arb. Rule 3

ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court.

Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Prehearing Exchange of Information.

At least 10 days before the date set for the hearing, the parties shall exchange:

- (1) Lists of witnesses they expect to testify;
- (2) Copies of documents or exhibits they expect to offer in evidence; and
- (3) A brief statement of the issues and their contentions. Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing.

(c) Exchanged Documents Considered Authenticated.

Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents

not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible.

Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses.

Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas.

N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings.

Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) Law of Evidence Used as Guide.

The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect he determines appropriate.

(i) No Ex Parte Communications With Arbitrator.

No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) Failure to Appear; Defaults; Rehearing.

If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered

upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond his control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

(k) No Record of Hearing Made.

No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions.

Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)—37(b)(2)(C) and N.C. Gen. Stat. §6-21.5.

(m) Proceedings in Forma Pauperis.

The right to proceed in *forma pauperis* is not affected by these rules.

(n) Limits of Hearings.

Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

- (1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.
- (2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded.

The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments he permits have been com-

pleted. In exceptional cases, he may in his discretion receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) Parties Must be Present at Hearings; Representation.

All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear *pro se*.

(q) Motions.

Designation of an action for arbitration does not affect a party's right to file any motion with the court.

- (1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in his award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Arb. Rule 3(b).
- (2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Arb. Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. See Arb. Rule 3(p).

The purpose of Arb. Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the

option in Arb. Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 4(a), which requires the arbitrator to file his award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, he should specify the points he wants addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§103-4, 103-5.

Under Arb. Rule 3(q) the court will rule on prehearing motions which dispose of the case on the pleadings or relate to the procedural management of the case. The court will normally defer to the arbitrator for his consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Arb. Rule 4

THE AWARD

(a) Filing the Award.

The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions.

No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award.

The award must resolve all issues raised by the pleadings and may exceed \$15,000.

(d) Copies of Award to Parties.

The court shall forward copies of the award to the parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Under Arb. Rule 4(a) the arbitrator should issue the award when the hearing is over and should not take the case under advisement. If the arbitrator wants post-hearing briefs, he must receive them within three days, consider them, and file his award within three days thereafter. See Arb. Rule 3(o) and its Comment.

See Arb. Rule 1(a) and its Comment in connection with Rule 4(c).

Arb. Rule 5

TRIAL DE NOVO

(a) Trial De Novo As Of Right.

Any party not in default for a reason subjecting him to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear.

(b) Filing Fee.

A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the demanding party improved his position over the arbitrator's award. Otherwise, the filing fee shall be forfeited to the fund from which arbitrators are paid.

(c) No Reference to Arbitration in Presence of Jury.

A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) No Evidence of Arbitration Admissible.

No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) Arbitrator Not to be Called as Witness.

An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. His notes are privileged and not subject to discovery.

(f) Judicial Immunity.

The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to his actions in the arbitration proceeding.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Arb. Rule 5(c) does not preclude cross-examination of a witness in later proceedings concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Rules 5(c) and 5(d).

See also the Comment to Arb. Rule 6 regarding demand for trial de novo.

Arb. Rule 6**THE COURT'S JUDGMENT****(a) Termination of Action by Agreement Before Judgment.**

The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) Judgment Entered on Award.

If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. By failing to demand a trial de novo the right is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Arb. Rule 7

COSTS

(a) Arbitration Costs.

The arbitrator may include in an award court costs accrued through the arbitration proceedings in favor of the prevailing party.

(b) Costs Following Trial De Novo.

If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Arb. Rule 7(a) incurred in the arbitration proceedings.

(c) Costs Denied if Party Does Not Improve His Position in Trial De Novo.

A party demanding trial de novo who does not improve his position may be denied his costs in connection with the arbitration proceeding by the trial judge, even though prevailing at trial.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
 Pilot Rule Amended: 4 March 1987.
 Permanent Rule Adopted: 14 September 1989

Arb. Rule 8

ADMINISTRATION

(a) Actions Designated for Arbitration.

The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties in all cases not exempted for comparison purposes pursuant to Arb. Rule 1(d)(2).

(b) Hearings Rescheduled; 60 Day Limit; Continuances.

- (1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.
- (2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) Date of Hearing Advanced by Agreement.

A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) Forms.

Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions.

To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) Definitions.

“Court” as used in these rules means, depending upon the context in which it is used:

- (1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or his delegate;
- (2) The Chief District Court Judge, if the action is pending in the District Court Division, or his delegate; or
- (3) Any assigned judge exercising the court’s jurisdiction and authority in an action.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

One goal of these rules is to expedite disposition of claims involving \$15,000 or less. See Arb. Rule 8(a). The 60 days in Arb. Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

Arb. Rule 9**APPLICATION OF RULES**

These Arb. Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb. Rule 1(b) or referred to arbitration by order of the court.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

A common set of rules has been adopted for the three pilot districts. These rules may be amended, to permit experiments with

variant procedures or to take into account local conditions, with the prior approval of the Supreme Court of North Carolina. The enabling legislation, G.S. §7A-37, vests rulemaking authority in the Supreme Court, and this includes amendments.

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW	GAMBLING
ADOPTION	GARNISHMENT
APPEAL AND ERROR	HOMICIDE
ARBITRATION AND AWARD	HOSPITALS
ARSON	INJUNCTIONS
ASSAULT AND BATTERY	INSURANCE
ATTORNEYS AT LAW	JUDGMENTS
AUTOMOBILES AND OTHER VEHICLES	JURY
BILLS OF DISCOVERY	LANDLORD AND TENANT
BURGLARY AND UNLAWFUL BREAKINGS	LIMITATION OF ACTIONS
CANCELLATION AND RESCISSION OF INSTRUMENTS	MASTER AND SERVANT
CONSTITUTIONAL LAW	MUNICIPAL CORPORATIONS
CONTRACTS	NARCOTICS
CORPORATIONS	NEGLIGENCE
COURTS	NUISANCE
CRIMINAL LAW	PARENT AND CHILD
DAMAGES	PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS
DEATH	PLEADINGS
DEDICATION	PROCESS
DEEDS	QUASI CONTRACTS AND RESTITUTION
DIVORCE AND ALIMONY	RAPE AND ALLIED OFFENSES
EASEMENTS	REFERENCE
ELECTION OF REMEDIES	RULES OF CIVIL PROCEDURE
EQUITY	SALES
ESTOPPEL	SCHOOLS
EVIDENCE	SEARCHES AND SEIZURES
FORGERY	
FRAUD	
FRAUDS, STATUTE OF	

SOCIAL SECURITY AND
PUBLIC WELFARE

STATE

TAXATION

TRESPASS

TRIAL

UNFAIR COMPETITION

UNIFORM COMMERCIAL CODE

VENDOR AND PURCHASER

WATERS AND WATERCOURSES

WEAPONS AND FIREARMS

WILLS

WITNESSES

ADMINISTRATIVE LAW

§ 4. Hearings of Administrative Boards

An assignment of error to the notice given appellant of a hearing before the Board of Dental Examiners was deemed abandoned. *In re Cameron v. N.C. Bd. of Dental Examiners*, 332.

§ 6. Availability of Review by Certiorari

An interview and investigation constituted "an agency proceeding" so that the superior court had jurisdiction to review respondent's order canceling petitioner's truck driver school license even though petitioner waived its right to an evidentiary hearing. *Charlotte Truck Driver Training School v. N.C. DMV*, 209.

§ 8. Scope and Effect of Judicial Review

The trial court did not err when reviewing an action by the State Board of Dental Examiners despite the dentist's contention that the court failed to review the entire record. *In re Cameron v. N.C. Bd. of Dental Examiners*, 332.

ADOPTION

§ 2. Parties and Procedure Generally

Even if the putative father's consent to an adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join the putative father within a reasonable time. *In re Adoption of Clark*, 1.

The putative father's consent to an adoption was unnecessary because he failed to take any steps before the filing of the adoption petition to legitimate his child even though the putative father did not learn of the child's existence until the adoption petition was filed. *Ibid.*

Petitioners could properly amend or supplement their petition for adoption with an affidavit concerning the putative father's failure to legitimate his child, and the putative father was not prejudiced by the amendment where he did not see the adoption petition until it had been supplemented with the necessary affidavit. *Ibid.*

APPEAL AND ERROR

§ 3. Review of Constitutional Questions

An argument that bingo statutes violate the First Amendment was not properly presented to the appellate court where it was raised only in appellants' reply brief and not in their initial brief. *Animal Protection Society v. State of North Carolina*, 258.

§ 6.2. Finality as Bearing on Appealability

An order compelling arbitration was interlocutory and not immediately appealable. *N.C. Electric Membership Corp. v. Duke Power Co.*, 123.

Defendant was not entitled to appeal the trial court's denial of his motion to dismiss for insufficient process. *CFA Medical, Inc. v. Burkhalter*, 391.

The trial court's order which dismissed only the claims for punitive damages affected a substantial right and was thus appealable. *Butt v. Goforth Properties, Inc.*, 615.

APPEAL AND ERROR — Continued

§ 6.8. Appeals on Motions for Summary Judgment

An order granting summary judgment in favor of one defendant was interlocutory but appealable. *DeHaven v. Hoskins*, 397.

§ 38. Settlement of Case on Appeal

It was not necessary to dismiss the appeal for failure to bring forward a "settled" record because the record contained two conflicting narratives of the evidence where a narrative of the evidence or a verbatim transcript was not necessary to understand defendant's assignments of error. *Napowsa v. Langston*, 14.

§ 45. Form and Contents of Brief

The Court of Appeals declined to review a question presented on appeal where defendants' question for review revealed no citation of authorities. *Tindall v. Willis*, 374.

§ 48. Harmless Error in Admission of Evidence

A van driver was not prejudiced by the trial court's evidentiary rulings where the jury found that such driver was not negligent. *Smith v. Pass*, 243.

ARBITRATION AND AWARD

§ 7. Conclusiveness of Award

The former general partners of a limited partnership could be held jointly and severally liable for an arbitration award against the limited partnership although they were not named individually as parties to the arbitration proceeding. *George W. Kane, Inc. v. Bolin Creek West Assoc.*, 135.

ARSON

§ 3. Competency of Evidence

An expert witness was properly permitted to state his opinion in an arson case that the fire was intentionally set. *S. v. English*, 611.

Evidence that a fire occurred at defendant's former residence five years earlier was not admissible in a prosecution of defendant for arson. *Ibid.*

§ 4.1. Cases Where Evidence Was Sufficient

The State presented sufficient evidence that defendant caused a fire and that the fire was willfully set to support defendant's conviction of first degree arson. *S. v. English*, 611.

ASSAULT AND BATTERY

§ 2. Defenses in Civil Actions for Assault

A defendant in a civil action may assert defense of family to justify assault on a third party, but the defense was not available in this wrongful death action where defendant failed to affirmatively plead the defense and the evidence failed to show that defendant reasonably believed his daughter was in peril of death or serious bodily harm at the time he shot deceased. *Young v. Warren*, 585.

§ 3. Actions for Civil Assault

Defendant's conduct in firing a gun which resulted in injury to plaintiff from a ricocheting bullet gave rise to actions for assault and battery and negligence, and the assault claim was barred by the one-year statute of limitations but the

ASSAULT AND BATTERY — Continued

negligence claim was not barred by the statute of limitations. *Vernon v. Barrow*, 642.

§ 16. Necessity of Submitting Question of Defendant's Guilt of Lesser Degrees of Offense

A defendant on trial for assault with a deadly weapon with intent to kill inflicting serious injury was entitled to an instruction on the lesser offense of assault with a deadly weapon inflicting serious injury based on his testimony that he was only trying to frighten the victim. *S. v. Harrington*, 187.

ATTORNEYS AT LAW**§ 5.1. Liability for Malpractice**

Defendant attorney was negligent in the handling of a construction loan for plaintiff lender by failing at closing to apply a land draw check so as to obtain a release of an existing land loan deed of trust and acquire a first lien on the property for the construction loan deed of trust, and defendant's negligence barred him from asserting equitable estoppel as a defense to plaintiff lender's action to recover damages for such negligence. *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.

Plaintiff insurer's cause of action for legal malpractice based on defendant attorney's failure to file answer on behalf of plaintiff's insureds accrued on the date a default judgment was entered against the insureds, and the statute of limitations was not tolled during pendency of the appeal of the underlying action. *Nationwide Mutual Ins. Co. v. Winslow*, 413.

§ 6. Withdrawal of Attorney from Case

The trial court did not err in allowing defendants' attorney to withdraw on the day the case was called for trial where defendants had a two week notice that the attorney would not represent them if he was not paid. *Lamb v. Groce*, 220.

§ 7. Fees Generally

The trial court has the discretion to award attorney fees in an action for retroactive child support. *Napowsa v. Langston*, 14.

The trial court erred in its award of attorney fees to plaintiff in her action for retroactive child support where the court made no findings on all factors required under G.S. 50-13.6 and plaintiff's expense affidavits included some legal expenses attributable to her paternity claim rather than her child support claim. *Ibid.*

§ 7.5. Allowance of Fees as Part of Costs

Defendant's motion under G.S. 6-21.5 for attorney fees connected with its preparation to defend against plaintiff's punitive damages claim should have been granted where plaintiff's action was primarily one in the nature of contract and did not give rise to a claim for punitive damages. *Barnes v. Ford Motor Co.*, 367.

The trial court properly awarded plaintiffs attorney fees in an action against defendant builder for an unfair trade practice in refusing to place a house built and sold to plaintiffs in a HOW program because the builder wanted to pressure plaintiffs into releasing funds which they had placed in escrow to cover the cost of necessary repairs. *Love v. Keith*, 549.

ATTORNEYS AT LAW — Continued

§ 7.7. Sanctions

The trial court properly imposed Rule 11(a) sanctions on plaintiff's attorney because of his consistent use of inflated figures in plaintiff's complaint for alimony and alimony pendente lite even after the opportunity to amend. *Shook v. Shook*, 578.

AUTOMOBILES AND OTHER VEHICLES

§ 2.4. Revocation of License; Proceedings Related to Drunk Driving

An officer's original request that petitioner submit to a chemical breath analysis was sufficient to comply with G.S. 20-16.2(c) without an additional request before a second breath sample was taken. *Tolbert v. Hiatt*, 380.

Petitioner willfully refused to take a breathalyzer test when he refused the breathalyzer operator's request that he remove the corner of a dollar bill from his mouth. *Ibid.*

The trial court's finding that petitioner willfully refused "without justification or excuse" to submit to a chemical analysis upon the request of the charging officer was sufficient to support the court's revocation of petitioner's driver's license. *Ibid.*

A driver's license revocation case is remanded for a determination as to whether petitioner willfully refused to submit to a chemical analysis of his blood. *Richardson v. Hiatt*, 780.

§ 5. Sale Generally

Written notice of nonrenewal to an automobile dealership franchisee must state reasons for nonrenewal with sufficient specificity to inform the dealer of the legal grounds for nonrenewal, and other information the franchisee has received may not be taken into account in evaluating the legal sufficiency of the written notice. *Star Auto Co. v. Jaguar Cars Inc.*, 103.

Written notice of nonrenewal given by respondent automobile distributor to petitioner dealer was sufficient to meet statutory requirements. *Ibid.*

§ 5.3. Requirements for Transfer of Title; When Title Passes

The trial court properly denied defendant's motion for summary judgment in an action arising from an automobile accident in North Carolina where defendant, a Georgia resident, claimed that he had sold the vehicle in Georgia prior to the accident. *Hargett v. Reed*, 292.

§ 45.2. Negligence Action; Relevancy and Competency of Evidence of Conduct or Events Prior to Accident

Testimony that a customer's garbage had previously been picked up by driving the truck into her driveway but that such practice ceased upon request by the customer was relevant in an action to recover for injuries received by a passenger when the car in which she was riding struck a garbage truck stopped partly on the paved road facing oncoming traffic. *Smith v. Pass*, 243.

§ 50.3. Sufficiency of Evidence of Negligence; Breach of Duty with Respect to Stopping or Parking

A jury question was presented as to whether a garbage truck was stopped at a customer's residence partly on the traveled portion of a road facing oncoming traffic for a necessary purpose so that it was not "parked" in violation of G.S. 20-161(a) and (b). *Smith v. Pass*, 243.

AUTOMOBILES AND OTHER VEHICLES — Continued

Plaintiff's evidence was sufficient for the jury on the issue of defendant garbage truck driver's common law negligence in stopping his truck at a customer's house partially in the traveled portion of the highway facing oncoming traffic. *Ibid.*

§ 53.2. Sufficiency of Evidence of Negligence; Failing to Stay on Right Side of Highway; by Vehicle Under Control

Evidence that a garbage truck was stopped partly on the left shoulder of the road facing oncoming traffic with its engine running presented a jury question as to whether the truck driver violated the statute requiring vehicles to be driven on the right side of the road. *Smith v. Pass*, 243.

§ 88. Sufficiency of Evidence of Contributory Negligence

A van driver was not contributorily negligent as a matter of law in striking a garbage truck stopped partially in the van's lane of travel where the driver's vision was obscured by the sun. *Smith v. Pass*, 243.

§ 89.1. Sufficiency of Evidence to Require Jury to Determine Last Clear Chance

The trial court erred by failing to submit an issue of last clear chance in an action to recover for injuries sustained by plaintiff when he was hit by defendant's car as he drove his golf cart across a road. *McMahan v. Stogner*, 764.

§ 90.9. Failure to Give Instructions on Particular Issues

The trial court did not err in a negligence action arising from an automobile accident by instructing the jury that no inference of negligence should arise from the fact of injury and damage without also instructing the jury that negligence may be inferred from a rear-end collision. *Smith v. Bohlen*, 347.

The trial court did not err in a negligence action arising from an automobile accident by failing to instruct the jury that it could render a verdict for plaintiff unless it found that defendant came forward with evidence to show he was not negligent. *Ibid.*

§ 90.15. Instructions Held Sufficient

There was no error in the trial court's instruction that the conduct of each driver is to be evaluated in the light of the factors and circumstances with which he was confronted at the time. *Smith v. Pass*, 243.

§ 91.5. Issues Relating to Damages

Allegations of intoxication alone were insufficient to permit a punitive damages claim to be submitted to the jury in an action to recover for injuries received in an automobile accident. *Howard v. Parker*, 361.

§ 125. Arrest for Operating Vehicle while under Influence of Alcohol

An officer had reasonable grounds to arrest petitioner for impaired driving, and petitioner's driver's license was properly revoked for refusal to submit to a chemical analysis of his blood. *Richardson v. Hiatt*, 196.

§ 126.2. Breathalyzer Tests Generally

Breathalyzer test results were inadmissible in a DWI prosecution where the readings for defendant's two breathalyzer tests differed from each other by an alcohol concentration greater than .02. *S. v. Tew*, 634.

AUTOMOBILES AND OTHER VEHICLES — Continued**§ 126.3. Blood Test; Manner and Time of Administration**

The trial court erred in concluding that respondent DMV failed to show that a physician, registered nurse, or other qualified person was present to withdraw petitioner's blood at the time the sample was requested and that petitioner thus did not willfully refuse to be tested. *Richardson v. Hiatt*, 196.

BILLS OF DISCOVERY**§ 6. Compelling Discovery; Sanctions Available**

The trial court did not abuse its discretion in permitting the State to introduce photographs not disclosed pursuant to defendant's pretrial discovery motion. *S. v. Drewyore*, 283.

BURGLARY AND UNLAWFUL BREAKINGS**§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally**

Fingerprint evidence was sufficient to support defendant's conviction of felonious breaking or entering. *S. v. Williams*, 627.

CANCELLATION AND RESCISSION OF INSTRUMENTS**§ 10.2. Actions for Rescission; Sufficiency of Evidence of Mistake**

The evidence was sufficient to support the jury's findings that a settlement agreement entered into by the parties to a construction dispute was subject to rescission because of mistake. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

CONSTITUTIONAL LAW**§ 4.1. Standing to Raise Constitutional Questions; Taxpayer Suits**

Respondent county did not have standing to raise the constitutionality of the statute exempting homes for the aged from ad valorem taxation. *In re Appeal of Moravian Home, Inc.*, 324.

§ 17. Personal and Civil Rights Generally

A charge against defendant for possession of a sawed-off shotgun in violation of G.S. 14-288.8 did not violate defendant's right to bear arms under the Second Amendment of the U. S. Constitution or Art. I, § 30 of the N. C. Constitution. *S. v. Fennell*, 140.

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

A second indictment charging the defendant with armed robbery after he had originally been charged with attempted armed robbery of a different victim was not the result of prosecutorial vindictiveness. *S. v. Knox*, 699.

§ 34. Double Jeopardy

The trial court erred in setting aside a judgment based on a plea negotiation since defendant's right against double jeopardy would be violated. *S. v. Johnson*, 757.

CONSTITUTIONAL LAW — Continued**§ 45. Right to Counsel; Right to Appear Pro Se**

The trial court erred in permitting defendant to represent himself without making the required inquiry at a point where his lawyer would most probably have sought a mistrial. *S. v. Godwin*, 565.

§ 50. Speedy Trial Generally

Although the Sixth Amendment guarantee of a speedy trial extends to the sentencing phase of a criminal prosecution, this defendant's constitutional rights were not violated where two of his convictions were remanded for resentencing on 30 December 1985 and the resentencing hearing was held on 13 June 1988. *S. v. Avery*, 572.

§ 60. Racial Discrimination in Jury Selection Process

Defendant's equal protection rights were not violated by the State's exercise of peremptory challenges of three black jurors. *S. v. Sanders*, 494.

§ 62. Jury Challenges and Voir Dire

Defendant was not estopped from pursuing the issue of racial discrimination in the jury selection process by his silence at the jury's empanelling where the trial judge recognized during the trial that a prima facie case of discrimination had been made during voir dire and conducted an inquiry at that time. *S. v. Sanders*, 494.

CONTRACTS**§ 7.1. Contracts Restricting Business Competition Generally; Between Employers and Employees**

A noncompetition clause in a sales representative agreement was valid and enforceable under Illinois law. *Wallace Computer Services v. Waite*, 439.

§ 12.2. Interpretation of Ambiguous Agreements

The trial court did not err in an action arising from a construction dispute by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict where the contract was not plain and unambiguous. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

§ 14.2. Contracts for Benefit of Third Person; Circumstances under which Third Person Is Denied Recovery

Plaintiff heating and air conditioning contractor for construction of a building at UNC-CH was not a third party beneficiary of a contract between the State and the general contractor so as to give plaintiff a right of action against the State for breach of contract based on change work orders which delayed plaintiff. *Bolton Corp. v. State of North Carolina*, 596.

§ 20.1. Excuse for Nonperformance; Impossibility; Destruction of Property

The evidence was sufficient for the jury to find that plaintiff was entitled to recover a pro rata share of the annual rent previously paid to defendant for lease of a tractor which was destroyed by fire halfway through the term of the lease even though plaintiff stored the tractor in a barn located on his farm property a mile from his residence rather than at the address shown on the face of the lease. *Barnes v. Ford Motor Co.*, 367.

CONTRACTS — Continued

The parties did not impliedly allocate to plaintiff lessee the risk of loss of a leased tractor which was destroyed by fire because the tractor was in his care and control at the time of the fire and thus render the doctrine of impossibility of performance unavailable to rescind the contract. *Ibid.*

The trial court properly instructed on the doctrine of impossibility of performance due to destruction of the subject matter of an agreement for lease of a tractor which was destroyed by fire. *Ibid.*

§ 24. Actions on Contracts; Parties

The trial court properly entered summary judgment for defendant in an action to recover on a contract plaintiffs entered into with defendant's husband who subsequently died. *Barrow v. Murphrey*, 738.

§ 26.1. Actions on Contracts; Evidence of Negotiations; Parol Evidence Rule

A written employment contract did not fully integrate the agreement of the parties, and evidence of plaintiff's oral agreement to comply with defendant employer's headlight safety program before he signed the contract was admissible in plaintiff's action for wrongful termination. *Allen v. Weyerhaeuser, Inc.*, 205.

§ 26.2. Actions on Contracts; Evidence of other Contracts or Dealings

The trial court did not err in an action arising from a construction dispute by admitting testimony from plaintiff's witnesses that the invoices which were used were not the type used with unit price contracts and were different from lump sum invoices. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

§ 33. Actions for Interference; Sufficiency of Plaintiff's Allegations

Plaintiff could not maintain a claim of tortious interference with his contracts for the sale of Pepsi products where his forecast of evidence showed that defendant interfered with arrangements with plaintiff's customers but failed to show that plaintiff had a contract with any of these customers. *Owens v. Pepsi Cola Bottling Co.*, 47.

CORPORATIONS**§ 6. Right of Stockholders to Maintain Action**

Plaintiff did not have standing to challenge a loan made by the corporate defendant to the individual defendant when plaintiff's beneficial interest in defendant corporation consisted only of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit. *Ashburn v. Wicker*, 162.

§ 12. Transactions between Corporation and its Officers

The trial court should have invalidated a deed from a corporation to an officer and director of the corporation where defendant failed to offer evidence rebutting the presumption against the validity of such a deed. *Poore v. Swan Quarter Farms*, 449.

COURTS**§ 2.1. Requirements for Jurisdiction**

A federal court could not confer subject matter jurisdiction upon a state court by abstaining temporarily from ruling on plaintiff's appeal from the Bankruptcy

COURTS — Continued

Court to allow the parties 90 days to file proceedings in state court to resolve issues concerning the quality of title offered by defendants. *Eways v. Governor's Island*, 201.

§ 21.5. Conflict of Laws between States; Tort Actions

Due process considerations require that defendant's status as the owner of a car involved in an automobile accident in North Carolina be examined under the law of Georgia. *Hargett v. Reed*, 292.

CRIMINAL LAW

§ 7. Entrapment

A defendant who denies an essential element which deals with intent but who admits committing the act underlying the offense with which he is charged may employ an entrapment defense. *S. v. Sanders*, 56.

Defendant could properly raise the defense of entrapment in a prosecution for possession of a controlled substance with intent to sell or deliver where defendant testified that he thought the substance he sold to an undercover agent was baking soda, and defendant thus denied the essential element of knowledge that the substance he was selling was cocaine. *Ibid.*

§ 23.1. Acceptance of Guilty Plea; Form; Offenses Included

The trial court erred in finding that the assistant district attorney who negotiated the plea at issue in this case did not agree to forego prosecution of defendant for any drug offenses defendant may have committed prior to a certain date. *S. v. Johnson*, 757.

The trial court erred in setting aside a judgment based on a plea negotiation since defendant's right against double jeopardy would be violated. *Ibid.*

§ 26.5. Plea of Former Jeopardy; Same Acts Violating Different Statutes

Defendant could properly be convicted of first degree sexual offense and of taking indecent liberties with a child without subjecting him to double jeopardy. *S. v. Manley*, 213.

§ 34. Evidence of Defendant's Guilt of other Offenses; Inadmissibility

Evidence that a fire occurred at defendant's former residence five years earlier was not admissible in a prosecution of defendant for arson. *S. v. English*, 611.

§ 34.5. Admissibility of Evidence of other Offenses to Show Identity of Defendant

Evidence that defendant had stolen riding lawn mowers from a farm implement dealer in another county was admissible to show identity and a common plan in a prosecution for larceny of a dump truck and garden tractors. *S. v. Bullock*, 524.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme

Testimony by an eight-year-old rape and sexual offense victim concerning prior acts of sexual misconduct by defendant with the victim was admissible to establish a common scheme or plan. *S. v. Hoffman*, 647.

CRIMINAL LAW — Continued

§ 35. Evidence that Offense Was Committed by Another

The trial court did not err in excluding testimony that there was possibly someone in the community who might have resembled the defendant and thereby caused the witnesses to make an error in their identification of defendant. *S. v. Knox*, 699.

§ 60.5. Evidence in Regard to Fingerprints; Sufficiency of Evidence

Fingerprint evidence was sufficient to support defendant's conviction of felonious breaking or entering. *S. v. Williams*, 627.

§ 62. Lie Detector Tests

Defendant was not entitled to a mistrial after State's witness testified that he had administered a psychological stress evaluation test to defendant and the court failed to give a curative instruction before excusing the jury for an overnight recess. *S. v. Hinton*, 683.

§ 73.1. Admission of Hearsay Statement as Prejudicial or Harmless Error

Defendant received adequate notice of the State's intention to offer hearsay evidence. *S. v. Bullock*, 524.

There was no merit to defendant's contention that the trial court did not consider the reason for a witness's unavailability to be a factor bearing on the trustworthiness of his statements or that the court failed to accord this factor sufficient weight. *Ibid.*

§ 75.2. Confession; Voluntariness; Effect of Promises or other Statements of Officers

The fact that defendant may have made inculpatory statements with the hope of leniency for his girlfriend did not render his statement involuntary. *S. v. Annadale*, 734.

§ 75.7. Voluntariness of Confession; Requirement that Defendant Be Warned of Constitutional Rights; What Constitutes Custodial Interrogation

Defendant's statement to officers in response to their question during a frisking procedure that he had a gun in his pocket was not the result of custodial interrogation. *S. v. Harris*, 691.

§ 86.4. Impeachment of Defendant; Prior Accusations of Crime

There was no prejudicial error in a prosecution for taking indecent liberties with a child in suppressing a prior conviction in Nebraska in 1973. *S. v. Moul*, 644.

§ 91.9. Speedy Trial; Time Limits Generally

The Speedy Trial Act does not address resentencing. *S. v. Avery*, 572.

§ 101.4. Conduct During Jury Deliberation

Prejudicial error occurred when an alternate juror retired to the jury room with the other twelve members and when, following the return of the verdict, the judge met privately with the jury members in the jury room. *S. v. Godwin*, 565.

§ 102.5. Conduct of District Attorney in Examining Witnesses

Any error in the district attorney's characterization of the substance found in defendant's vehicle as "marijuana" before testimony was given about any chemical analysis of the substance was cured by the trial court's instruction. *S. v. Drewyore*, 283.

CRIMINAL LAW — Continued

§ 116. Charge on Defendant's Failure to Testify

Defendant's requested instruction that the jury not presume from his silence any admission that his fingerprints were impressed at the crime scene at the time the crime was committed was given in substance. *S. v. Williams*, 627.

§ 117.5. Charge on Character Evidence about Defendant

The trial court's failure to instruct the jury in a rape and sexual offense case on certain character traits of defendant was not plain error. *S. v. Hoffman*, 647.

§ 127. Arrest of Judgment Generally; Effect

Two consecutive ten-year sentences for breaking or entering and larceny were reversed where defendants were originally convicted of breaking or entering, larceny, and felony murder; judgment was arrested on the breaking or entering and larceny convictions; the murder conviction was reversed and a new trial ended in a mistrial; and sentence was imposed on the prior arrested judgments. *S. v. Pakulski*, 517.

§ 128.2. Particular Grounds for Mistrial

The jury was not deadlocked so as to require the trial court to grant defendant's motion for a mistrial after the jury deliberated from 4:07 p.m. until 5:36 p.m., went to dinner, deliberated further from 6:55 until 9:37, and announced that it was divided ten-two and that no progress had been made since dinner. *S. v. Green*, 558.

§ 138.15. Fair Sentencing Act; Aggravating Factors in General

The prosecutor's summary of the State's evidence upon defendant's guilty plea was sufficient to support the trial court's findings of aggravating factors where defense counsel's statement to the court constituted an admission of the correctness of that summary. *S. v. Mullican*, 27.

§ 141. Sentence for Repeated Offenses

The trial court had jurisdiction to try defendant as a habitual felon even though indictments for the underlying felonies did not charge her with being a habitual felon where defendant received notice by separate indictment of the State's intent to prosecute her as a habitual felon. *S. v. Sanders*, 494.

§ 148. Judgments Appealable

Defendant could properly appeal from the trial court's order vacating an earlier judgment based on a plea negotiation and directing that the case be tried. *S. v. Johnson*, 757.

§ 163. Exceptions and Assignments of Error to Charge

The trial court's failure to instruct the jury on entrapment did not constitute plain error. *S. v. Sanders*, 56.

DAMAGES

§ 7. Liquidated Damages

An agreement stating that if plaintiff left his property with defendant for more than six months, it would become defendant's property was a penalty clause, not a liquidated damages clause, and as such was unenforceable. *Tate v. Action Moving & Storage*, 541.

DAMAGES — Continued

§ 13.1. Competency and Relevancy of Evidence; Nature and Extent of Personal Injuries

Plaintiff's medical bills from an orthopedic surgeon were admissible. *Smith v. Pass*, 243.

§ 16.1. Sufficiency of Evidence; Causation and Extent of Injury

A driver's evidence of the cause of his injuries was sufficient for the jury without the presentation of expert medical testimony. *Smith v. Pass*, 243.

§ 16.3. Sufficiency of Evidence; Loss of Earnings

Testimony by a van owner whose van was damaged in a collision and whose sole source of income was his van pool business was sufficient to support an instruction on lost earnings. *Smith v. Pass*, 243.

§ 17.7. Punitive Damages

Plaintiffs' evidence was insufficient to support a claim for punitive damages where it tended to show that defendants were negligent in failing adequately to secure a trailer before unhitching it from a truck so that it rolled down two hills and crashed into plaintiffs' house. *Butt v. Goforth Properties, Inc.*, 615.

DEATH

§ 6. Evidence of Criminal Prosecution Arising out of Death

The trial court in a wrongful death action properly instructed that the jury could consider defendant's plea of guilty in a criminal case arising from the same facts but that the conviction was not conclusive evidence of defendant's culpable negligence. *Young v. Warren*, 585.

DEDICATION

§ 2. Dedication by Map or Plat

Where land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those rights of ways. *Price v. Walker*, 712.

§ 2.2. Dedication by Map; Sufficiency of Acts of Dedication

An intention to dedicate a roadway could be found where conveyances from the original owner to plaintiffs' and defendants' predecessors in title were made by express reference to a map of all of the original owner's property which showed the road in question. *Price v. Walker*, 712.

§ 3. Acceptance of Dedication

A town's provision of police and fire protection and water and garbage services to homeowners in a subdivision within the town did not constitute an implied acceptance by the town of dedication of a road in the subdivision. *Concerned Citizens v. Holden Beach Enterprises*, 38.

DEEDS

§ 19.3. Restrictive Covenants; Real Covenants

The term "retail" in a restrictive covenant between the parties could reasonably be construed to include a bowling center. *Westminster Co. v. Union Mutual Stock Life Ins. Co.*, 117.

§ 20.6. Restrictive Covenants in Subdivisions; Who May Enforce Restrictions

Summary judgment was properly granted for defendants in an action to enforce restrictive covenants allowing mobile homes only during construction of a permanent dwelling and for no longer than one year. *Hair v. Hales*, 431.

DIVORCE AND ALIMONY

§ 18.9. Alimony Pendente Lite; Sufficiency of Evidence

The trial court properly dismissed plaintiff's claim for alimony and alimony pendente lite where plaintiff failed to show that she was a dependent spouse. *Shook v. Shook*, 578.

§ 18.10. Alimony Pendente Lite; Findings Generally

The trial court's findings did not support an award of alimony pendente lite and counsel fees retroactively from the date the parties separated until the date of the entry of the order over three years later. *Haywood v. Haywood*, 426.

§ 24.5. Modification of Child Support Order

The trial court has no authority to strike plaintiff's accumulated child support arrearages where plaintiff never made a motion for modification of the civil court order awarding child support. *Tate v. Tate*, 774.

Social Services had standing to challenge the striking of child support arrearages. *Ibid.*

§ 24.10. Termination of Child Support Obligation

The trial court erred in a civil contempt proceeding by finding that defendant was in arrears for \$500 for support of a son and in contempt for failure to provide hospital insurance where the son was 18 years old, had graduated from high school, had a part-time job, and was attempting to raise money to go to college. *S. v. Benfield*, 451.

§ 26. Modification of Foreign Child Custody Order

The trial court erred in enforcing a Tennessee child custody order where no attempt was made to serve defendant with notice and she in fact never received notice of the Tennessee hearing. *Henson v. Henson*, 777.

§ 30. Equitable Distribution

An equitable distribution order must be remanded where it took into consideration a fatally defective order for temporary alimony. *Haywood v. Haywood*, 426.

EASEMENTS

§ 3. Easements as Appurtenant or in Gross

Defendants' easement was not in fact a true dedication but was closer to an easement appurtenant which is created when the purchaser whose transaction relies on a plat is conveyed the land. *Price v. Walker*, 712.

EASEMENTS — Continued

§ 5. Creation of Easements by Implication or Necessity

The language "subject to" found in plaintiffs' deed did not create an easement of ingress and egress over their land where the easement itself was created by dedication, but the language notified any purchaser that an easement existed across the tract. *Price v. Walker*, 712.

An easement across plaintiffs' property was not an easement by necessity, and the fact that defendants had alternative routes to their property did not eliminate the easement. *Ibid.*

§ 6.1. Creation of Easements by Prescription; Sufficiency of Evidence

The public was not entitled to a prescriptive easement in a pathway across defendant's property for access to a public beach where the evidence supported the court's conclusions that defendant had interrupted the public's use since 1963 and that the public's use of defendant's property was not confined to a definite and specific line of travel. *Concerned Citizens v. Holden Beach Enterprises*, 38.

The statute creating a presumption of title in the State was inapplicable where the State was attempting to establish an easement across defendant's land. *Ibid.*

ELECTION OF REMEDIES

§ 4. Acts Constituting Election and Effect of Election

An election of remedies issue was not before the appellate court where defendant did not plead such defense. *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.

EQUITY

§ 2. Laches

The doctrine of laches is not applicable to an action for retroactive child support. *Napowska v. Langston*, 14.

ESTOPPEL

§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped; Conduct other than Silence

The former general partners of a limited partnership were equitably estopped from denying joint and several liability for an arbitration award against the partnership. *George W. Kane, Inc. v. Bolin Creek West Assn.*, 135.

§ 4.5. Equitable Estoppel; Conduct of Party Asserting Estoppel

Defendant attorney's negligence barred him, as a matter of law, from asserting equitable estoppel as a defense to plaintiff lender's action to recover damages for his negligent handling of a construction loan closing. *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.

EVIDENCE

§ 15. Relevancy and Competency of Evidence in General

The trial court in a wrongful death action should have granted plaintiff's motion to prevent admission of testimony concerning the victim's possession of a firearm and his blood alcohol level. *Young v. Warren*, 585.

EVIDENCE — Continued

§ 15.1. Remoteness of Evidence

The trial court did not err in admitting testimony by the investigating officer and a medical technician concerning the effect of the sun on visibility at an accident scene. *Smith v. Pass*, 243.

§ 19.1. Evidence of Conditions at other Times

The trial court properly excluded a meteorologist's testimony concerning visibility conditions on the date of an accident and two years later on the ground that there was an insufficient showing of similarity of conditions on the two dates. *Smith v. Pass*, 243.

§ 19.2. Evidence of other Accidents

The trial court properly admitted evidence that another garbage truck placed by defendant at the accident scene at the same time the next day was also struck by an oncoming vehicle. *Smith v. Pass*, 243.

§ 32. Parol or Extrinsic Evidence Affecting Writings; Nature of Rule

Testimony about the Homeowners Warranty Program did not violate the parol evidence rule. *Love v. Keith*, 549.

§ 40. Nonexpert Opinion Evidence in General

Opinions and inferences stated by a customs agent were admissible under Rule 701. *S. v. Drewyore*, 283.

§ 47. Expert Testimony in General

The trial court did not err in excluding a meteorologist's opinion testimony about the effect of the sun's glare on drivers. *Smith v. Pass*, 243.

An expert in traffic engineering and highway design was not competent to render an opinion that defendant board of education showed "substantial disregard for the lives and safety of motorists using the driveway in question" by "actively" allowing cars to park in the driveway. *Yates v. J. W. Campbell Electrical Corp.*, 354.

§ 50.2. Testimony by Medical Experts; Cause of Injury

The trial court properly admitted opinion testimony by an orthopedic surgeon who diagnosed a thoracic fracture a month after plaintiff was involved in a collision that the fracture was caused by the collision. *Smith v. Pass*, 243.

FORGERY

§ 2.2. Sufficiency of Evidence

Evidence of intent was sufficient for the jury in a prosecution for uttering forged checks. *S. v. Sanders*, 494.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiff's forecast of evidence was insufficient to support a claim for fraud based on alleged misrepresentations that a 100 case shipment inventory of Pepsi limit imposed on plaintiff also applied to other customers throughout defendant supplier's territory. *Owens v. Pepsi Cola Bottling Co.*, 47.

FRAUD — Continued**§ 12.1. Nonsuit**

The trial court did not err in an action for fraud arising from the sale of a condominium by denying defendant husband's motion for a directed verdict. *Douglas v. Doub*, 505.

FRAUDS, STATUTE OF**§ 3. Pleading**

Defendants in an action to enforce restrictive covenants properly raised the statute of frauds as a defense in their answer. *Hair v. Hales*, 431.

GAMBLING**§ 4. Games of Chance**

Even if a charitable solicitor's sale of combs and candies to patrons who were then permitted to participate in "free" bingo games fit within the G.S. Ch. 131C definition of a "charitable sales promotion," the element of bingo in the fundraising scheme brought all activity connected with the operation of that game within the ambit of the bingo statutes. *Animal Protection Society v. State of North Carolina*, 258.

Consideration must exist for a violation of the gambling statutes but not of the bingo statutes. *Ibid.*

The penalty provisions of the bingo statutes may be enforced against a charitable solicitor and two charities where bingo games conducted by the solicitor for the charities violate provisions of the bingo statutes regarding licensure and use of game proceeds. *Ibid.*

Consideration was required for participation in "free" bingo games offered by a charitable solicitor to patrons who purchased combs and candies at inflated prices so that the bingo games constituted gambling where the patrons understood their purchases to be the basis for the opportunity to play bingo. *Ibid.*

GARNISHMENT**§ 2. Proceedings to Secure and Enforce Garnishment**

The trial court erred in denying defendant's motion for garnishment of plaintiff's wages based on an erroneous finding that plaintiff made his child support payments in a timely manner. *Tate v. Tate*, 774.

HOMICIDE**§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter**

The evidence was insufficient for the jury in a prosecution for involuntary manslaughter based on an alleged hunting accident where it failed to show that defendant was negligent in firing his rifle or that a bullet from his gun was the cause of the victim's death. *S. v. Meadlock*, 146.

HOSPITALS

§ 3. Liability of Charitable Hospital for Negligence of Employees

Plaintiff's complaint was sufficient to state a claim against defendant hospital for medical malpractice based on negligent procedures employed in anesthetizing and immobilizing plaintiff during surgery. *Fournier v. Haywood County Hospital*, 652.

INJUNCTIONS

§ 13.2. Grounds for Issuance of Temporary Orders; Evidence of Irreparable Injury

A preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff's zoning ordinance was vacated. *Town of Knightdale v. Vaughn*, 649.

INSURANCE

§ 29. Life Insurance; Right to Proceeds; Nature of Beneficiary's Interest and Rights

Defendant insurer was not estopped from claiming that plaintiff was not the primary beneficiary of a \$100,000 policy on the life of her deceased husband based on defendant's letter to the insured regarding the status of his policies. *Barber v. Woodmen of the World Life Ins. Society*, 340.

Plaintiff was not entitled to a directed verdict on her claim for breach of fiduciary duty on a \$100,000 life insurance policy based on defendant insurer's misrepresentation to the insured as to the beneficiary of that policy. *Ibid.*

§ 79.3. Automobile Liability Insurance Rates; Commissioner's Findings of Fact; Sufficiency of Evidence

The Insurance Commissioner erred in disapproving the Rate Bureau's 1 July 1987 automobile insurance rate filing and ordering into effect overall decreases in the existing rates. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 157.

§ 90. Automobile Liability Insurance; Limitations on Use of Vehicle

The absence of a driver's license did not demonstrate that a driver could not have reasonably believed that he was entitled to drive so that he would be covered by the owner's policy because the driver may have known that he had no legal right to drive but nevertheless may have had a reasonable belief that he was "entitled" to drive based upon the permission of the person possessing the car. *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 178.

§ 149. General Liability Insurance

The "no action" clause in defendant's liability policy, which precluded a suit by the insured against the insurer until the insured's liability had been determined by judgment or settlement, did not apply in this direct suit brought by plaintiff insured against defendant insurer for breach of defendant's obligation to defend. *Duke University v. St. Paul Mercury Ins. Co.*, 663.

An insured has three years under G.S. 1-52(1) from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured. *Ibid.*

The trial court properly refused to dismiss plaintiff's claim to recover attorney fees incurred in an action which defendant general liability insurer refused to defend on the ground that plaintiff delayed in notifying defendant where part

INSURANCE — Continued

of the delay resulted because plaintiff was unaware that its action was covered by defendant's policy until so informed by its errors and omissions insurer, and part of the delay was attributable to plaintiff's quarterly system of reporting claims to its insurers. *Ibid.*

The trial court correctly disallowed plaintiff's legal expenses incurred in connection with the prosecution of its counterclaims in an action which defendant insurer had refused to defend, but the court erred in disallowing plaintiff's recovery of legal expenses incurred in connection with its defense against injunctive relief. *Ibid.*

In an action to recover legal fees from an insurer which had refused to defend, defendant was entitled to credit from plaintiff's settlement with another insurer to the extent that the settlement covered the same legal expenses awarded against defendant. *Ibid.*

JUDGMENTS

§ 37. Requisites of Res Judicata; Finality and Validity of Judgment

Summary judgment on the basis of collateral estoppel was not proper where the Commissioner of Labor brought an action for the retaliatory discharge of an employee for filing a complaint with the N. C. Division of Labor and the employee had filed a claim for unemployment compensation which had been rejected based on a determination of misconduct. *Brooks v. Stroh Brewery Co.*, 226.

§ 37.5. Preclusion or Relitigation of Judgments in Proceedings Involving Real Property Rights

The trial court in an action concerning ownership of real property correctly found that a prior judgment was res judicata as to the location of the boundary line. *Tindall v. Willis*, 374.

§ 55. Right to Interest

Plaintiff in a construction dispute was entitled to interest on the entire judgment of \$51,749.97 even though \$20,000.00 had been tendered by defendants because plaintiff was entitled to rescind the settlement agreement pursuant to which the \$20,000.00 had been tendered. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

JURY

§ 7.14. Manner of Exercising Peremptory Challenges

Defendant's equal protection rights were not violated by the State's exercise of peremptory challenges of three black jurors. *S. v. Sanders*, 494.

LANDLORD AND TENANT

§ 13.3. Notice of Renewal

A lease renewal sent by regular rather than registered mail was sufficient. *MER Properties-Salisbury v. Golden Palace, Inc.*, 402.

§ 18. Forfeiture for Nonpayment of Rent

A default for nonpayment of rent was not cured by defendant's tendering of its delinquent rent payment within 15 days of receipt of notice of default

LANDLORD AND TENANT — Continued

rather than within 15 days after notice was mailed to defendant. *Cumberland Associates v. Scotto's Pizza of N.C.*, 753.

LIMITATION OF ACTIONS**§ 4.2. Accrual of Negligence Actions**

Plaintiff insurer's cause of action for legal malpractice based on defendant attorney's failure to file answer on behalf of plaintiff's insureds accrued on the date a default judgment was entered against the insureds, and the statute of limitations was not tolled during pendency of the appeal of the underlying action. *Nationwide Mutual Ins. Co. v. Winslow*, 413.

§ 4.3. Accrual of Cause of Action for Breach of Contract in General

An insured has three years under G.S. 1-52(1) from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured. *Duke University v. St. Paul Mercury Ins. Co.*, 663.

§ 5. Accrual of Cause of Action for Trespass or for Nuisance

The three-year statute of limitations applied to an action to recover damages for gasoline contamination of plaintiffs' well water allegedly caused by leakage from defendant's underground storage tanks. *Wilson v. McLeod Oil Co.*, 479.

Claims against third-party defendants based on gasoline contamination of plaintiffs' well water were barred by the statute of limitations where third-party defendants' last acts occurred more than ten years prior to institution of the action. *Ibid.*

§ 11. Effect of Personal Disability or Incapacity

A minor claimant in a professional malpractice case may bring the action at any time before he reaches age 19 where the time limitation in G.S. 1-15(c) has expired, and the appointment of a guardian for the minor does not cause the statute to begin to run against the minor. *Osborne v. Annie Penn Memorial Hospital*, 96.

§ 13. Part Payment

Statements by defendant that "we plan to pay" so much per month and "we expect to pay the balance" were insufficient to toll the statute of limitations in an action for recovery on a contract for the reproduction of cassette tapes. *American Multimedia, Inc. v. Freedom Distributing, Inc.*, 750.

§ 15. Estoppel

In an action to recover legal fees incurred in an action which defendant insurer refused to defend, defendant was not equitably estopped to plead the statute of limitations by its participation in settlement negotiations. *Duke University v. St. Paul Mercury Ins. Co.*, 663.

MASTER AND SERVANT**§ 8. Terms of Contract Generally**

A written contract for plaintiff to haul defendant's timber did not fully integrate the agreement of the parties where plaintiff orally agreed before signing the contract to comply with defendant's headlight safety program, and plaintiff breached the contract by refusing to comply with that safety program. *Allen v. Weyerhaeuser, Inc.*, 205.

MASTER AND SERVANT — Continued

§ 9. Action to Recover Compensation

The trial court in an action to recover severance pay provided in an employment contract properly struck the defense that the action was barred because plaintiff was terminated for cause. *Daily v. Mann Media, Inc.*, 746.

§ 10.2. Actions for Wrongful Discharge

Defendant was entitled to summary judgment as a matter of law in an action in which the Commissioner of Labor alleged that defendant discharged an employee in retaliation for filing a complaint about an unsafe working condition with The Occupational Health and Safety Division of the N. C. Department of Labor. *Brooks v. Stroh Brewery Co.*, 226.

An action by the Commissioner of Labor alleging retaliatory discharge for reporting an unsafe working condition was not barred by the employee's acceptance of a multiplant grievance committee determination. *Ibid.*

No public policy exception to the employment-at-will doctrine will be recognized to permit an action for wrongful discharge when the termination results from the employee's use of self-defense. *McLaughlin v. Barclays American Corp.*, 301.

§ 11. Solicitation of Former Employer's Customers

A noncompetition clause in a sales representative agreement was valid and enforceable under Illinois law. *Wallace Computer Services v. Waite*, 439.

§ 13. Interference with Contract of Employment by Third Person

The trial court properly entered summary judgment for plaintiff's superiors on plaintiff's claim for malicious interference with his employment contract where there was no evidence that defendants acted in a manner excluding their legitimate business interests in plaintiff's employment. *McLaughlin v. Barclays American Corp.*, 301.

§ 55.5. Workers' Compensation; Relation of Injury to Employment, Particularly as to "Arising out of" Employment

A mentally retarded employee's death from choking while eating a peanut butter sandwich on her employer's premises did not arise out of her employment. *Forsythe v. Inco*, 742.

§ 65.2. Workers' Compensation; Back Injuries

The evidence supported the Industrial Commission's denial of plaintiff's claim for compensation for a back injury on the ground that plaintiff's testimony was not credible and failed to establish an injury by accident. *Hunt v. Scotsman Convenience Store*, 620.

§ 69. Workers' Compensation; Amount of Recovery Generally

The Industrial Commission erred in limiting plaintiff's award of compensation for total disability to the maximum total compensation payable in 1973 when plaintiff became partially disabled rather than the amount allowed by the statutes in effect in 1981 when he became totally disabled. *Peace v. J. P. Stevens Co.*, 129.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

Summary judgment for the City of Concord was appropriate in an action arising from attempts by Kannapolis and Concord to annex the same area. *City of Kannapolis v. City of Concord*, 591.

MUNICIPAL CORPORATIONS — Continued

§ 2.1. Annexation; Compliance with Statutory Requirements

A town's annexation ordinance did not comply with the continuity requirements of G.S. 160A-36(b)(1), although the area did abut directly the pre-annexation boundary of the town, where the literal requirements of the statute were to be met by using very narrow shoestring corridors of land to connect the annexed areas to the town. *Amick v. Town of Stallings*, 64.

A resolution of annexation by the City of Kannapolis was invalid where Kannapolis sought to annex property pursuant to the statute for involuntary annexation, but its resolution of intent did not provide that the annexation would take effect one year after the passage of the resolution. *City of Kannapolis v. City of Concord*, 591.

An annexation ordinance which recites compliance with all applicable statutory provisions establishes prima facie substantial compliance with those provisions and the burden is on the challenger to the ordinance to show failure to meet statutory requirements. *Thrash v. City of Asheville*, 457.

§ 2.2. Annexation; Compliance with Statutory Requirements of Use and Size of Tracts

The City did not err in an annexation by counting certain properties as separate lots. *Thrash v. City of Asheville*, 457.

The City did not err in an annexation by classifying certain property as in commercial use and certain other property as in institutional use. *Ibid.*

The trial court did not err in an annexation challenge by classifying a 17.7-acre tract as vacant rather than as in industrial use. *Ibid.*

§ 2.3. Annexation; Compliance with other Statutory Requirements

A resolution of intent to annex property by the City of Concord was not valid because the property was not contiguous to municipal boundaries at the time even though the City on the same date passed a resolution fixing the date for a public hearing to accept petitions for voluntary annexation of an intervening privately owned strip of land. *City of Kannapolis v. City of Concord*, 591.

§ 2.5. Effect of Annexation

The existence of outstanding bonds was not a bar to the annexation of a water and sewer district. *Thrash v. City of Asheville*, 457.

§ 2.6. Extension of Utilities to Annexed Territory

The trial court did not err in an annexation challenge by finding that the City's report of plans for the extension of police service to the annexed area met statutory requirements. *Thrash v. City of Asheville*, 457.

The trial court did not err in an annexation challenge by holding that the City could lawfully annex part of a water and sewer district. *Ibid.*

§ 4.2. Powers of Municipalities in Particular Areas

The trial court properly concluded in an annexation challenge that a 1928 resolution in which the City stated that it would oppose annexation of the property was ultra vires. *Thrash v. City of Asheville*, 457.

§ 30.6. Zoning; Special Permits and Variances

A board of adjustment violated its own procedural rules when it agreed some six weeks after denying petitioner's application for a zoning variance to rehear

MUNICIPAL CORPORATIONS — Continued

the application after the chairman reviewed the minutes of the meeting in which the petition had been denied and stated that he would like to change his vote. *In re Application for Variance*, 182.

§ 30.10. Zoning; Particular Requirements and Restrictions

A zoning ordinance requiring a 100-foot buffer zone between a high-density planned development and a low-density residential district was properly interpreted by a board of adjustment to require that the 100-foot buffer be measured inward from the outer edge of the high-density zone. *P.A.W. v. Town of Boone Bd. of Adjustment*, 110.

§ 30.13. Zoning; Billboards and Outdoor Advertising Signs

A sign erected by petitioner was a prohibited roof sign and not a permitted canopy sign where it was located on the top of a structure which extended 25 feet from the wall of petitioner's building across two driveway lanes used by bank patrons at drive-through teller windows. *Raleigh Place Assoc. v. City of Raleigh*, 217.

NARCOTICS

§ 1.3. Elements of Statutory Offenses

Defendant could not be convicted for conspiracy to possess cocaine with intent to sell or deliver where he was the purchaser to whom delivery was to be made. *S. v. Morgan*, 639.

A defendant may be charged with and convicted for both sale and delivery of the same substance but may be punished for only one of those offenses. *S. v. Moore*, 718.

§ 2. Indictment

An indictment for conspiracy to traffic in cocaine was insufficient where it failed to give any weight for the cocaine involved. *S. v. Epps*, 173.

A count of an indictment charging trafficking in cocaine by sale was not fatally defective because it failed to allege the weight of the cocaine where a prior count of the same indictment alleged the cocaine weight, and both counts were based on a single drug transaction. *Ibid.*

§ 3.1. Competency and Relevancy of Evidence Generally

The trial court committed harmless error in a narcotics prosecution by admitting evidence concerning prior sales of alcohol at the building where defendant was arrested and searched. *S. v. Givens*, 72.

Defendant was not prejudiced by testimony of a police officer that scales found on defendant's person were common drug paraphernalia. *Ibid.*

The trial court properly instructed the jury not to consider as evidence cocaine seized from a car parked outside the building where defendant was arrested. *Ibid.*

Evidence concerning defendant's driving activities, the accessibility of a beach cottage to an inlet, and a boat outside the cottage was relevant in a prosecution for trafficking in marijuana by possession and by transportation. *S. v. Drewyore*, 283.

§ 4. Sufficiency of Evidence

The State's evidence was sufficient to prove that defendant knowingly possessed marijuana where it showed that the rental truck containing marijuana which defendant was driving emitted a strong odor of marijuana. *S. v. Drewyore*, 283.

NARCOTICS — Continued

§ 4.3. Sufficiency of Evidence of Constructive Possession

One defendant had constructive possession of cocaine found in a drink house and pool hall where defendant had cocaine in his possession when he arrived at the building and discarded his cocaine in the building when police arrived. *S. v. Givens*, 72.

§ 4.4. Insufficiency of Evidence of Constructive Possession

Evidence that defendant had come to a building to receive drugs was insufficient to show that defendant had constructive possession of cocaine discovered in the building. *S. v. Givens*, 72.

NEGLIGENCE

§ 13.1. Contributory Negligence; Knowledge and Appreciation of Danger

The trial court erred in instructing the jury on contributory negligence in an action to recover for damages sustained when a pipe in plaintiff's sprinkler system froze and burst allegedly because of defendant's negligence in failing to locate and drain a low point in the system. *River Hills Country Club v. Queen City Sprinkler Corp.*, 442.

§ 20. Actions Generally; Limitations

Defendant's conduct in firing a gun which resulted in injury to plaintiff from a ricocheting bullet gave rise to actions for assault and battery and negligence, and the assault claim was barred by the one-year statute of limitations but the negligence claim was not barred by the statute of limitations. *Vernon v. Barrow*, 642.

§ 29.3. Sufficiency of Evidence; Proximate Cause; Foreseeability

The trial court erred in entering summary judgment against plaintiffs on the issue of negligence in the installation of a roof on their shopping center. *Lormic Development Corp. v. North American Roofing Co.*, 705.

§ 49. Negligence in Condition and Maintenance of Sidewalks

Plaintiff's forecast of evidence in an action to recover for injuries sustained when she fell on an uneven sidewalk outside defendant hospital was insufficient to show negligence by defendant and disclosed that plaintiff was contributorily negligent as a matter of law. *Pulley v. Rex Hospital*, 89.

§ 59.1. Negligence in Condition or Use of Land; Particular Cases Where Person on Premises Is Licensee

Plaintiffs were licensees rather than invitees while on a school driveway where they merely drove their vehicle onto the driveway in order to turn around. *Yates v. J. W. Campbell Electrical Corp.*, 354.

§ 59.2. Duty of Care Owed to Licensees

Defendant board of education did not owe a higher measure of care to minor licensees while the minors were on school property where the board was unaware that the minors were on its property. *Yates v. J. W. Campbell Electrical Corp.*, 354.

§ 59.3. Sufficiency of Evidence in Actions by Licensees

A jury question was presented as to whether defendant wife was affirmatively negligent in leaving a pan of oil heating on her stove when she knew that plaintiff licensees were on the premises so as to render her liable for injuries sustained

NEGLIGENCE — Continued

by the female plaintiff when she collided with defendant's husband who was carrying a pan of burning oil from defendant's house. *DeHaven v. Hoskins*, 397.

A school board's alleged negligence in the design and maintenance of a school driveway was insufficient to support recovery by plaintiff licensees for injuries received in a collision while plaintiffs' vehicle was backing out of the driveway. *Yates v. J. W. Campbell Electrical Corp.*, 354.

NUISANCE**§ 4. Pollution of Streams**

Plaintiffs' forecast of evidence in an action to recover damages for contamination of their well water by gasoline leakage from underground storage tanks presented issues of material fact as to defendants' liability based on nuisance. *Wilson v. McLeod Oil Co.*, 479.

PARENT AND CHILD**§ 1.6. Termination of Parental Rights; Competency and Sufficiency of Evidence**

The court's findings that respondent was mentally incapable of providing proper care to her minor children and that such incapability would continue throughout the minority of the children were not supported by clear and convincing evidence. *In re Scott*, 760.

§ 7. Parental Duty to Support Child

Defendant could be held liable for child support expenses incurred by the mother before the date his paternity was established, and plaintiff mother could recover reimbursement to the extent she paid the father's share of support expenditures during the past three years. *Napowsa v. Langston*, 14.

The doctrine of laches is not applicable to an action for retroactive child support. *Ibid.*

The trial court made insufficient findings to support its award of retroactive child support. *Ibid.*

The trial court has the discretion to award attorney fees in an action for retroactive child support. *Ibid.*

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS**§ 5. Licensing and Regulation of Dentists**

In an action before the Board of Dental Examiners which resulted in a suspension of appellant's license to practice dentistry, there was sufficient evidence in view of the entire record as submitted to support the Board's findings. *In re Cameron v. N.C. Bd. of Dental Examiners*, 332.

The action of the Board of Dental Examiners in suspending appellant's license for a period of five years was not arbitrary, capricious and an abuse of discretion. *Ibid.*

§ 6.2. Revocation of Licenses Generally; Evidence

The Board of Medical Examiners erred in revoking respondent's license to practice medicine because he utilized homeopathic medicines in his practice where the Board neither charged nor found that respondent's departures from acceptable and prevailing medical practices either endangered or harmed his patients or the public. *In re Guess*, 435.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS — Continued**§ 12. Liability of Anesthetist**

Plaintiff's complaint was sufficient to state a claim against defendant hospital for medical malpractice based on negligent procedures employed in anesthetizing and immobilizing plaintiff during surgery. *Fournier v. Haywood County Hospital*, 652.

PLEADINGS**§ 37. Issues Raised by the Pleadings**

Defendant was bound by the factual allegation in its answer that it agreed to store plaintiff's property, and the denial of a storage agreement in the deposition of defendant's president was of no import. *Tate v. Action Moving & Storage*, 541.

PROCESS**§ 9. Personal Service on Nonresident Individuals in another State**

The trial court in a paternity action had personal jurisdiction over a nonresident defendant pursuant to G.S. 49-17, and that statute does not unconstitutionally predetermine the standard for minimum contacts. *Cochran v. Wallace*, 167.

§ 9.1. Personal Service on Nonresident Individuals in another State; Minimum Contacts Test

The trial court did not violate the nonresident defendant's due process rights by deciding that it had personal jurisdiction over him without affording him an additional hearing to determine his contacts with North Carolina where a hearing was held on defendant's motion to dismiss for lack of personal jurisdiction and defendant chose to challenge only the constitutionality of the statute giving the court jurisdiction over him. *Cochran v. Wallace*, 167.

§ 14.3. Service of Process on Foreign Corporation; Minimum Contacts; Sufficiency of Evidence

A nonresident defendant had insufficient contacts with this state to permit the exercise of personal jurisdiction over him in an action for breach of contract to receive and convey payment to plaintiff for goods manufactured by plaintiff in North Carolina and shipped to customers whose orders were solicited by defendant. *CFA Medical, Inc. v. Burkhalter*, 391.

QUASI CONTRACTS AND RESTITUTION**§ 2.1. Actions to Recover on Implied Contracts; Sufficiency of Evidence**

Plaintiff was entitled to an instruction on the law of implied in fact contract and to recover the reasonable value of extra stone furnished in a construction project. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

RAPE AND ALLIED OFFENSES**§ 2. Parties and Offenses**

Defendant could properly be convicted of first degree sexual offense and of taking indecent liberties with a child without subjecting him to double jeopardy. *S. v. Manley*, 213.

RAPE AND ALLIED OFFENSES — Continued**§ 4. Relevancy and Competency of Evidence**

Testimony by parents that defendant had not molested their children and by children that defendant had not molested them was irrelevant in a prosecution for rape and sexual offense committed against defendant's niece. *S. v. Hoffman*, 647.

§ 4.1. Proof of other Acts and Crimes

Testimony by an eight-year-old rape and sexual offense victim concerning prior acts of sexual misconduct by defendant with the victim was admissible to establish a common scheme or plan. *S. v. Hoffman*, 647.

§ 4.2. Articles of Clothing

Defendant was not prejudiced by the admission of panties allegedly worn by a child rape and sexual offense victim and the results of lab tests performed on the panties. *S. v. Hoffman*, 647.

§ 5. Sufficiency of Evidence

The trial court did not err in submitting the charge of first degree sexual offense to the jury where it was clear that defendant's beating of the victim with a croquet stick forced her to submit to defendant. *S. v. Hinton*, 683.

There was sufficient evidence to support alternative jury instructions for both second degree rape and attempted second degree rape, and the trial court did not err in refusing to arrest judgment on the verdict of attempted second degree rape. *Ibid.*

There was sufficient evidence of vaginal intercourse to support defendant's conviction of first degree rape of a child. *S. v. Green*, 558.

§ 6.1. Instructions on Lesser Degrees of Crime

The trial court in a prosecution for first degree rape of a child was not required to instruct on attempted first degree rape. *S. v. Green*, 558; *S. v. Hoffman*, 647.

REFERENCE**§ 8. Review of Exceptions by the Court**

The record shows that the trial judge performed his duty to review the evidence and the referee's findings of fact and law when exceptions were taken to the referee's findings of fact and law. *Quate v. Caudle*, 80.

RULES OF CIVIL PROCEDURE**§ 4.1. Service of Process by Publication**

There no longer exists an obligation to mail a copy of a notice of service of process by publication to an address where the party sought to be served no longer resides. *Snead v. Foxx*, 723.

§ 11. Signing and Verification of Pleadings

The trial court properly imposed Rule 11(a) sanctions on plaintiff's attorney because of his consistent use of inflated figures in plaintiff's complaint for alimony and alimony pendente lite even after the opportunity to amend. *Shook v. Shook*, 578.

§ 12. Defenses and Objections

The thirty days defendant had under Rule 12 to answer the complaint was not extended by Rule 6(e) to thirty-three days, and plaintiffs' motions for entry

RULES OF CIVIL PROCEDURE — Continued

of default and default judgment filed thirty-one days after delivery of the summons and complaint to defendant were properly made after defendant's time to answer had expired. *Williams v. Moore*, 601.

The trial court could consider plaintiff's motion to strike defendant's defense although it was untimely filed. *Daily v. Mann Media, Inc.*, 746.

§ 13. Counterclaim and Crossclaim

Plaintiff's claim for conversion of screens, storm doors and other materials was not a compulsory counterclaim to a prior action brought by defendant in another county to recover on a contract to install vinyl siding on plaintiff's home. *Hailey v. Allgood Construction Co.*, 630.

§ 15. Amended and Supplemental Pleadings

Petitioners could properly amend or supplement their petition for adoption with an affidavit concerning the putative father's failure to legitimate his child, and the putative father was not prejudiced by the amendment where he did not see the adoption petition until it had been supplemented with the necessary affidavit. *In re Adoption of Clark*, 1.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to institute direct claims against third-party defendants. *Wilson v. McLeod Oil Co.*, 479.

§ 19. Necessary Joinder of Parties

Even if the putative father's consent to an adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join the putative father within a reasonable time. *In re Adoption of Clark*, 1.

§ 55. Default

Plaintiffs' claim was not for a sum certain which would permit entry of default judgment by the clerk where plaintiffs' claimed damages were mitigated by a sum dependent on plaintiffs' estimate of the "fair rental value" of some unspecified amount of land. *Williams v. Moore*, 601.

§ 56.3. Summary Judgment; Sufficiency of Supporting Material; Moving Party

Summary judgment was properly entered in favor of defendants based on the pleadings and affidavits submitted by plaintiffs. *Animal Protection Society v. State of North Carolina*, 258.

§ 56.7. Summary Judgment; Appeal

Denial of defendant wife's motion for summary judgment in an unfair and deceptive trade practice action arising from the sale of a condominium was not reviewed. *Douglas v. Doub*, 505.

§ 59. New Trials

The trial court did not err in an action for fraud and unfair and deceptive trade practices arising from the sale of a condominium by denying defendant's motion for a new trial based on an allegedly excessive jury verdict. *Douglas v. Doub*, 505.

RULES OF CIVIL PROCEDURE — Continued

§ 60. Relief from Judgment or Order

The trial court erred in denying defendants' Rule 60(b) motion for relief from a judgment of dismissal without making findings as to whether defendants had notice that the case appealed from the magistrate to the district court was on the calendar for disposition. *Windley v. Dockery*, 771.

§ 60.4. Relief from Judgment or Order; Appeal

The trial court correctly denied defendant's motion for relief from a judgment under Rule 60 where the defendant did not file an appeal from the judgment or make a motion for a new trial under Rule 59. *Concrete Supply Co. v. Ramseur Baptist Church*, 658.

SALES

§ 17. Counterclaims for Breach of Warranty; Sufficiency of Evidence

The evidence was sufficient to support the jury's verdict that defendant Baity impliedly and expressly warranted to plaintiffs that a heating system would meet state and local codes and be fit for the ordinary purposes for which such systems were used. *Russell v. Baity*, 422.

SCHOOLS

§ 11. Liability for Torts

The Industrial Commission correctly decided in favor of defendant in a personal injury action brought by a student at the North Carolina School for the Deaf for injuries suffered during a shop class. *Payne v. N.C. Dept. of Human Resources*, 309.

SEARCHES AND SEIZURES

§ 12. Stop and Frisk Procedures

Officers had a reasonable and articulable suspicion that a crime was being committed so that an investigatory stop of the rental truck defendant was driving was justified and a search of the vehicle and the seizure of marijuana found therein were lawful. *S. v. Drewyore*, 283.

A search of defendant and seizure of a gun from his person by officers executing a search warrant was lawful where it was based upon a reasonable suspicion that the occupants of the motel room to be searched were armed or within reach of weapons. *S. v. Harris*, 691.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 2. Recovery of Amount Paid to Recipient

Social Services had standing to challenge the striking of child support arrearages. *Tate v. Tate*, 774.

STATE

§ 2. State Lands

The public trust doctrine will not be extended to secure public access to a public beach across the land of a private property owner without compensation. *Concerned Citizens v. Holden Beach Enterprises*, 38.

STATE — Continued

§ 4. Actions against the State; Sovereign Immunity

A heating and air conditioning contractor's claim against the State based on change work orders which delayed the general contractor's work and in turn delayed plaintiff's work was outside the scope of G.S. 143-135.3 and was thus barred by sovereign immunity. *Bolton Corp. v. State of North Carolina*, 596.

§ 4.4. Other Actions against the State

There is no language in G.S. 143-291 which prohibits plaintiff from bringing an action against the State for negligent issuance of an ID card in her name. *Talbot v. N.C. Dept. of Transportation*, 446.

A prime contractor's claim against the State for breach of contract as assignee of its subcontractor was properly dismissed because an assignment of a claim against the State is void. *Bolton Corp. v. State of North Carolina*, 596.

Plaintiff heating and air conditioning contractor for construction of a building at UNC-CH was not a third party beneficiary of a contract between the State and the general contractor so as to give plaintiff a right of action against the State for breach of contract based on change work orders which delayed plaintiff. *Ibid.*

A prime contractor's claim against the State on behalf of its subcontractor for breach of a contract for construction of a building at UNC-CH was barred by sovereign immunity. *Ibid.*

§ 8.2. Tort Claims Act; Negligence of State Employee; Particular Actions

A provision of G.S. 20-37.7(g) prohibiting any action against the State for misuse of a special identification card does not apply when the card is negligently issued. *Talbot v. N.C. Dept. of Transportation*, 446.

TAXATION

§ 25. Assessment and Levy of Ad Valorem Taxes Generally

The Property Tax Commission properly ruled that petitioner's property on which it operated a home for the elderly should be excluded from ad valorem taxation. *In re Appeal of Moravian Home, Inc.*, 324.

§ 25.4. Ad Valorem Taxes; Valuation and Assessment

The evidence was sufficient to support the Property Tax Commission's determination that the method of land valuation used by the Hyde County tax assessor was arbitrary and produced a value for petitioner's property substantially in excess of the true value in money. *In re Appeal of Boos*, 386.

The evidence presented by the taxpayers supported the Property Tax Commission's conclusion that the county's method of appraisal for property tax purposes was arbitrary. *In re Appeal of Senseney*, 407.

The taxpayers produced competent, material and substantial evidence that the county's assessed value of land for property tax purposes was substantially in excess of the land's true value. *Ibid.*

The taxpayers' estimate of value contained in their application for a hearing before the Property Tax Commission was not a judicial admission. *Ibid.*

§ 25.11. Ad Valorem Taxes; Proceedings; Judicial Redress

Although respondent county could not appeal from the County Board of Equalization and Review to the N. C. Property Tax Commission, the county could appeal

TAXATION — Continued

to the Court of Appeals from a decision of the Property Tax Commission. *In re Appeal of Moravian Home, Inc.*, 324.

§ 31.1. Sales and Use Tax; Particular Transactions and Computations

A discount offered by a taxpayer to its customers for prompt payment constituted a "cash discount" within the meaning of G.S. 105-164.3(6) so that the Department of Revenue could properly make an assessment based on the discounts. *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 151.

§ 32. Intangibles Tax

The Department of Revenue correctly classified payments owed to plaintiff for the sale of its trade accounts to factors as accounts receivable rather than as "other evidences of debt" for intangibles tax purposes. *Guilford Mills, Inc. v. Powers*, 417.

TRESPASS

§ 3. Continuing Trespass

The presence of gasoline in plaintiffs' well water from leaking storage tanks was a continuing trespass. *Wilson v. McLeod Oil Co.*, 479.

§ 9. Permanent Damages

Plaintiffs' forecast of evidence in an action to recover damages for contamination of well water by gasoline leakage from underground storage tanks presented issues of material fact as to defendants' liability based on trespass. *Wilson v. McLeod Oil Co.*, 479.

TRIAL

§ 6. Stipulations

The trial judge's decision limiting the liability of the codefendant manufacturer was final in a breach of warranty action arising from the sale of a heating system. *Russell v. Baity*, 422.

§ 11.2. Argument and Conduct of Counsel; Objection to and Correction of Improper Argument

The trial court did not err in a negligence action arising from an automobile accident by denying plaintiff's motion for a new trial based on improper comments and questions by defense counsel. *Smith v. Bohlen*, 347.

The trial court did not err by not acting *ex mero motu* to correct an impropriety in the closing argument of defense counsel in an automobile negligence action. *Ibid.*

§ 13.1. Allowing Jury to View Exhibits; Discretion of Trial Court

The trial court had the discretion to refuse to permit the jury to inspect the parties' lease during its deliberations. *Barnes v. Ford Motor Co.*, 367.

§ 45. Acceptance or Rejection of Verdict by Court

The trial court abused its discretion by unilaterally reducing plaintiff's verdict to one-half the amount returned by the jury. *Jorgensen v. Seeman*, 767.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The Soft Drink Interbrand Competition Act was inapplicable to plaintiff's action for tortious contractual interference, fraud, price fixing and unfair trade practices. *Owens v. Pepsi Cola Bottling Co.*, 47.

Plaintiff's evidence established a genuine issue of fact regarding his allegations of price fixing by a Pepsi supplier in violation of G.S. 75-5(b)(3). *Ibid.*

The evidence was sufficient to raise a question of fact as to whether defendant Pepsi supplier was guilty of an unfair trade practice by demanding that plaintiff raise his prices and limiting plaintiff's inventory and his customers. *Ibid.*

The trial court properly trebled the damages awarded to plaintiff for an unfair trade practice based upon defendant's intentional underestimation of the cost of constructing a log home for plaintiffs. *Quate v. Caudle*, 80.

Interest expense on a loan obtained by plaintiffs to finance cost overruns was recoverable as an item of damages for defendant's unfair trade practice in intentionally underestimating the cost of constructing a log home for plaintiffs. *Ibid.*

The trial court did not err in denying plaintiff's motions for a directed verdict on her claim for an unfair trade practice based on defendant insurer's refusal to pay her the proceeds of a life insurance policy, but such an issue should have been submitted to the jury. *Barber v. Woodmen of the World Life Ins. Society*, 340.

Testimony about the Homeowners Warranty Program did not violate the parol evidence rule. *Love v. Keith*, 549.

Defendant builder committed an unfair trade practice by refusing to enroll a house he built and sold to plaintiffs in a HOW program because he wanted to pressure plaintiffs into releasing funds which they had placed in escrow to cover the costs of necessary repairs. *Ibid.*

The trial judge in an unfair trade practice action erred in imposing interest on the amount of treble damages rather than on the amount of compensatory damages only. *Ibid.*

The trial court did not err in an action for unfair trade practices and fraud arising from the sale of a condominium by denying defendant wife's motion for a directed verdict. *Douglas v. Doub*, 505.

The trial court did not commit prejudicial error in an action for fraud and unfair competition arising from the sale of a condominium by submitting to the jury an issue concerning whether the purchase was in commerce or affected commerce. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 10. Warranties in General

The parties intended for the provisions of a manufacturer's sample warranty for a roof to ultimately govern defendant installer's obligation, but the parties did not intend for the provisions contained in the sample warranty to take effect until after the warranty was actually executed by defendant, and an issue of fact existed as to whether plaintiffs timely gave defendant notice of the defects within 30 days after their discovery once the warranties were executed. *Lormic Development Corp. v. North American Roofing Co.*, 705.

UNIFORM COMMERCIAL CODE — Continued

§ 12. Implied Warranties; Merchantability

The trial court properly entered summary judgment for defendant on a claim for breach of implied warranty of merchantability where a written warranty effectively disclaimed the warranty of merchantability. *Lormic Development Corp. v. North American Roofing Co.*, 705.

§ 37. Warehouse Receipts

The "Household Goods Descriptive Inventory" which was given to plaintiff when his goods were loaded was intended by defendant to serve as a warehouse receipt and defendant was responsible under the U.C.C. for its actions as a warehouseman. *Tate v. Action Moving & Storage*, 541.

§ 45. Default and Enforcement of Security Interest

The trial court correctly granted defendant's motion for a Rule 12(b)(6) dismissal of an action seeking damages for failing to notify plaintiff of a disposition of collateral in which plaintiff had a subordinate security interest. *City Finance Co. v. Massey Motor Co.*, 623.

VENDOR AND PURCHASER

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

The evidence did not show as a matter of law that plaintiffs were unreasonable in relying on defendant sellers' misrepresentations that the house plaintiffs purchased from defendants had a new roof. *Blanchfield v. Soden*, 191.

An earlier opinion in the same matter, 93 N.C. App. 310, was withdrawn in part on reconsideration by the Court of Appeals because the trial court made a finding that attempted to resolve an issue of material fact. *Blackwell v. Dorosko*, 637.

WATERS AND WATERCOURSES

§ 3.2. Pollution

The three-year statute of limitations applied to an action to recover damages for gasoline contamination of plaintiffs' well water allegedly caused by leakage from defendants' underground storage tanks. *Wilson v. McLeod Oil Co.*, 479.

Claims against third-party defendants based on gasoline contamination of plaintiffs' well water were barred by the statute of limitations where third-party defendants' last acts occurred more than ten years prior to institution of the action. *Ibid.*

Plaintiffs' forecast of evidence in an action to recover damages for contamination of their well water by gasoline leakage from underground storage tanks was sufficient to present issues of material fact as to defendants' liability based on strict liability under G.S. 143-215.93, nuisance, trespass and negligence. *Ibid.*

WEAPONS AND FIREARMS

§ 1. Generally; Definitions

Operability is not an element of the crime of possession of a weapon of mass death and destruction in violation of G.S. 14-288.8, and defendant bears the initial burden of producing evidence of inoperability. *S. v. Fennell*, 140.

WEAPONS AND FIREARMS — Continued**§ 2. Carrying or Possessing Weapons**

A charge against defendant for possession of a sawed-off shotgun in violation of G.S. 14-288.8 did not violate defendant's right to bear arms under the Second Amendment of the U. S. Constitution or Art. I, § 30 of the N. C. Constitution. *S. v. Fennell*, 140.

A disassembled sawed-off shotgun qualifies as a weapon of mass death and destruction under G.S. 14-288.8. *Ibid.*

WILLS**§ 10. Probate of Holographic Wills**

Caveators offered a sufficient writing for probate as a holographic codicil. *In re Will of Penley*, 655.

§ 28.6. Construction of Wills; Meaning and Use of Words

Language in a will leaving all of the testator's property to her two adopted daughters and three grandchildren in stated percentages with the part of any deceased daughter or grandchild to go to the survivor in the percentage indicated was construed to mean that each surviving beneficiary would take her share in the percentage indicated. *NCNB v. Apple*, 606.

§ 36.2. Particular Devises as Creating Defeasible Fee or Reversionary Interest

The trial court properly determined that, pursuant to the provisions of testator's will, the assets of a trust should go to the estate of the last of three trustees to survive, subject to the beneficial interest therein of testator's wife. *Fisher v. Melton*, 729.

§ 41. Rule against Perpetuities

The rule against perpetuities was not violated by provisions of a trust. *Thornhill v. Riegg*, 532.

The term descendants was construed to mean children in a trust provision so that the rule against perpetuities was not violated. *Ibid.*

A provision in a will setting forth a procedure for the descendants of a child deceased to receive their shares of a trust was construed to refer to the testator's children's children and not to the testator's great-grandchildren. *Ibid.*

There was no rule against perpetuities problem in a will provision which enabled a trustee in his discretion to distribute trust principal to descendants of a child deceased. *Ibid.*

A provision in a will providing for the residue of a trust to be distributed by intestate succession in certain circumstances did not violate the rule against perpetuities. *Ibid.*

A provision in a will providing for distribution of a trust to the testator's great-grandchildren in certain circumstances was void because it violated the rule against perpetuities. *Ibid.*

§ 66.1. Lapsed Legacies; Effect of Anti-Lapse Statute

A provision in a will which disposed of all property not required to carry out the provisions stated above was a residuary clause and the share of the testator's deceased daughter would pass to all other named beneficiaries under the anti-lapse statute. *NCNB v. Apple*, 606.

WITNESSES

§ 1.2. Competency of Witness; Age; Children as Witnesses

The trial court did not abuse its discretion in finding that a seven-year-old victim was competent to testify in a rape trial although she testified she did not know what it meant to break a promise or what an oath was. *S. v. Green*, 558.

WORD AND PHRASE INDEX

ACCOUNTS RECEIVABLE

Intangibles tax, *Gulford Mills, Inc. v. Powers*, 417.

AD VALOREM TAXES

Method of valuation arbitrary, *In re Appeal of Boos*, 386; *In re Appeal of Senseney*, 407.

ADOPTION

Putative father's rights, *In re adoption of Clark*, 1.

AGGRAVATING FACTORS

Guilt of greater crime, *S. v. Mullican*, 27.

Position of trust, *S. v. Mullican*, 27.

ALIMONY

Dependent spouse, *Shook v. Shook*, 578.

Inflated figures knowingly used, *Shook v. Shook*, 578.

ALIMONY PENDENTE LITE

Retroactive, *Haywood v. Haywood*, 426.

ANNEXATION

Burden of proof on challenge, *Thrash v. City of Asheville*, 457.

Number of lots, *Thrash v. City of Asheville*, 457.

Prior resolution promising no annexation, *Thrash v. City of Asheville*, 457.

Requirement that area abut pre-annexation boundary, *Amick v. Town of Stallings*, 64.

Resolutions of intent invalid, *City of Kannapolis v. City of Concord*, 591.

Water and sewer district, *Thrash v. City of Asheville*, 457.

ANSWER

Allegation binding, *Tate v. Action Moving & Storage*, 541.

APPEAL

Conflicting narratives of evidence, *Napowsa v. Langston*, 14.

Failure to cite authorities, *Tindall v. Willis*, 374.

Fewer than all claims, *Butt v. Goforth Properties, Inc.*, 615.

From judgment setting aside plea bargain, *S. v. Johnson*, 757.

From summary judgment for one defendant, *DeHaven v. Hoskins*, 397.

Of summary judgment after verdict, *Douglas v. Doub*, 505.

Order compelling arbitration interlocutory, *N.C. Electric Membership Corp. v. Duke Power Co.*, 123.

Rule 60 motion not substitute for, *Concrete Supply Co. v. Ramseur Baptist Church*, 658.

ARBITRATION

Individual liability of partners, *George W. Kane, Inc. v. Golin Creek West Assoc.*, 135.

Order compelling interlocutory, *N.C. Electric Membership Corp. v. Duke Power Co.*, 123.

ARREST OF JUDGMENT

Sentence on prior arrested judgments, *S. v. Pakulski*, 517.

ARSON

Burning of mother's home, *S. v. English*, 611.

Evidence of prior fire, *S. v. English*, 611.

Opinion that fire intentionally set, *S. v. English*, 611.

ASSAULT

- Civil, defense of family, *Young v. Warren*, 585.
 Injury from ricocheting bullet, *Vernon v. Barrow*, 642.
 Instruction on lesser offense, *S. v. Harrington*, 187.

ASSIGNMENT

- Claim against the State, *Bolton Corp. v. State of North Carolina*, 596.

ATTORNEYS

- Accrual of insurer's claim for legal malpractice, *Nationwide Mutual Ins. Co. v. Winslow*, 413.
 Estoppel unavailable for negligence in loan closing, *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.
 Sanctions for inflated alimony claim, *Shook v. Shook*, 578.
 Withdrawal from case, *Lamb v. Groce*, 220.

ATTORNEYS' FEES

- Child support, *Napowsa v. Langston*, 14.
 Insurer's refusal to defend, *Duke University v. St. Paul Mercury Ins. Co.*, 663.
 Preparation to defend against punitive damages, *Barnes v. Ford Motor Co.*, 367.
 Retroactive award for alimony pendente lite, *Haywood v. Haywood*, 426.
 Unfair trade practices claim, *Love v. Keith*, 549.

AUTOMOBILE

- Sale of repossessed, *City Finance Co. v. Massey Motor Co.*, 623.

AUTOMOBILE ACCIDENT

- Georgia ownership of vehicle, *Hargett v. Reed*, 292.
 Improper comments and questions by counsel, *Smith v. Bohlen*, 347.

**AUTOMOBILE ACCIDENT —
Continued**

- Intoxication not basis for punitive damages, *Howard v. Parker*, 361.
 Rear-end collision, *Smith v. Bohlen*, 347.

AUTOMOBILE FRANCHISE

- Nonrenewal of, *Star Auto Co. v. Jaguar Cars Inc.*, 103.

AUTOMOBILE INSURANCE

- Argument concerning effect of lawsuits on insurance industry, *Smith v. Bohlen*, 347.
 Driver's belief that he was entitled to use vehicle, *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 178.

BEACHFRONT PROPERTY

- Unfair trade practices in sale, *Blackwell v. Dorosko*, 637.

BINGO

- "Free" upon purchase of items, *Animal Protection Society v. State of North Carolina*, 258.

BOARD OF DENTAL EXAMINERS

- Review of, *In re Cameron v. N.C. Bd. of Dental Examiners*, 332.

BOUNDARY

- Action res judicata, *Tindall v. Willis*, 374.

BREATHALYZER TEST

- Additional request for sequential sample not required, *Tolbert v. Hiatt*, 380.
 Difference in tests greater than .02, *S. v. Tew*, 634.
 Refusal to remove portion of dollar bill from mouth, *Tolbert v. Hiatt*, 380.

BUFFER ZONE

Not arbitrary or capricious, *P.A.W. v. Town of Boone Bd. of Adjustment*, 110.

CASH DISCOUNT

Sales tax, *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 150.

CHILD CUSTODY

Tennessee order not enforceable, *Henson v. Henson*, 777.

CHILD SUPPORT

Arrearages stricken, *Tate v. Tate*, 774.

Doctrine of laches, *Napowsa v. Langston*, 14.

Emancipated child, *S. v. Benfield*, 451.

Prior to date paternity established, *Napowsa v. Langston*, 14.

Retroactive, *Napowsa v. Langston*, 14.

COCAINE

Amount not stated in indictment, *S. v. Epps*, 173.

Belief that powder was baking soda, *S. v. Sanders*, 56.

Conspiracy to possess with intent to sell by purchaser, *S. v. Morgan*, 639.

Constructive possession, *S. v. Givens*, 72.

CODICIL

Holographic, *In re Will of Penley*, 655.

COLLATERAL

Sale of repossessed automobile, *City Finance Co. v. Massey Motor Co.*, 623.

COMPLAINT

Time to answer, *Williams v. Moore*, 601.

COMPULSORY COUNTERCLAIM

Conversion action was not, *Hailey v. Allgood Construction Co.*, 630.

CONDOMINIUM

Fraud and unfair trade practice in sale of, *Douglas v. Doub*, 505.

CONFESSION

Hope of leniency for girlfriend, *S. v. Annadale*, 734.

CONSTRUCTIVE POSSESSION

Cocaine seized in drink house, *S. v. Givens*, 72.

CONTRACT

With deceased spouse, *Barrow v. Murphy*, 738.

CONTRIBUTORY NEGLIGENCE

Driving with sun in face, *Smith v. Pass*, 243.

Sprinkler system, *River Hills Country Club v. Queen City Sprinkler Corp.*, 442.

Uneven sidewalk outside hospital, *Pulley v. Rex Hospital*, 89.

CONVERSION

Action not compulsory counterclaim, *Hailey v. Allgood Construction Co.*, 630.

Warehouseman's failure to comply with statutes, *Tate v. Action Moving & Storage*, 541.

CORPORATION

Loan made by, no standing to challenge, *Ashburn v. Wicker*, 162.

Presumed invalidity of deed to officer, *Poore v. Swan Quarter Farms*, 439.

COVENANT NOT TO COMPETE

Legitimate business interest, *Wallace Computer Services v. Waite*, 439.

DEDICATION

Path across property, *Price v. Walker*, 712.

DEFAULT JUDGMENT

Claim not for sum certain, *Williams v. Moore*, 601.

DENTIST

Suspension of license, *In re Cameron v. N.C. Bd. of Dental Examiners*, 332.

DOUBLE JEOPARDY

First degree sexual offense and taking indecent liberties, *S. v. Manley*, 213.
Judgment based on plea bargain set aside, *S. v. Johnson*, 757.

DRIVER'S LICENSE

Revocation for refusal to submit to blood analysis, *Richardson v. Hiatt*, 780.

DRIVING WHILE IMPAIRED

Reasonable grounds for arrest, *Richardson v. Hiatt*, 196.
Taking blood sample, *Richardson v. Hiatt*, 196.

EASEMENT

Path across property, *Price v. Walker*, 712.
Road across private property to beach, *Concerned Citizens v. Holden Beach Enterprises*, 38.

ELECTION OF REMEDIES

Necessity for pleading, *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.

EMPLOYMENT AT WILL

No public policy exception for use of self-defense, *McLaughlin v. Barclays American Corp.*, 301.

ENTRAPMENT

Denial of essential element, *S. v. Sanders*, 56.

EQUITABLE DISTRIBUTION

Fatally defective order for temporary alimony, *Haywood v. Haywood*, 426.

ESTOPPEL

General partners of limited partnership, *George W. Kane, Inc. v. Golin Creek West Assoc.*, 135.
Settlement negotiations, *Duke University v. St. Paul Mercury Ins. Co.*, 663.
Unavailability to attorney in negligent loan closing, *N.C. Federal Sav. and Loan Assn. v. Ray*, 317.

FELONY MURDER

Sentencing on felony after murder conviction reversed, *S. v. Pakulski*, 517.

FINGERPRINTS

Sufficient to support felonious breaking or entering, *S. v. Williams*, 627.

**FIRST DEGREE
SEXUAL OFFENSE**

Croquet stick as weapon, *S. v. Hinton*, 683.
Different elements from taking indecent liberties, *S. v. Manley*, 213.

FORFEITURE OF PROPERTY

Left with mover, *Tate v. Action Moving & Storage*, 541.

FRAUD

Sale of condominium, *Douglas v. Doub*, 505.

FRISKING

Drug arrest, *S. v. Harris*, 691.

GAMBLING

Free bingo upon purchase of items, *Animal Protection Society v. State of North Carolina*, 258.

GARBAGE TRUCK

Collision with, *Smith v. Pass*, 243.

GASOLINE

Contamination of well water, *Wilson v. McLeod Oil Co.*, 479.

GEORGIA LAW

Applied to automobile ownership, *Hargett v. Reed*, 292.

GOLF CART

Hit by car, *McMahan v. Stogner*, 764.

GREASE

Left on stove by homeowner, *DeHaven v. Hoskins*, 397.

HABITUAL FELON

Separate indictment, *S. v. Sanders*, 494.

HEARSAY

Notice of intent to introduce, *S. v. Bullock*, 524.

Witness unavailable, *S. v. Bullock*, 524.

**HEATING AND AIR
CONDITIONING CONTRACTOR**

Delay in general contractor's work, *Bolton Corp. v. State of North Carolina*, 596.

HEATING SYSTEM

Breach of warranty, *Russell v. Baity*, 422.

HERNIA

Hand injury while undergoing surgery for, *Fournier v. Haywood County Hospital*, 652.

HOME FOR ELDERLY

Exclusion from ad valorem taxation, *In re Appeal of Moravian Home, Inc.*, 324.

HOMEOPATHIC REMEDIES

Revocation of license to practice medicine, *In re Guess*, 435.

HOSPITAL

Patient's hand injury while anesthetized, *Fournier v. Haywood County Hospital*, 652.

Uneven sidewalk outside, *Pulley v. Rex Hospital*, 89.

HOW PROGRAM

Representations by builder, *Love v. Keith*, 549.

HUNTER

Involuntary manslaughter, *S. v. Meadlock*, 146.

I.D. CARD

Negligent issuance of, *Talbot v. N.C. Dept. of Transportation*, 446.

**IMPLIED WARRANTY OF
MERCHANTABILITY**

Roof, *Lormic Development Corp. v. North American Roofing Co.*, 705.

INDECENT LIBERTIES

Different elements from first degree sexual offense, *S. v. Manley*, 213.

Prior conviction, *S. v. Moul*, 644.

INDICTMENT

Habitual felon, *S. v. Sanders*, 494.

INSUFFICIENT PROCESS

Denial of motion to dismiss interlocutory, *CFA Medical, Inc. v. Burkhalter*, 391.

INTANGIBLES TAX

Sale of trade accounts, *Guilford Mills, Inc. v. Powers*, 417.

INTEREST

Entitlement to on entire judgment, *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

INVOLUNTARY MANSLAUGHTER

Victim shot by hunter, *S. v. Meadlock*, 146.

JURISDICTION

Nonresident defendant in paternity action, *Cochran v. Wallace*, 167.

Not conferred on state court by federal court, *Eways v. Governor's Island*, 201.

JURY

Alternate juror in room during deliberations, *S. v. Godwin*, 565.

JURY SELECTION

Peremptory challenges based on race, *S. v. Sanders*, 494.

LEASE

Notice of renewal, *MER Properties-Salisbury v. Golden Palace, Inc.*, 402.

Rescission of, *Barnes v. Ford Motor Co.*, 367.

Termination for nonpayment of rent, *Cumberland Associates v. Scotto's Pizza of N.C.*, 753.

LEGAL MALPRACTICE

Insurer's claim against attorney, *Nationwide Mutual Ins. Co. v. Winslow*, 413.

LIABILITY INSURANCE

No action clause, *Duke University v. St. Paul Mercury Ins. Co.*, 663.

Refusal to defend, *Duke University v. St. Paul Mercury Ins. Co.*, 663.

LIBRARY

Heating and air conditioning contractor's claim, *Bolton Corp. v. State of North Carolina*, 596.

LICENSEES

Persons turning around in school driveway, *Yates v. J. W. Campbell Electrical Corp.*, 354.

LIFE INSURANCE

Application of estoppel, *Barber v. Woodmen Of The World Life Ins. Society*, 340.

Representation as to beneficiary, *Barber v. Woodmen Of The World Life Ins. Society*, 340.

LOG HOUSE

Cost overruns, *Quate v. Caudle*, 80.

LOST PROFITS

Sufficient evidence by van owner, *Smith v. Pass*, 243.

MARIJUANA

Odor showing knowledge of possession, *S. v. Dreygore*, 283.

Prosecutor's characterization of substance as, *S. v. Dreygore*, 283.

MEDICAL BILLS

Admissibility of, *Smith v. Pass*, 243.

MEDICAL MALPRACTICE

Hand injury while anesthetized, *Fournier v. Haywood County Hospital*, 652.

Time for bringing action by minor, *Osborne v. Annie Penn Memorial Hospital*, 96.

METEOROLOGIST

Visibility conditions and sun's glare, *Smith v. Pass*, 243.

MINIMUM CONTACTS

Tennessee contract, *CFA Medical, Inc. v. Burkhalter*, 391.

MIRANDA WARNINGS

Not required during frisking, *S. v. Harris*, 691.

MISTRIAL

Failure of jury to agree, *S. v. Green*, 558.

MOTION TO STRIKE DEFENSE

Untimely, *Daily v. Mann Media, Inc.*, 746.

NARCOTICS

One punishment for sale and delivery of controlled substance, *S. v. Moore*, 718.

Quashal of indictment, *S. v. Epps*, 173.
Scales characterized as drug paraphernalia, *S. v. Givens*, 72.

NEGLIGENCE

Grease left on stove, *DeHaven v. Hoskins*, 397.

Roof installation, *Lormic Development Corp. v. North American Roofing Co.*, 705.

NONCOMPETITION COVENANT

Legitimate business interest, *Wallace Computer Services v. Waite*, 439.

OTHER OFFENSES

Identity and common plan or scheme, *S. v. Bullock*, 524.

PATERNITY ACTION

Nonresident defendant, *Cochran v. Wallace*, 167.

PAVING CONTRACT

Settlement for extra work, *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

PENALTY CLAUSE

Property left with warehouseman, *Tate v. Action Moving & Storage*, 541.

PEPSI

Distribution of, *Owens v. Pepsi Cola Bottling Co.*, 47.

PEREMPTORY CHALLENGES

On basis of race, *S. v. Sanders*, 494.

PLEA BARGAIN

Binding on prosecutor, *S. v. Johnson*, 757.

PRICE FIXING

Sale of Pepsi, *Owens v. Pepsi Cola Bottling Co.*, 47.

PRIOR OFFENSES

Competency to show common scheme or plan, *S. v. Hoffman*, 647.

PRO SE REPRESENTATION

No inquiry by judge, *S. v. Godwin*, 565.

PROCESS

Service by publication, *Snead v. Foxx*, 723.

PROMPT PAYMENT

Cash discount, *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 150.

PROPERTY TAX COMMISSION

Appeal from, *In re Appeal of Moravian Home, Inc.*, 324.

PROSECUTORIAL VINDICTIVENESS

Two crimes arising from same transaction, *S. v. Knox*, 699.

PUNITIVE DAMAGES

Attorney fees for preparation of defense against, *Barnes v. Ford Motor Co.*, 367.

Intoxication as basis for, *Howard v. Parker*, 361.

RAPE

Alternative jury instructions, *S. v. Hinton*, 683.

Attempted rape instruction not required, *S. v. Green*, 558; *S. v. Hoffman*, 647.

Competency of child to testify, *S. v. Green*, 558.

Failure to molest other children, *S. v. Hoffman*, 647.

Prior sexual misconduct showing common scheme or plan, *S. v. Hoffman*, 647.

Vaginal intercourse with child, *S. v. Green*, 558.

REAR-END COLLISION

No inference of negligence, *Smith v. Bohlen*, 347.

RECORD ON APPEAL

Conflicting narratives of evidence, *Napowska v. Langston*, 14.

REFEREE

Exceptions to findings of fact and law, *Quate v. Caudle*, 80.

REMITTITUR

Abuse of discretion, *Jorgensen v. Seeman*, 767.

RES JUDICATA

Action to determine ownership of real property, *Tindall v. Willis*, 374.

RESTRICTIVE COVENANTS

Construed to include bowling center, *Westminster Co. v. Union Mutual Stock Life Ins. Co.*, 117.

Inapplicable to prior purchaser, *Hair v. Hales*, 431.

Statute of frauds, *Hair v. Hales*, 431.

RETALIATORY DISCHARGE

Complaint about unsafe working condition, *Brooks v. Stroh Brewery Co.*, 226.

REVOCAION OF DRIVER'S LICENSE

Refusal to submit to chemical analysis of blood, *Richardson v. Hiatt*, 780.

RICOCHETING BULLET

Assault and negligence actions, *Vernon v. Barrow*, 642.

RIGHT TO BEAR ARMS

Sawed-off shotgun, *S. v. Fennell*, 140.

ROBBERY

Two crimes arising from same transaction, *S. v. Knox*, 699.

ROOF

Breach of warranty for installation, *Lormic Development Corp. v. North American Roofing Co.*, 705.

Representation of newness, *Blanchfield v. Soden*, 191.

RULE 60 MOTION

Duty of court to make findings, *Windley v. Dockery*, 771.

No substitute for appeal, *Concrete Supply Co. v. Ramseur Baptist Church*, 658.

RULE AGAINST PERPETUITIES

Trust provision, *Thornhill v. Riegg*, 532.

SAFETY PROGRAM

Termination for failure to comply with, *Allen v. Weyerhaeuser, Inc.*, 205.

SALES TAX

Cash discount, *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 150.

SAWED-OFF SHOTGUN

Possession of, *S. v. Fennell*, 140.

SCHOOL DRIVEWAY

Persons turning around in as licensees, *Yates v. J. W. Campbell Electrical Corp.*, 354.

SCHOOL FOR THE DEAF

Injury in shop class, *Payne v. N.C. Dept. of Human Resources*, 309.

SEARCHES AND SEIZURES

Investigatory stop and search, *S. v. Drewyore*, 283.

SERVICE OF PROCESS

By publication, *Snead v. Foxx*, 723.

SETTLEMENT AGREEMENT

Subject to rescission because of mistake, *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 270.

SEVERANCE PAY

Termination for cause, *Daily v. Mann Media, Inc.*, 746.

SHOP CLASS

Injury in, *Payne v. N.C. Dept. of Human Resources*, 309.

SIGN

Prohibited, *Raleigh Place Assoc. v. City of Raleigh*, 217.

SILENCE

Instruction on defendant's, *S. v. Williams*, 627.

SIMILAR ACCIDENT

Admissibility of evidence, *Smith v. Pass*, 243.

SOVEREIGN IMMUNITY

Claim by heating and air conditioning contractor, *Bolton Corp. v. State of North Carolina*, 596.

Negligent issuance of I.D. card, *Talbot v. N.C. Dept. of Transportation*, 446.

SPEEDY TRIAL

Resentencing, *S. v. Avery*, 572.

SPRINKLER SYSTEM

Failure to drain low points, *River Hills Country Club v. Queen City Sprinkler Corp.*, 442.

STATUTE OF LIMITATIONS

Assault and negligence actions, *Vernon v. Barrow*, 642.

STATUTE OF LIMITATIONS —**Continued**

- Equitable estoppel, *Duke University v. St. Paul Mercury Ins. Co.*, 663.
- Gasoline contamination of well water, *Wilson v. McLeod Oil Co.*, 479.
- Insurer's action for legal malpractice, *Nationwide Mutual Ins. Co. v. Winslow*, 413.
- Not tolled by letter, *American Multimedia, Inc. v. Freedom Distributing, Inc.*, 750.
- Professional malpractice action by minor, *Osborne v. Annie Penn Memorial Hospital*, 96.

STRESS EVALUATION TEST

- Evidence not prejudicial, *S. v. Hinton*, 683.

SUMMARY JUDGMENT

- Appeal after verdict, *Douglas v. Doub*, 505.
- Immediately appealable, *DeHaven v. Hoskins*, 397.

SUN

- Effect at accident scene, *Smith v. Pass*, 243.

TAX STATUTE

- Standing of county to raise constitutionality, *In re Appeal of Moravian Home, Inc.*, 324.

TERMINATION OF PARENTAL RIGHTS

- Mental capacity of mother, *In re Scott*, 760.

THIRD PARTY BENEFICIARY

- Heating and air conditioning contractor was not, *Bolton Corp. v. State of North Carolina*, 596.

TRACTOR

- Destroyed by fire, *Barnes v. Ford Motor Co.*, 367.

TRAILER

- Negligence in unhitching, *Butt v. Go-forth Properties, Inc.*, 615.

TRUCK DRIVER SCHOOL LICENSE

- Cancellation of, *Charlotte Truck Driver Training School v. N.C. DMV*, 209.

TRUST

- Distribution of assets to surviving trustees, *Fisher v. Melton*, 729.
- One provision void, remainder valid, *Thornhill v. Riegg*, 532.
- Rule against perpetuities, *Thornhill v. Riegg*, 532.

UNFAIR TRADE PRACTICES

- Attorney fees, *Love v. Keith*, 549.
- Breach of contract to construct log house for stated sum, *Quate v. Caudle*, 80.
- Defective heating system, *Russell v. Baity*, 422.
- Interest expenses as damages, *Quate v. Caudle*, 80.
- Interest on trebled damages, *Love v. Keith*, 549.
- Refusal to pay life insurance proceeds, *Barber v. Woodmen Of The World Life Ins. Society*, 340.
- Sale of beachfront property, *Blackwell v. Dorosko*, 637.
- Sale of condominium, *Douglas v. Doub*, 505.
- Sale of house, *Love v. Keith*, 549.
- Soft drinks, *Owens v. Pepsi Cola Bottling Co.*, 47.

USED CAR LOT

- Zoning violation, *Town of Knightdale v. Vaughn*, 649.

UTTERING FORGED CHECKS

Sufficiency of evidence, *S. v. Sanders*, 494.

VERDICT

Not coerced by court's instruction, *S. v. Green*, 558.

Unilaterally reduced by judge, *Jorgensen v. Seeman*, 767.

WAREHOUSE RECEIPT

Household goods descriptive inventory, *Tate v. Action Moving & Storage*, 541.

WARRANTIES

Heating system, *Russell v. Baity*, 422.

Installation of roof, *Lormic Development Corp. v. North American Roofing Co.*, 705.

WELL WATER

Gasoline contamination of, *Wilson v. McLeod Oil Co.*, 479.

WILLS

Construction of survivor, *NCNB v. Apple*, 606.

Residuary clause, *NCNB v. Apple*, 606.

WORKERS' COMPENSATION

Plaintiff's testimony not credible, *Hunt v. Scotsman Convenience Store*, 620.

Statutes in effect at time of disability controlling, *Peace v. J. P. Stevens Co.*, 129.

WRONGFUL DEATH

Evidence of criminal prosecution, *Young v. Warren*, 585.

Evidence of victim's possession of firearm and blood alcohol level, *Young v. Warren*, 585.

WRONGFUL DISCHARGE

Use of self-defense with violent subordinate, *McLaughlin v. Barclays American Corp.*, 301.

ZONING

Buffer zone, *P.A.W. v. Town of Boone Bd. of Adjustment*, 110.

Used car lot, *Town of Knightdale v. Vaughn*, 649.

Variance, *In re Application for Variance*, 182.

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