NORTH CAROLINA COURT OF APPEALS REPORTS

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CITE THIS VOLUME
96 N.C. App.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. FRANK DOUGLAS EVERHARDT

No. 8925SC29

(Filed 17 October 1989)

1. Constitutional Law § 51 (NCI3d) — speedy trial — constitutional issue — prosecution delay — no prejudice

The trial court did not err by denying defendant's motion to dismiss charges of assault with a deadly weapon inflicting serious injury on constitutional speedy trial grounds where the alleged crime occurred in July 1984; the victim did not report it until the summer of 1987; the police did not interview defendant until August of 1987; a warrant was not procured until November 1987; defendant was indicted in February 1988; and the trial, originally set for June 1988, began on 15 September 1988. Defendant did not point to any evidence that law enforcement officials deliberately or unnecessarily delayed prosecution in order to gain some tactical advantage over defendant and did not demonstrate that the delay actually prejudiced the conduct of his defense.

Am Jur 2d, Criminal Law §§ 849 et seq.

2. Criminal Law § 224 (NCI4th)— Speedy Trial Act—continuances—no violation

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by denying defendant's motion to dismiss under N.C.G.S. § 15A-701 where the trial occurred more than 120 days after indictment only because of continuances; defendant sought one of those delays; the State sought the other two continuances because of crowded dockets and the unavailability of essential State witnesses; and only 80 days ran against the 120-day limit when the periods of time due to continuances were excluded. Parenthetically, N.C.G.S. §§ 15A-701 through 15A-704 were repealed effective 1 October 1989.

Am Jur 2d, Criminal Law §§ 849 et seq.

3. Assault and Battery § 11.1 (NCI3d)— indictment—deadly weapon—sufficiently alleged

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant's sexual assault on his wife by not dismissing the indictment for lack of specificity where, although the indictment alleged that defendant assaulted his wife with a table leg and other objects such as a drink bottle and the evidence tended to show that defendant assaulted her with the leg of a footstool, the difference was more in semantics than in substance; the indictment sufficiently alleged the deadliness of the drink bottle to place defendant on notice of the prosecution; and defendant failed to cite any authority and so abandoned an issue regarding the time period described by the indictment. N.C. Rules of Appellate Procedure, Rule 28(b)(5).

Am Jur 2d, Indictments and Informations §§ 261-263, 266.

4. Assault and Battery § 14.3 (NCI3d)— sexual assault—deadliness of weapons—evidence sufficient

The trial court did not err by failing to dismiss for insufficient evidence the charge of felonious assault with a deadly weapon inflicting serious injury where defendant sexually assaulted his wife with a cola bottle and a six to eight-inch footstool leg. The issue of deadliness was for the jury.

Am Jur 2d, Assault and Battery §§ 48-55.

5. Assault and Battery § 14.3 (NCI3d); Rape and Allied Offenses § 5 (NCI3d)— assault with a deadly weapon inflicting serious injury—sexual assault—psychological trauma—physical injury

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by allowing the jury to determine that defendant's sexual assaults on his wife with various objects while she was bound hand and foot caused serious physical or bodily injury where the State presented the victim's testimony, testimony by treating physicians and by other experts which tended to prove that the trauma to the victim at the time was both mental and physical; the gravity of the physical injury did not become apparent until well after the incidents; and there was evidence of severe depression, insomnia, anorexia nervosa and severe, chronic headaches. Serious physical injury may be proven even when it is not evident immediately upon the impact of the assault; case law and medical science recognize that physical injury may later manifest itself as a result of psychological trauma.

Am Jur 2d, Assault and Battery §§ 48-55.

6. Assault and Battery § 14.3 (NCI3d)— sexual assault—proximate cause of injuries

In a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant's sexual assaults on his wife, the State provided adequate proof that defendant's actions in 1984 proximately caused mental distress which led to mental and physical conditions for which the victim was first treated in January 1985 and hospitalized in September 1985.

Am Jur 2d, Assault and Battery §§ 48-55.

7. Criminal Law § 34.4 (NCI3d)— sexual assault on wife—prior assaults—admissible to show lack of consent

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant's sexual assaults on his wife by admitting testimony that defendant had violently abused his wife for years. N.C.G.S. § 8C-1, Rule 404(b) permits admission of extrinsic conduct evidence so long as the evidence is relevant for some purposes other than to prove the defendant had the propensity to commit the act for which he is being tried; in this case, the State sought to prove that, because of the victim's fear arising from

other abuse, her failure to leave the husband's home should not be construed as consent to his abuse. Moreover, the same or like evidence was later admitted without defendant's objection.

Am Jur 2d, Assault and Battery § 67; Evidence § 366.

APPEAL by defendant from *Ferrell (Forrest A.), Judge.* Judgment entered 15 September 1988 in Superior Court, CATAWBA County. Heard in the Court of Appeals 30 August 1989.

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

Christian, Houck, Sigmon & Green, by Daniel R. Green, Jr., for defendant-appellant.

GREENE, Judge.

This is an appeal by defendant from his conviction of assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32(b). The trial court imposed a ten-year sentence.

The State's evidence tended to show that the defendant, Frank Douglas Everhardt, married the wife-victim in July 1974 and they were divorced in October 1985. According to Ms. Everhardt, they separated on 21 July 1984 due to events which occurred the week before.

On 15 July 1984, after preparing supper, bathing their two children and putting them to bed, Ms. Everhardt went to bed. Before she could fall asleep her husband came home drunk, and demanded she get up. When she failed to respond to his demand that she "wake up bitch," he dragged her from the bed by her hair and bashed her head against the floor. While she lay crying he acquired some rope from an adjacent porch and tied her hands and feet separately to the top and bottom of the bed. The defendant then pointed a loaded pistol to her head and said: "If you scream bitch, I will blow your brains out." He then ripped off her clothing and forcibly inserted a six to eight inch footstool leg into her vagina for ten to fifteen minutes. While she still lay bound, he forced her to have vaginal and oral sex. After smoking a cigarette, he untied her. The defendant threatened to kill her if she ever told anyone. That night Ms. Everhardt slept on the couch, and the next day she managed to go to work as usual.

On the next evening the defendant, apparently drunk, again tied Ms. Everhardt to the bed and threatened her with the pistol. The defendant then used a syringe to inject liquor into her vagina for a period of ten to fifteen minutes. He commented when he finished that "I have never seen a drunk pussy before." During this time the defendant repeatedly threatened to kill her and told her that she was stuck with him for the rest of her life since he would make it so that no other man would want her. The next day Ms. Everhardt again managed to go to work.

On the third evening the defendant again tied Ms. Everhardt spread-eagle to the bed and held the gun to her head. He then inserted a cucumber and cola bottles into her vagina. After inserting the cucumber in her vagina, he forced it into her mouth. After forcing her to submit to vaginal sex, the defendant untied her and forcibly pushed her off the bed onto the floor. Ms. Everhardt again slept on the couch and stoically went to work the next day.

On the fourth night, the defendant again tied Ms. Everhardt to the bed, threatening her with the gun. He again inserted the footstool leg into her vagina, with more angry force than on the earlier occasion. He then burned her vagina with a cigarette lighter. During this time he again threatened her and told her he would "fix" her so that no other man would want her. The next day Ms. Everhardt again managed to go to work.

On the fifth evening the defendant attacked Ms. Everhardt in the kitchen where she was preparing supper. Grabbing her by the hair of her head, he threw her to the floor and bashed her head against the floor and dragged her about the house. He then relented long enough for her to put the kids to bed while he watched television. The defendant then tied her, again placing the pistol to her head. He inserted various vegetables into her vagina, including cucumbers, carrots and olives. He then forced her to eat these vegetables. Leaving her tied to the bed, the defendant ate the supper she had prepared for him, all the while laughing and saying how he would fix her so that no one else would want her. After he finished eating, he forced her to have vaginal and oral sex before untying her. Again she sought respite, sleeping alone on the couch.

On the sixth night the defendant again tied Ms. Everhardt, threatened her with the pistol, and forcibly had vaginal and oral sex. Leaving her tied, he then went to the kitchen and got a

plate of spaghetti which Ms. Everhardt had been preparing for supper. As she was compelled to watch, he then masturbated and ejaculated on the spaghetti and forced it into her mouth with a fork, making her eat it. He then inserted a curling iron in her vagina. During all of this, the defendant made statements similar to those of the previous night, and told her she was ugly and was a "pile of shit." After this abuse went on for what "seemed like forever," the defendant left her bound for an hour before returning to untie her. Ms. Everhardt testified that after being untied: "I locked the bathroom door and I threw up and I laid on the bathroom floor and I cried, cried and cried and I knew that I could not stand to live with him anymore and I could not take it anymore."

Ms. Everhardt's sixteen-year-old son testified that in July of 1984 he was eleven or twelve years old. During the week in question, he awakened on two nights and went to the doorway of his parents' bedroom. Each night he saw Ms. Everhardt tied to the bed while the defendant sexually abused her in the manner discussed above. The child heard her pleading for the defendant to leave her alone while the defendant cursed her and threatened to kill her.

The next day Ms. Everhardt and the children moved. She testified she feared the defendant might carry out his threat of killing her, and she also feared for her children's safety. She also feared the defendant because of "years and years of physical violence," although the events of July 1984 were of a different order and degree of abuse compared to earlier occurrences.

Following the incidents of July 1984, Ms. Everhardt felt like she was "the lowest person on the face of the earth," a "nobody." She had no self-esteem and no confidence. She was afraid and ashamed, and she feared that she had done something to cause the abuse the defendant visited upon her.

Ms. Everhardt had been the victim of abuse from childhood through much of her life. An earlier husband had beaten her so badly that in the mid-seventies she required brain surgery to remove damaged nerves, and in 1972 she attempted suicide. Prior to July 1984, she had received psychological counseling from time to time.

After leaving the defendant in July 1984, Ms. Everhardt lived with her mother. In January 1985, Ms. Everhardt entered the First Step Program, a program for victims of spousal abuse directed

by Angela Phillips. This program provided both individual and group counseling. Ms. Phillips testified that upon entering the program Ms. Everhardt was "very weak emotionally and physically," very timid, frightened, ashamed and subdued.

Ms. Everhardt testified that due to the abuse of July 1984, her mental and physical condition had so deteriorated by September 1985 that she was admitted to Catawba Memorial Hospital of Hickory for two weeks. Dr. Phillip Schmitt, her treating psychiatrist, testified as such and as an expert in clinical psychiatry. He described her condition as severely depressed, suicidal, insomnic, anxious and anorexic. He also noted she was subject to chronic, severe headaches. Dr. Schmitt also testified that symptoms such as Ms. Everhardt's could follow traumatic stress, and a substantial delay in the reaction is not uncommon. Dr. Schmitt testified that Ms. Everhardt's mental and physical conditions were related to the sexual and physical abuse by the defendant.

Ms. Everhardt was next hospitalized in December 1986 at Frye Regional Medical Center in Hickory where Dr. Carlos de la Garza, Medical Director of the Eating Disorder Unit, diagnosed her as suffering from anorexia nervosa with severe depression. He described her as "severely malnourished," and he stated that this condition is usually related to past abuse. He testified that often anorexia nervosa victims subconsciously seek to make themselves sexually unattractive by starvation. He testified that "she wanted to be sexually unattractive because in the past she had been abused sexually and she felt that [her sexual attractiveness] was the cause of that [the abuse]."

Beginning in May 1987, Ms. Everhardt was counseled by Roland Mullinax, a clinical social worker at the Family Guidance Center in Hickory. The trial court qualified him as an expert in clinical social work and family therapy. Mr. Mullinax described Ms. Everhardt in May 1987 as suffering from eating and sleeping disorders, low self-esteem and under high stress. Mr. Mullinax stated that his treatment, which continued up to the week before trial, resulted in substantial improvement in her condition.

Frank Everhardt denied all of Ms. Everhardt's accusations. He testified that he had left his wife on 13 July 1984, and by 16 July 1984 he was living in another apartment with a new girlfriend, Diana Williams. The defendant failed to procure Diana Williams' testimony even though he had been in contact with her until a

few months before trial. Also, the defendant denied ever having abused Ms. Everhardt. However, he admitted expressing a desire, to more than one person, to tie her and the police investigator to the back of his pickup truck in order to drag them down a highway. Lastly, the defendant testified that he had been convicted of driving while license revoked, driving while license permanently revoked, larceny of an automobile and driving under the influence.

The issues presented are: I) whether the defendant's statutory and constitutional rights to a speedy trial were violated; II) whether the indictment alleged the crime with sufficient specificity; III) whether the State offered sufficient evidence for the jury to find the defendant guilty of assault with a deadly weapon causing serious physical injury; IV) whether evidence of prior assaults by defendant was improperly admitted.

I

[1] The defendant argues the trial court erred in denying defendant's motion to dismiss all charges on the grounds that defendant was not afforded a speedy trial as required by N.C.G.S. § 15A-701 (1988) and the United States Constitution.

A

The defendant apparently bases his constitutional claim on pre-indictment delays, and he thus asserts abuse of his due process rights. "Essentially a pre-accusation delay violates due process only if the defendant can show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *State v. McCoy*, 303 N.C. 1, 7-8, 277 S.E.2d 515, 522 (1981).

The defendant notes that although the alleged crime occurred in July 1984, the victim did not report it until the summer of 1987, the police did not interview the defendant until August 1987, the police did not procure a warrant until November 1987, and the defendant was finally indicted in February 1988. The trial, originally set for June 1988, began on 15 September 1988.

The defendant fails, however, to satisfy either part of the *McCoy* test. First, the defendant has not pointed to any evidence that law enforcement officials deliberately or unnecessarily delayed

prosecution in order to gain some tactical advantage over the defendant. Second, even so, the defendant has not demonstrated the "delay actually prejudiced the conduct of his defense . . . ."

The defendant argued unconvincingly that the State's delays prejudicially resulted in the loss of two essential witnesses. One of these witnesses, the defendant's mother, died on 28 June 1987. She died before the State began its investigation, and thus any hesitancy of the State could not have affected her availability. The other potential witness was Diane Williams, the woman with whom defendant claims to have been living in July 1984. Certainly her testimony would have been significant had it tended to prove an alibi, but we have no way of knowing whether the trial delay itself resulted in the absence of this witness. The defendant served this witness a subpoena for the trial initially scheduled 6 June 1988. However, when the re-scheduled trial occurred, she was nowhere to be found. The defendant has not indicated why she became unavailable. In sum, the defendant was afforded due process of law.

B

[2] Defendant's N.C.G.S. § 15A-701 (1988) argument also fails. The trial occurred more than 120 days after indictment only because of continuances. The defendant sought one of these delays. Two other delays occurred as a result of continuances granted at the State's request. The State sought continuances because of crowded dockets and the unavailability of an essential State witness.

"While the burden of proof in supporting a motion to dismiss remains with the defendant, the State has the burden of going forward with evidence to show that periods of time should be excluded from the computation." *State v. Kivett*, 321 N.C. 404, 408, 364 S.E.2d 404, 406 (1988).

We find the State's motions for continuances and the orders granted thereon contained facially valid reasons for continuance, and the orders contained "the mandatory finding that the ends of justice served by granting the continuances outweigh the best interest of the public and the defendant in a speedy trial." *Kivett*, 321 N.C. at 408, 364 S.E.2d at 407. Thus, the periods of time which passed because of the continuances were properly not counted in the computation of the number of days between indictment and trial. Although 206 days passed between indictment (22 February

1988) and trial (15 September 1988), only 80 days ran against the 120-day time limit because of three consecutive continuances beginning 10 May 1988 and ending 13 September 1988. Therefore, no N.C.G.S. § 15A-701 violation occurred.

Parenthetically, we note that effective 1 October 1989, the 1989 General Assembly repealed Article 35 of Chapter 15A (N.C.G.S. §§ 15A-701 through 15A-704). 1989 S.L. Ch. 688, s.1.

II

[3] The defendant also argues the trial court should have dismissed the indictment for lack of specificity. To place a criminal action before the jury, the State must first have alleged the crime with sufficient specificity in the indictment. *State v. Pallet*, 283 N.C. 705, 198 S.E.2d 433 (1973). The jury here convicted the defendant upon an indictment that alleged "on or about the 15-20th day of July, 1984 . . . the defendant . . . unlawfully, willfully and feloniously did assault . . . [Ms.] Everhardt with a table leg, a deadly weapon, by repeatedly inserting it and other foreign objects such as drink bottles into the vagina of . . . [Ms.] Everhardt while she was bound hands and feet with a rope, inflicting serious injury."

The defendant argues the indictment did not specify any deadly weapon which was proven in evidence. "[I]t is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon." *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977).

The defendant asserts the indictment was faulty since it alleged he assaulted the victim with a "table leg," and the evidence tended to show the defendant assaulted Ms. Everhardt with the leg of a footstool. This is more a difference in semantics than in substance. The defendant had fair warning that the State sought to prosecute him for assaulting his wife with the leg of a piece of furniture, and the State explicitly called it a deadly weapon and provided the approximate date on which the assault occurred. We have no doubt the defendant was fully aware of the nature of the crime the State sought to prove.

Regarding the "drink bottles" mentioned in the indictment, we also conclude the indictment sufficiently alleged deadliness of

these objects to place the defendant on notice of the prosecution. The indictment states the defendant assaulted Ms. Everhardt with a deadly weapon by inserting the furniture leg *and* other objects such as *drink bottles* into her vagina. While the indictment may not be the model of clarity, it does "charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense. . . ." *Pallet*, 283 N.C. at 708, 198 S.E.2d at 434.

The defendant also raises an issue regarding the time period described by the indictment during which the criminal acts were alleged to have occurred. Since the defendant failed to cite any authority, this assignment of error is deemed abandoned. North Carolina Rule of Appellate Procedure 28(b)(5).

III

[4] The defendant also argues the trial court erred in failing to dismiss for insufficient evidence the charge of felonious assault with a deadly weapon inflicting serious injury. "If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

A

We first address whether sufficient evidence of use of a deadly weapon was placed before the jury. A deadly weapon is:

> Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . . . The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.
>
> Where the alleged deadly weapon and the manner of its use are of such character as to admit but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the court must take the responsibility of so declaring.

State v. Smith, 187 N.C. 469, 470, 121 S.E. 737 (1924) (citations omitted). However, "[i]f there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or

as used would not likely produce death or great bodily harm and the other evidence tending to show the contrary, the jury must, of course, resolve the conflict." *Palmer*, 293 N.C. at 643, 239 S.E.2d at 413.

Regarding the deadly character of the drink bottles, we find the evidence presented clearly placed the issue before the jury. A cola bottle is "an instrument which, depending on its use, may or may not be likely to produce great bodily harm . . . ." *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) (cola bottle inserted into victim's rectum).

Similarly, we are unable to hold that a six to eight inch stool leg, and "the manner of its use" compel a conclusion that it was not a deadly weapon. The issue of the deadliness of the stool leg was for the jury.

B

[5] The defendant also contends the trial court erred in allowing the jury to determine that the defendant's assault caused serious injury since the State presented no evidence of physical harm.

"The term 'inflicts serious injury,' under G.S. 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon." *Joyner*, 295 N.C. at 65, 243 S.E.2d at 373 (citing *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962)). "Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question which the jury must decide under proper instructions." *Id.* The State's failure to provide any evidence of physical or bodily injury may preclude the jury from deciding the issue. *Id.*

The State contests this last statement, citing *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982) for the proposition that serious injury may also be proven by showing serious mental injury. The Court in *Boone* decided that "serious personal injury" as used in N.C.G.S. § 14-27.2 *et seq.* may be established on proof of mental injury in order to raise the severity of rape and sexual offense cases from second to first degree. In so holding, the Supreme Court noted that the state legislature had redefined first degree rape to include the language "serious personal injury," in place of the former language "serious bodily injury." 307 N.C. at 202, 297 S.E.2d at 588. The Supreme Court explicitly limited its holding to the rape statute. 307 N.C. at 204, 297 S.E.2d at 589.

While "a wrecked nervous system" is often considerably more painful and enduring than "wounded or lacerated limbs," *May v. Western Union Telegraph Co.*, 157 N.C. 416, 422, 72 S.E. 1059, 1061 (1911), this court is not at liberty to extend the *Boone* decision to the interpretation of N.C.G.S. § 14-32. The language of N.C.G.S. § 14-27.2, "serious personal injury," and the legislative context in which it arose, differs substantially from the language of N.C.G.S. § 14-32, "serious injury." Further, in *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988), the Court continued to adhere to the "physical or bodily" interpretation for N.C.G.S. § 14-32, explicitly accepting earlier case law which the Court had rejected in *Boone* in application to N.C.G.S. § 14-27.2.

We do, however, determine the State presented sufficient evidence of physical or bodily injury. The State presented the victim's testimony, testimony of treating physicians and of other experts which tended to prove the trauma to Ms. Everhardt at the time of the incident was both mental and physical. However, the gravity of the physical injury incurred did not become apparent until well after the incident. The State's case included evidence of severe depression, insomnia, anorexia nervosa, and severe, chronic headaches.

In Dorland, *Medical Dictionary* (26th ed. 1985), depression is defined as "a psychiatric syndrome consisting of dejected mood, psychomotor retardation, insomnia, and weight loss . . . ." Psychomotor retardation means "underactivity of both mind and body . . . ," and more specifically, psychomotor pertains "to *motor effects* of cerebral or psychic activity." (Emphasis added.)

Insomnia is an "inability to sleep; abnormal wakefulness." Anorexia nervosa is "a psychophysiologic condition . . . characterized by severe and prolonged inability or refusal to eat, sometimes accompanied by spontaneous vomiting, extreme emaciation, amenorrhea (impotence in males), and other biological changes." Psychophysiologic pertains "to psychophysiology; having bodily symptoms of a psychogenic origin." Psychogenic means "having an emotional or psychologic origin (in reference to a symptom), as opposed to a physicogenic, or organic basis." Lastly, psychophysiology is "the science that deals with the relationship between psychologic and physiologic processes."

As the definitions indicate, the case at hand requires at least a superficial venture into psychophysiology. Such ventures are not

unknown to North Carolina jurisprudence. An instructive example is *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), a civil action for intentional infliction of emotional distress. The elements of the civil cause of action are reminiscent of the criminal case at hand since here also we have extreme and outrageous conduct, intended to cause and causing severe emotional distress. Significantly, the Court there held that "[r]ecovery may be had for the emotional distress so caused *and* for any other *bodily* harm which proximately results from the distress itself." *Dickens*, 302 N.C. at 452-53, 276 S.E.2d at 335 (emphasis added). Neither immediate physical injury nor foreseeability were required. *Id.* Indeed, we also see a psychophysiologic observation in Restatement (2d) of Torts Sec. 46, Comment k, regarding intentional infliction of emotional distress. "Normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe."

N.C.G.S. § 14-32(b) punishes an assailant only where the victim incurs serious physical or bodily injury. Physical injury is certainly something more than emotional distress. *See Dickens*, 302 N.C. at 448, 276 S.E.2d at 332 (dictum). We hold that serious physical injury may be proven even when it is not evident immediately upon the impact of the assault. Case law and medical science recognize that physical injury may later manifest itself as the result of psychological trauma.

The seriousness of the injury was properly before the jury. When an injury may or may not be serious "depending upon its severity and the painful effect it may have on the victim," the issue is for the jury to determine upon "the particular facts of each case." *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 628 (1964). Here the victim endured considerable physical pain and was hospitalized for her condition. These are two factors to be considered in determining whether an injury is serious. *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983).

The pain of Ms. Everhardt's severe, chronic headaches could be a serious physical injury. Whether a headache results from a blow to the head or a blow to the psyche is legally irrelevant since either headache may feel the same physically to the victim, and here we are concerned only with whether the victim experiences a serious physical injury. Further, insomnia is a physical as well as a mental phenomenon, and a jury could properly find it to be

a serious injury. Anorexia nervosa is by definition both physical and mental, and ample evidence was available to the jury that the victim here suffered physical emaciation therefrom. Lastly, depression involved psychomotor retardation which has to do with the physical manifestations of the depressed mental condition. From this evidence we find the State established the victim incurred physical or bodily injury. We are unable to state, as a matter of law, that these injuries are *per se* not serious. Thus, the issue was properly placed before the jury to determine whether any of these injuries were serious. *Ferguson*, 261 N.C. at 560, 135 S.E.2d at 628.

C

[6] The defendant also argues the State provided inadequate proof that his actions in July 1984 proximately caused mental distress which led to the mental and physical conditions for which Ms. Everhardt was first treated in January 1985 and hospitalized in September 1985. North Carolina homicide cases are instructive on the principles of causation applicable in criminal law:

> To warrant a conviction in this case, the State must establish that the acts of the defendants were a proximate cause of the death. "[T]he act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act." *State v. Minton*, 234 N.C. 716, 722, 68 S.E.2d 844, 848 (1952); *State v. Everett*, 194 N.C. 442, 140 S.E. 22 (1927). There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death. *State v. Luther*, 285 N.C. 570, 206 S.E.2d 238 (1974); *State v. Horner*, 248 N.C. 342, 103 S.E.2d 694 (1958).

State v. Cummings, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980). *See generally* Torcia, 1 *Wharton's Criminal Law* § 26 (14th ed. 1978); 22 C.J.S. *Criminal Law* § 45 (1989).

To prove causation the State must prove (1) that defendant's actions caused the mental distress, and (2) the mental distress led to the physical conditions later experienced. *See Kimberly v. Howland*, 143 N.C. 399, 404, 55 S.E. 778, 780 (1906) (civil action for physical injuries manifesting themselves after "nervous shock" caused by defendant's negligence). As the preceding paragraphs indicate, in principle, nothing prevents the State from proving its

case by such a chain of causation. *See generally* 38 Am. Jur. 2d *Fright, Shock, and Mental Disturbance* §§ 13-24 (1968). Proof in fact here first consisted of the victim's own testimony. *Cf. Scott v. State*, 169 Ga. App. 710, 314 S.E.2d 718 (1984) (victim's testimony as to injury and treatment admissible to prove aggravated assault). Ms. Everhardt testified as to the devastating emotional effects of the defendant's abuse. Also, she testified, without objection, that her later mental breakdown with the associated physical illnesses was the result of the incidents of 1984.

The jury, having heard the details of Ms. Everhardt's ordeal and having heard Ms. Everhardt's testimony of its emotional impact, had sufficient evidence from which to determine Ms. Everhardt immediately incurred severe psychological injury from the defendant's abuse. Expert testimony was not necessary since the issue presented is not "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion. . . ." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965). In other words, the defendant's actions were so outrageously abusive that the jury was not faced with a complicated medical question in determining those actions caused the victim severe psychological harm.

Proving the next link in the causal chain perhaps would have been more difficult in the absence of expert testimony. However, we need not decide whether the victim's testimony would have sufficed alone. The State also presented expert testimony to the effect that Ms. Everhardt's mental condition and the physical symptoms associated therewith could have been caused by traumatic abuse such as Ms. Everhardt experienced. "Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc." *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 541, 42 S.E. 983, 985 (1902). Here the jury had the victim's detailed account of these factors as well as the expert testimony of Drs. Schmitt and de la Garza relating her physical conditions to physical and sexual abuse.

The defendant argues the jury would have no basis for determining whether Ms. Everhardt's physical symptoms were the result of the abuse of July 1984 or the abuse and stress she underwent in earlier years. However, the State was not required to prove that Ms. Everhardt's physical condition absolutely could not have

been caused by something other than the events of July 1984. It was only required to prove beyond a reasonable doubt that the defendant's abuse in July 1984 caused her eventual mental breakdown and physical injuries. *See State v. Minton*, 234 N.C. 716, 721, 68 S.E.2d 844, 847 (1952) (homicide case); *see also Cummings*, 301 N.C. at 377, 271 S.E.2d at 279. The jury could reasonably have found that some preexisting mental condition or instability could have been aggravated by the abuse of July 1984, thus causing serious injury.

> The consequences of an assault which is the direct cause of the death of another are not excused nor is the criminal responsibility for the death lessened by a preexisting physical condition which made the victim unable to withstand the shock of the assault and without which preexisting condition the blow would not have been fatal.

State v. Atkinson, 290 N.C. 673, 682, 259 S.E.2d 858, 864 (1979), *overruled on other grounds*, 302 N.C. 101, 273 S.E.2d 666 (1981) (citations omitted); *see also* 22 C.J.S. *Criminal Law* § 45 (one whose act results in a criminal offense is guilty of the crime even though a concurrent cause is an "existent infirmity" of the victim).

IV

[7] The defendant also argues the trial court erred to the defendant's prejudice by admitting evidence of assaults occurring prior to those for which the defendant was tried. Indeed, Ms. Everhardt testified the defendant had violently abused her for years.

North Carolina Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

North Carolina Rule of Evidence § 404(b) (1988).

This list of other purposes is nonexclusive, and thus evidence not falling within these categories may be admissible. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). Rule 404(b) permits admission of extrinsic conduct evidence so long as the evidence is relevant for some purpose other than to prove the defendant

has the propensity to commit the act for which he is being tried. *Id.* The record clearly reflects the State sought admission of prior acts to explain Ms. Everhardt's failure to move out. Specifically, the State sought to prove that because of her fear arising from earlier abuse, Ms. Everhardt's failure to leave her husband's home should not be construed as consent to his abuse. In *State v. Young*, 317 N.C. 396, 413, 346 S.E.2d 626, 636 (1986), the Court held evidence of victim's knowledge of defendant's prior acts "may be admitted to show that the victim's will had been overcome by her fears for her safety where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim." In most cases the victim's consent would likely be irrelevant to enforcement of N.C.G.S. § 14-32(b). However, in the peculiar case at hand, evidence of the victim's consent to the sexual abuse with potentially deadly weapons could well have negated the State's ability to prove serious injury occurred. Had the victim consented to the abuse, the State would have had great difficulty proving the defendant's acts resulted in psychological trauma which manifested itself in serious physical injury.

Although admissible under Rule 404(b), the probative value of this evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). This issue is a "matter within the sound discretion of the trial court, 'and his ruling may be reversed for an abuse of discretion only upon a showing that it "was so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988) (citations omitted). Here the record shows no abuse of discretion by the trial court in admitting this evidence.

Additionally, the same or like evidence was later admitted without defendant's objection. Accordingly, the defendant's objection to the admission of testimony regarding such prior assaults and physical abuse is waived, and no prejudicial error results by reason thereof. *See State v. Tysor*, 307 N.C. 679, 300 S.E.2d 366 (1983).

Lastly, the defendant's two remaining assignments of error relate to evidentiary matters. Since the defendant failed to present any substantive argument or citation on these issues, the assignments of error are deemed abandoned. North Carolina Rule of Appellate Procedure 28(b)(5). Nevertheless, we have examined these issues and found them without merit.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. WILLIAM DICKSON MAXWELL

No. 8815SC784

(Filed 17 October 1989)

1. **Rape and Allied Offenses § 4.1 (NCI3d)— rape and taking indecent liberties with minor—attempt to show defendant as sexual deviant—evidence improperly admitted**

In a prosecution of defendant for taking indecent liberties with a minor, his adopted daughter, and first degree statutory rape, the trial court erred in admitting evidence of defendant's frequent nudity, his frequent fondling of himself, and an adulterous affair, since the testimony was not evidence of defendant's plan or scheme to take advantage of his daughter; there was no medical or other physical evidence presented by the State in support of the prosecutrix's claims and no eyewitnesses so that the outcome of the case depended upon the jury's perception of the truthfulness of each witness; and the evidence, which was of questionable relevance and tended to make defendant appear to be a sexual deviant, could inflame the jury and cause a verdict to be entered on an improper basis. N.C.G.S. § 8C-1, Rules 403 and 404(b).

Am Jur 2d, Rape §§ 65, 67, 95.

2. **Criminal Law § 35 (NCI3d)— rape and taking indecent liberties with minor—prosecutrix's prior accusation against uncle—evidence improperly excluded**

In a prosecution of defendant for taking indecent liberties with a minor, his adopted daughter, and first degree statutory rape, the trial court erred in excluding evidence regarding a prior accusation of sexual misconduct made by the prosecutrix directed at her uncle, since it was error to exclude defendant's evidence which could show a possible alternative explanation about the crime with which he was charged.

Am Jur 2d, Rape § 87.

3. Criminal Law § 89.3 (NCI3d)— corroborating witnesses— testimony properly admitted

There was no merit to defendant's contention that the trial court erred in allowing testimony of several witnesses for corroborative purposes when such testimony did not corroborate the testimony of prior witnesses, since some of the testimony was not objected to by defendant, and some of the testimony, though going beyond the prosecutrix's testimony, essentially corroborated the statements made by the prosecutrix.

Am Jur 2d, Rape §§ 94-99.

APPEAL by defendant from *Allen (J. B., Jr.), Judge*. Judgment entered 15 January 1988 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 21 February 1989.

Defendant was convicted on one charge of taking indecent liberties with a minor and two separate charges of first-degree statutory rape. Defendant was committed to two life sentences for the rapes, and a three-year sentence for the indecent liberties conviction. The court ordered defendant to serve the terms concurrently. From this order, defendant appeals.

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

Latham, Wood, Eagles & Hawkins, by William A. Eagles; and Singleton, Murray & Craven, by Rudolph G. Singleton, Jr., for defendant-appellant.

ORR, Judge.

Defendant's convictions relate to three separate incidents of alleged sexual abuse. The prosecutrix, who is the adopted daughter of the defendant, was 14 years old at the time she testified. She stated that in January of 1985 her mother was hospitalized for surgery. She and the oldest of her two brothers were being picked up from school and served dinner by their paternal grandparents during that period. Each evening, the two were taken home and put to bed by their father. On 3 January 1985, after the prosecutrix and her brother had been put to bed, defendant disrobed and went into the prosecutrix' room. Defendant allegedly climbed into bed

on top of her, removed her underwear and forced her to engage in sexual intercourse with him.

The prosecutrix further testified that on 30 March 1986, Easter Sunday morning, defendant entered her room wearing only a robe. He then sat on her bed and awakened her by touching her on her chest and on her vaginal area. Defendant's sexual advances were interrupted when the prosecutrix' two younger brothers entered her room and refused to leave. The prosecutrix' mother entered her room and asked defendant and the two younger children to leave. The prosecutrix then dressed and joined her family for breakfast.

The final incident allegedly occurred on 4 January 1987 after the prosecutrix' parents were separated. Defendant was babysitting for the three children while their mother was away for the day. On that evening, after all three children had been put to bed, defendant entered the prosecutrix' room and forced her to have sex with him. When the prosecutrix' mother returned, defendant left and spent the night at his parents' home.

On 24 January 1987, while the prosecutrix was on an overnight ski trip with her mother and a friend of her mother's, the prosecutrix' aunt found a letter she had written to a rock band named "Motley Crue." In this letter, the prosecutrix stated that her father had been forcing her to have sex with him since she was four years old. She also asked the band for their help. The prosecutrix' aunt told the girl's grandparents who then told the prosecutrix' mother. Her mother thereafter told James Graves, a family friend, about these alleged incidents. Mr. Graves first confronted defendant with these allegations and then contacted the Burlington Police. Thereafter, the prosecutrix was interviewed by employees from the Burlington Police Department and from the Alamance County Department of Social Services. Following an examination of the prosecutrix by a physician and a child psychologist, the defendant was arrested and charged as previously indicated.

Defendant denies all allegations of sexual misconduct. He contends that his daughter has fabricated these stories and that she is not a credible witness.

Defendant has raised 12 issues in his appeal before this Court. The first of the three issues which we address and which in part forms the basis of our decision to grant defendant a new trial

relates to the admission of prejudicial evidence. The second issue we address relating to the court's exclusion of relevant and probative information also supports our decision to grant defendant a new trial. The final issue we address which relates to the admission of corroborating testimony is discussed in this opinion due to the likelihood that this issue may arise again in defendant's new trial.

I.

[1] The first issue which we shall address is whether the trial court erred in admitting testimony of alleged prior bad acts of a sexual nature committed by defendant. Defendant argues that this testimony, which was admitted in violation of G.S. 8C-1, Rule 403, is unduly prejudicial to him. The State contends that the evidence was properly admitted pursuant to G.S. 8C-1, Rule 404(b) to show defendant's plan or scheme to take advantage of his daughter.

G.S. 8C-1, Rule 403 states: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In order to determine whether this testimony should have been admitted, the trial court was required to perform a balancing test, thereby weighing the probative value of the proffered testimony against its potential prejudicial impact on the jury. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). This decision rests within the sound discretion of the court. *Id.*

The three areas of alleged personal misconduct to which several witnesses testified are defendant's frequent nudity, his frequent fondling of himself and an adulterous affair, all of which were objected to by defendant.

In the case before us, the prosecutrix' mother testified as follows:

Q. Now during the—the time that—that you were married to Mr. Maxwell, how did he normally—what did he normally sleep in in terms of dress?

A. He slept in the nude.

MR. MESSICK: Objection.

COURT: Overruled.

Q. You may answer.

A. He slept in the nude.

. . .

Q. And was that still after the children were born?

A. Yes, sir.

Q. Now were there ever occasions when he would present himself to Shannon in the nude?

MR. MESSICK: Object.

. . .

Q. Were there ever times when you were in the room with your husband and Shannon and he had no clothes on?

A. Yes, sir.

. . .

Q. And how old was Shannon at that time?

A. At all ages.

. . .

Q. And was he still—did it still happen then when she was eleven?

A. Yes, sir.

Q. Did you ever say anything to him about it?

A. Yes, I did.

A. I felt that it wasn't proper to run around without your clothes on in front of a child her age, even the boys for that matter. I was constantly telling him that I didn't appreciate it and asking him not to do it.

Q. And what was his response?

A. That—that was the way he was going to do things and if I didn't like it too bad.

This witness further testified that defendant would go to the children's bedrooms in the nude to check on them. She stated that this situation was a "constant battle" between her and her

ex-husband. She testified that defendant would fondle himself in front of her and the children. According to her testimony, this "was a constant thing with him." She stated that defendant would use his hand and stroke his penis in the presence of the prosecutrix. When she would complain about his behavior, defendant would respond that he could do what he wanted to do in his house. The prosecutrix' mother also testified about having allegedly "caught him [defendant] with this other woman." She testified at length to having sat outside this other woman's apartment and having followed the two to a Holiday Inn. She further testified to a fist fight which took place between herself, defendant and her sister when she refused to allow him to enter their home after discovering his alleged affair.

The prosecutrix' aunt testified that the prosecutrix' mother had told her of her arguments with defendant concerning his frequent nudity and his alleged affair. Mr. Graves, a family friend, further testified that he stopped visiting defendant and his family because he could "no longer tolerate his [adulterous] behavior." He testified that defendant admitted to him that he was "running around on his wife."

After closely scrutinizing this testimonial evidence, we are unable to agree with the State's contention that this testimony was properly admitted as evidence of defendant's plan or scheme to take advantage of his daughter. The prosecutrix' mother stated that defendant regarded nudity as normal; therefore, there is no evidence that he was attempting to prepare the prosecutrix for sexual intercourse with him by "making her aware of such sexual conduct and arousing her" as was the case in *State v. Williams*, 318 N.C. 624, 632, 350 S.E.2d 353, 358 (1986). Furthermore, the *only* testimony from the prosecutrix regarding defendant's fondling of himself in her presence involved one occasion when she was younger in which she stated that she had gotten up from a nap and had gone into a room where her father was seated on the couch "playing with himself." When she entered the room, defendant told her to "get back upstairs and get in the bed." She also testified that on one other occasion when she was 11 years old, she observed her father fondling himself with a book in his lap in an attempt to hide what he was doing. She stated that she was only in the room for a "second" at that time.

There was no connection between evidence of defendant's alleged affair and the crimes with which he was charged. This evidence does not establish a plan or scheme to commit the offenses charged. In fact, it does little more than impermissibly inject character evidence which raises the question of whether defendant acted in conformity with these character traits at the times in question. *See* G.S. 8C-1, Rule 404. "[S]ubstantive evidence of a defendant's past, and distinctly separate, criminal activities or misconduct is generally excluded when its only logical relevancy is to suggest defendant's propensity or predisposition to commit the type of offense with which he is presently charged." *State v. Shane*, 304 N.C. 643, 653-54, 285 S.E.2d 813, 820 (1982). The admission of this inflammatory evidence was highly prejudicial to defendant's defense. Moreover, we find that this is essentially a case of who and what to believe—the prosecutrix' accusations or defendant's claim of innocence. There was no medical or other physical evidence presented by the State in support of the prosecutrix' claims. There were no eyewitnesses to these alleged events; therefore, the outcome of this case depended upon the jury's perception of the truthfulness of each witness. Consequently, the court's admission of evidence which could inflame the jury and cause a verdict to be entered on an improper basis, such as emotion, was prejudicial. In the absence of this extensive, highly prejudicial evidence, which was of questionable relevance and which tended to make defendant appear to be a sexual deviant, we cannot say that a different result could not have been reached. *See State v. Kimbrell*, 320 N.C. 762, 360 S.E.2d 691 (1987). Defendant has met his burden of demonstrating prejudice under G.S. 15A-1443.

II.

[2] Defendant further asserts that he was prejudiced by the court's exclusion of evidence regarding a prior accusation of sexual misconduct made by the prosecutrix directed at her uncle. The State contends that this evidence was properly excluded because there is no proof that the allegation was false, and because the allegation was made at least nine years prior to this trial. We reject the State's argument for the following reasons.

The excluded testimony related to an incident when the prosecutrix was approximately four years of age. After observing the prosecutrix masturbating, her parents asked her why she was behaving that way. She stated that her "Uncle Scott showed [her]."

Two of the charges before us today involve testimony by the prosecutrix that her father had been sexually molesting her since age four. This evidence of a previous allegation involving untoward sexual behavior perpetrated on the prosecutrix is highly relevant to the charges against defendant. If we accept her prior allegations as true, then, as the State has pointed out, the prosecutrix' excessive masturbation might have been indicative of sexual abuse. The accusation against her Uncle Scott is probative of identifying the perpetrator of that abuse. In *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), our Supreme Court stated that: " 'Any evidence calculated to throw light upon the crime charged' should be admitted by the trial court." *Id.* at 13, 366 S.E.2d at 449. The court then concluded that the trial court's exclusion of one of defendant's exhibits which could have constituted a possible alternative explanation about the crime with which defendant was charged was error. *Id.* Likewise, we find that the trial court's exclusion of this evidence was error as well.

III.

[3] The remaining issue which we shall discuss relates to whether the trial court erred in admitting the testimony of several witnesses for corroborative purposes when such testimony did not corroborate the testimony of prior witnesses. Defendant contends that the trial court erred in allowing testimony from eight witnesses to be received as substantive evidence. He claims that multiple hearsay was admitted for the purpose of corroborating statements which the witnesses had not made. Furthermore, he contends that much of the evidence was unduly prejudicial to him in violation of G.S. 8C-1, Rule 403.

> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Moreover, "[t]o be admissible as corroborative evidence, testimony of a prior statement by the witness sought to be corroborated does not have to be precisely identical to such prior testimony of that witness." *State v. Madden*, 292 N.C. 114, 128, 232 S.E.2d 656, 665 (1977).

The prosecutrix gave testimony on direct and cross-examination regarding two alleged incidents of rape and one alleged incident of indecent liberties being taken with her. She stated that after her aunt found the letter which she had written to "Motley Crue," she told her two best friends, who were her schoolmates, about these incidents. Thereafter, the prosecutrix was interviewed by a policewoman from the Burlington Police Youth Division, a social worker with the Alamance County Department of Social Services, a child psychologist and a gynecologist. The prosecutrix told each of these witnesses about the alleged sexual abuse during her conversations with them.

The transcript reveals that these four professionals testified to the incidents of alleged abuse as they had been described by the prosecutrix. Nicole Cox, one of the prosecutrix' schoolmates, testified, without objection from the defense, about a conversation in which the prosecutrix told her she had been molested by her father since the age of four. Marissa Forbes, another schoolmate, gave the same testimony. When viewing the testimony of these witnesses which described the alleged sexual abuse, we find that their statements do essentially corroborate the statements made by the prosecutrix. Although Marissa Forbes' testimony went beyond what the prosecutrix testified to telling Marissa, her statements mirrored those of Nicole Cox which were received without objection. Consequently, defendant waived his right to challenge that testimony on appeal. *See State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 555 (1986).

Likewise, defendant's challenge to the admission of statements made by the prosecutrix' mother and aunt regarding the alleged sexual abuse must also fail. The admission of their testimony is not reversible error. Testimony of the same nature was properly received from other witnesses as corroboration of the prosecutrix' statements. Therefore, the testimony from her mother and aunt was, at worst, redundant and not prejudicial to defendant's case. *Id.*

Based upon the foregoing, we hold that defendant is entitled to a new trial. We have considered the collective impact of the evidence which was admitted in error and we find that although each individual witness's testimony may not have been sufficient independent grounds for reversal, the aggregate effect of such evidence was to prejudice defendant's right to a fair trial. As to

defendant's remaining assignments of error, we find them to be without merit and decline to address them.

New trial.

Judges BECTON and PARKER concur.

LYNN M. HARVEY, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF MICHAEL E. WICHMANN, DECEASED, EMPLOYEE, PLAINTIFF v. RALEIGH POLICE DEPARTMENT, CITY OF RALEIGH, EMPLOYER, SELF-INSURED, DEFENDANT

No. 8810IC1050

(Filed 17 October 1989)

1. **Master and Servant § 68 (NCI3d)— workers' compensation— suicide of police officer—depression—not an occupational disease**

In a workers' compensation action arising from the suicide of a police officer, the Industrial Commission did not err by finding that, despite plaintiff's expert testimony to the contrary, the preponderance of the evidence establishes that factors other than the deceased employee's occupation produced the dysthymic disorder (depression) and his ultimate death. It does not appear from a review of the record that the Commission ignored or disregarded plaintiff's doctor's testimony, and there was evidence in the record which would support the finding of fact which differed from the opinion given by plaintiff's doctor. The Industrial Commission is not limited to the consideration of expert medical testimony in cases involving complex medical issues.

Am Jur 2d, Workmen's Compensation §§ 106, 240-243, 310.

2. **Master and Servant § 67 (NCI3d)— workers' compensation— suicide of police officer—depression—no increased risk from occupation**

The Industrial Commission did not err by finding that a deceased officer was not at an increased risk, as compared to members of the general public, of developing depression by virtue of his job where there was testimony supporting the Commission's findings. Furthermore, the finding that the

deceased officer's employment did not significantly contribute to or become a significant cause or factor in the development of the depression was a clear finding that plaintiff failed to prove causation.

Am Jur 2d, Workmen's Compensation §§ 106, 240-243, 310.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 6 July 1988. Heard in the Court of Appeals 14 April 1989.

Michaels and Jones, P.A., by Gregory M. Martin, for plaintiff appellant.

Dawn S. Bryant for defendant appellee.

COZORT, Judge.

Plaintiff's decedent, Michael E. Wichmann, was a police officer employed with the defendant, Raleigh Police Department. Officer Wichmann committed suicide on 1 June 1982. Plaintiff filed for benefits under the Workers' Compensation Act, alleging that her husband suffered from dysthymic disorder, depression, which resulted in his committing suicide. The Commission found that Officer Wichmann suffered from dysthymic disorder. However, the Commission also found that Officer Wichmann was not at an increased risk, as compared to members of the general public, of developing this condition by virtue of his job as a law enforcement officer. The Commission further found that Officer Wichmann's employment as a law enforcement officer did not significantly contribute to, nor was a significant causal factor in, the development of Officer Wichmann's depression. Plaintiff appeals. We affirm.

The primary issues to be considered in this appeal are: (1) whether the Commission improperly disregarded expert testimony on the nature and genesis of Officer Wichmann's depression; (2) whether the Commission erred in finding that Officer Wichmann was not at an increased risk of developing depression by virtue of his job as a law enforcement officer; and (3) whether the Commission erred in finding that Officer Wichmann's employment as a law enforcement officer did not significantly contribute to his depression.

Wichmann was employed with the Raleigh Police Department on 6 February 1978. His initial training period progressed smooth-

ly until he was injured in an accident. After an absence of several months, Wichmann returned to work; however, he encountered difficulties in job performance. Several supervisors recommended that Officer Wichmann's employment as a police officer be terminated. The Chief of Police, Frederick K. Heineman, decided to retain Officer Wichmann, and after Officer Wichmann was transferred, his work performance improved.

In 1982, Officer Wichmann began working part time as a security officer for K-Mart, while keeping his full-time employment with the Raleigh Police Department. On 19 May 1982, Officer Wichmann was notified that he was being put on administrative leave because of an internal affairs investigation on an allegation that Wichmann had stolen a candy bar from a convenience store. On 28 May 1982, Wichmann was informed that he could not work off duty while on administrative leave. Also in May, Wichmann was notified by K-Mart that he had been named in a lawsuit against K-Mart and Wichmann for false arrest.

On the night of 31 May 1982, Wichmann left his home at about 11:30 p.m. after having had an argument with his wife. When he had not returned the next morning, his wife called the Raleigh Police Department and learned he did not report for work. Wichmann's wife went out looking for him and found his truck parked in a field about 500 feet from their house. One end of a garden hose had been attached to the exhaust pipe, and the other end had been taped in the window of the truck. Wichmann died of asphyxiation due to carbon monoxide inhalation.

Plaintiff filed a claim for benefits under N.C. Gen. Stat. § 97-38, alleging that Wichmann suffered from an occupational disease due to his employment by the Raleigh Police Department and that this compensable occupational disease resulted in his death. The defendant, Raleigh Police Department, denied plaintiff's claim, and the matter was scheduled for hearing before a Deputy Commissioner of the North Carolina Industrial Commission. The case came on for hearing on 30 November 1984, with additional testimony being received in 1985. On 18 October 1985, Deputy Commissioner Angela R. Bryant filed an Opinion and Award finding that Wichmann's suicide was directly caused by depression which was an occupational disease. Defendant appealed to the Full Commission. In an Opinion and Award filed 22 May 1986, the Full Commission vacated and set aside a portion of the Deputy Commissioner's

Opinion and Award, holding that Wichmann's death was not due to a compensable occupational disease. Plaintiff filed notice of appeal to the North Carolina Court of Appeals. In an opinion filed 5 May 1987, this Court reversed the main portion of the Industrial Commission's Opinion and Award and remanded the case to the Commission for further consideration. *Harvey v. Raleigh Police Department*, 85 N.C. App. 540, 355 S.E.2d 147, *disc. rev. denied*, 320 N.C. 631, 360 S.E.2d 86 (1987). This Court held that the Commission's conclusions of law were not supported by findings of fact. This Court also held that the Commission appeared to have ignored testimony by Dr. Bruce L. Danto, an expert in psychiatry who had performed a "psychological autopsy" on Wichmann. The Court held Dr. Danto's testimony would assist the Commission in determining whether Wichmann had a dysthymic disorder and directed the Commission to consider his testimony on remand.

The case came on for hearing a second time before the Full Commission on 24 May 1988. In an opinion filed 6 July 1988, the Commission adopted the Opinion and Award filed 22 May 1986 with the following modifications:

FINDINGS OF FACT

35. The deceased employee suffered from a dysthymic disorder (depression) at the time of his death. However, the deceased employee was not at an increased risk, as compared to members of the general public, of developing this condition by virtue of his job as a law enforcement officer. Further, his employment as a law enforcement officer did not significantly contribute to, nor was a significant causal factor in, the disorder's development, nor did the deceased employee's occupation aggravate or accelerate the disorder.

36. While the testimony of Bruce L. Danto, M.D. is certainly credible, competent and properly admitted into evidence, the preponderance of the evidence establishes that factors other than the deceased employee's occupation produced the dysthymic disorder and his ultimate death.

37. The deceased employee was not mentally deranged and deprived of normal judgment as a result of his employment.

In all other respects the Industrial Commission Opinion and Award filed 22 May 1986 through the *Award* section stands as written.

[1] Plaintiff first contends that the Commission improperly disregarded the expert testimony of Dr. Danto. In support of that argument the plaintiff further contends that, since there was no expert medical testimony to rebut Dr. Danto's testimony, the Commission erred in finding to the contrary. Citing *Click v. Pilot Freight*, 300 N.C. 164, 265 S.E.2d 389 (1980), plaintiff argues that there must be medical testimony to support Finding of Fact No. 36, which is quoted above. The plaintiff argues that *Click* requires expert medical testimony to support findings by the Commission in cases of this nature.

We disagree with plaintiff's analysis for several reasons. First, our review of the record does not lead us to the conclusion that the Commission ignored or disregarded Dr. Danto's testimony. Dr. Danto was tendered by the plaintiff as an expert in psychiatry, suicidology and police stress. Dr. Danto performed a "psychological autopsy" on the decedent, a process involving interviewing family members and reviewing records of the deceased. The purpose is to determine the probable cause of death or the person's state of mind at the time of his death. Dr. Danto testified that his psychological autopsy of Officer Wichmann led him to the opinion that Wichmann suffered from depression, that his employment significantly contributed to the depression, and that the depression was the direct cause of his suicide. Dr. Danto also testified as to the amount and type of stress police officers are exposed to as compared to members of the general public. In its findings of fact, the Commission found that Officer Wichmann suffered from depression at the time of his death. This finding appears to be based directly upon Dr. Danto's testimony. Therefore, it does not appear that the Commission disregarded or ignored Dr. Danto's testimony.

Furthermore, there was evidence in the record which would support the finding of fact which differed with the opinion given by Dr. Danto. Dr. John McCall was submitted as an expert witness for the defendant. Dr. McCall administered a battery of psychological tests to Wichmann in 1978 prior to his employment with the defendant. He had also conducted a class in which Officer Wichmann was a member and had reviewed the files since Officer Wichmann's suicide. Dr. McCall testified that psychological autopsies are not accepted procedures in the field of clinical psychology. His testimony cast doubt on the reliability of forming an opinion about the cause of a psychological problem when the psychologist had never had

any contact with the person being diagnosed. Dr. McCall also testified that there were many factors which contributed to Officer Wichmann's suicide:

> I believe he had so many stresses on him and all of them contributed.
>
> * * * *
>
> To me, there were many, many stresses in this poor man's life and I don't know which one killed him and only God does. And, I think anybody that says they can rule out—anybody who says no other stressor had anything to do with it—it was only the fact that this or that that—I just think that that just flies in the face of reason.
>
> * * * *
>
> I believe that the poor man was overwhelmed with all kinds of problems, which contributed to his final suicide, but again, this is, you know, you people are the ones who know the facts. I was fortunate to sit in the courtroom to hear the testimony that first day, and that helped me to understand more than I did before. And I would say yes, I see that he had unbelievable problems to cope with. A variety of things.
>
> * * * *
>
> . . . There are a multiple variety of things that could have made it difficult. But again, why did he ultimately perform this act, suicide, is a mystery, and police suicides are common enough, but not the most suicides are in police work. Dentists commit suicide more than police. Psychiatrists do. And so, it's so difficult to know why they do it.

There was also evidence from Officer Wichmann's associates that he enjoyed his work and that the primary contributors to stress came from his home environment and financial difficulties. First, Officer Sam Murray, who worked an adjoining beat with Officer Wichmann and considered him the closest friend he had on the police force, testified that Officer Wichmann acted as if he was "in a safe harbor at work." There was evidence that Officer Wichmann had some problems in his first year on the force. One, his supervisors said that a lack of confidence was his biggest problem. But the evidence is clear that Officer Wichmann's performance

improved in 1979 and continued to improve, leading up to a promotion in August 1981.

Also, Wichmann was being sued for actions he took as a security officer for K-Mart, his off-duty employer. He was under investigation for allegedly shoplifting at a convenience store. He had financial difficulties and, according to Officer Murray, many times did not have enough money to buy a meal or to put gas in his car, even though he worked two jobs. Wichmann's wife, plaintiff herein, handled the couple's finances. She and Officer Wichmann fought, both verbally and physically. On the Friday before he committed suicide, Officer Wichmann told his supervisor at K-Mart that he was extremely apprehensive about going home, apparently because he thought he would have to quit his off-duty job while he was under investigation for shoplifting. This testimony was in contradiction to testimony from Wichmann's wife that the stress on Officer Wichmann was coming from his work as a policeman.

Thus, we find there is sufficient evidence to support the Commission's finding that Officer Wichmann's employment did not significantly contribute to and was not a significant cause or factor in the depression which apparently led to his suicide. If the Commission's findings are supported by competent evidence, they are conclusive on appeal even though there is evidence that would have supported findings to the contrary. *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). Moreover, we do not read *Click* to require that the Industrial Commission must find in accordance with plaintiff's expert medical testimony if the defendant does not offer expert medical testimony to the contrary. In *Click*, our Supreme Court held:

> [W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, *only an expert can give competent opinion evidence as to the cause of the injury.*

300 N.C. at 167, 265 S.E.2d at 391 (citation omitted) (emphasis added).

We read *Click* as an evidentiary ruling on the admissibility of opinion testimony as to the cause of an injury involving complicated medical questions, and not as instructions for the Industrial Commission on having to find in accordance with expert medical testimony. Decisions handed down by the Supreme Court since

Click support this analysis. For example, in *Rutledge v. Cultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), the court stated:

> In determining whether a claimant's exposure to cotton dust has significantly contributed to, or been a significant causative factor in, chronic obstructive lung disease, *the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony.* It may consider other factual circumstances in the case, among which are (1) the extent of the worker's exposure to cotton dust during employment, (2) the extent of other non-work-related, but contributing, exposures and components; and (3) the manner in which the disease developed with reference to the claimant's work history. *See Booker v. Duke Medical Center, supra*, 297 N.C. at 476, 256 S.E.2d at 200.

Id. at 105, 301 S.E.2d at 372 (emphasis added).

We read *Rutledge* as a clear statement from the Supreme Court that the Industrial Commission is not limited to the consideration of expert medical testimony in cases involving complex medical issues. We find no merit to the plaintiff's contentions to the contrary.

[2] We next consider plaintiff's argument that the Commission erred in finding that Officer Wichmann was not at an increased risk, as compared with the members of the general public, of developing depression by virtue of his job as a law enforcement officer. We find no merit to this argument. First, Dr. McCall's testimony supports the Commission's findings. Furthermore, even if we were to concur with plaintiff's argument that the evidence was insufficient to support such a finding, the Commission's finding that Officer Wichmann's employment did not significantly contribute to or become a significant cause or factor in the development of the depression, was a clear finding that the plaintiff failed to prove causation. The burden of proving each and every element of compensability is upon the plaintiff. *Moore v. J. P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159 (1980). By the Commission's findings, it is evident that the Commission was of the opinion that plaintiff failed to prove that job stress was a significant cause of the depression which led to Officer Wichmann's suicide.

For the reasons stated above, the opinion and award of the Industrial Commission is

Affirmed.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES HARPER

No. 885SC896

(Filed 17 October 1989)

1. **Criminal Law § 73.2 (NCI3d)— undercover officer's written notes—no inadmissible double hearsay**

There was no merit to defendant's contention that an undercover officer's written notes summarizing alleged drug transactions with defendant included statements of third persons who did not testify at trial and thus contained inadmissible double hearsay, since the statements of the third party declarants were not offered for their truth but to explain the officer's conduct, and they were thus not objectionable as hearsay.

Am Jur 2d, Evidence §§ 991-998, 1002.

2. **Criminal Law § 73 (NCI3d)— undercover officer's notes—inadmissible hearsay**

Summaries by an undercover officer of alleged drug transactions with defendant were hearsay and inadmissible as substantive evidence, since, in criminal cases, matters observed by police officers and other law enforcement personnel are explicitly excluded from the operation of Rule 803(8) of the N.C. Rules of Evidence which excepts public records and reports from the hearsay rule.

Am Jur 2d, Evidence §§ 991-998, 1002.

3. **Criminal Law § 33.3 (NCI3d)— record from another case excluded—evidence irrelevant**

There was no merit to defendant's contention that the trial judge erred in failing to admit into evidence the record from a case against another resident of the boarding house where defendant lived showing that the State took a voluntary dismissal of the charges against her, since the fact that the

State took a voluntary dismissal in a separate case was irrelevant in the action against defendant.

Am Jur 2d, Evidence §§ 973 et seq.

4. **Criminal Law § 33.3 (NCI3d)— presence of defendant's fellow boarding house residents at trial—evidence improperly admitted—defendant not prejudiced**

Though the trial court erred in permitting testimony regarding the presence in the courtroom of two of the women from the boarding house where defendant lived and where alleged drug transactions took place, such error was harmless because defendant failed to show that there was a reasonable possibility that the outcome of the trial would have been different without the error.

Am Jur 2d, Trial §§ 61-67.

5. **Criminal Law § 874 (NCI4th)— jury's request to repeat instructions—court's refusal—additional instructions given—no error**

The trial judge did not abuse his discretion in refusing to repeat instructions on burden of proof in response to a question raised by the jury during deliberations, since it did not appear from the jurors' question that they were confused about the burden of proof, and the additional instructions which the court did give were not of such a nature as to give undue emphasis to the State's case. N.C.G.S. § 15A-1234(a)(1).

Am Jur 2d, Trial §§ 641-644, 754-757, 935.

6. **Criminal Law § 1185 (NCI4th)— aggravating factor of prior conviction—what constitutes prior conviction**

There was no merit to defendant's contention that his single prior conviction was for a relatively minor crime and that the trial judge therefore abused his discretion in finding it as an aggravating factor, since the legislature has determined that conviction of any criminal offense punishable by more than 60 days' confinement is an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)o.

Am Jur 2d, Criminal Law §§ 525, 535 et seq., 598, 599.

7. **Criminal Law § 1203 (NCI4th)— failure to find nonstatutory mitigating factors—no abuse of discretion**

There was no merit to defendant's contention that the trial judge erred in finding no factors in mitigation, since the consideration of nonstatutory mitigating factors is within the trial judge's discretion, and the judge's failure to find nonstatutory mitigating factors, even when supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent a showing of an abuse of that discretion.

Am Jur 2d, Criminal Law §§ 525, 535 et seq., 598, 599.

8. **Criminal Law § 1347 (NCI4th)— consecutive sentences—cumulative effect not disproportionate to crimes**

There was no merit to defendant's contention that the cumulative effect of the consecutive sentences was disproportionate to his crimes and that as such his sentence violated the Eighth Amendment prohibition against cruel and unusual punishment, since the decision to impose consecutive sentences was discretionary with the trial judge.

Am Jur 2d, Criminal Law §§ 552, 625-631.

9. **Criminal Law § 1068 (NCI4th)— sentencing hearing—reputation of boarding house where defendant lived—inadmissible hearsay—defendant not prejudiced**

The trial judge erred in permitting the district attorney to express at the sentencing hearing his opinion regarding the reputation of the boarding house where defendant lived as a place where drugs were available and to refer to a 1981 opinion of the Court of Appeals discussing generally the reputation of the same boarding house involved here, since such evidence was inadmissible hearsay, but defendant was not prejudiced where the trial judge stated that he would not charge the reputation of the boarding house to defendant, and nothing in the record suggested that he did.

Am Jur 2d, Criminal Law §§ 527, 530; Trial §§ 193, 195.

APPEAL by defendant from judgment entered 30 March 1988 in NEW HANOVER County Superior Court, by *Judge Samuel T. Currin*. Heard in the Court of Appeals 21 March 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane T. Friedensen, for the State.

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

BECTON, Judge.

The defendant, James Harper, was convicted of possession with intent to sell and deliver marijuana and sale and delivery of marijuana. Harper contends on appeal that the trial judge erred by: (1) admitting in evidence the undercover officer's written summaries of the two drug transactions with Harper since the summaries contained inadmissible hearsay; (2) permitting testimony regarding the presence of certain spectators in the courtroom; (3) failing to admit a proffered exhibit in evidence; (4) failing to repeat certain instructions in response to a question from the jury; (5) permitting testimony at the sentencing hearing that "the green house" (the boarding house where Harper lived and worked) was reputed to be a place where drugs were readily available; and (6) sentencing Harper to two consecutive five-year prison terms, the maximum penalty allowable for Harper's offenses. We affirm the judgment below.

I

Harper contends that the judge committed prejudicial error by admitting in evidence State's Exhibits 4 and 8, the undercover officer's written notes summarizing the alleged drug transactions with Harper. Harper contends that the summaries included statements of third persons who did not testify at trial and thus contained inadmissible double hearsay. He further argues that the summaries themselves were inadmissible hearsay.

The notes related the events surrounding two drug sales which took place on the afternoons of 13 June and 27 June 1987, outside a house on Harnett Street in Wilmington known as "the green house." The summaries included statements made by "Pee Wee," "Pee Wee's mother," "an unknown voice," "an unknown black female," "the lady on the porch," and "an unknown black male" (later identified as Harper). The summaries described these individuals guiding the undercover officer into the house, and then outside to a clump of bushes where Harper sold him the marijuana. With the exception of Harper and the unknown female "complaining about having to stand out there holding the drugs, and the possibility of the law

busting them," the substance of the third parties' statements recorded in the notes was limited to telling the officer to wait, to go ahead, and where to go. At trial, the officer testified to essentially the same facts.

[1] As an initial matter, we conclude that there was no hearsay-within-hearsay problem presented here because the statements of the third party declarants were not offered for their truth, but to explain the officer's conduct. *See State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made). Out-of-court statements offered for any purpose other than to prove the truth of the matter asserted are not objectionable as hearsay. *See id.; State v. Wilson*, 322 N.C. 117, 137, 367 S.E.2d 589, 601 (1988); N.C. Gen. Stat. Sec. 8C-1, R. Evid. 801(c) (1988). *See also* Brandis, 1 *Brandis on North Carolina Evidence* Sec. 141 (3d ed. 1988).

[2] We agree with Harper's next argument that the summaries themselves were hearsay and therefore were inadmissible as substantive evidence. Rule 803(8) of the North Carolina Rules of Evidence excepts public records and reports from the hearsay rule. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 803(8) (1988). Among the public records outside the hearsay rule are those "setting forth . . . matters observed pursuant to duty imposed by law as to which there was a duty to report. . . ." Sec. 8C-1, R. Evid. 803(8)(B). However, "in criminal cases[,] matters observed by police officers and other law-enforcement personnel" are explicitly excluded from the Rule's broad sweep. *Id.; see State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988).

The rationale behind the exclusion of police reports is to prevent "prosecutors [from] attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime." *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976); *see also State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984). The underlying theory is that "observations by police officers at the scene of the crime . . . [may not be] as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." Weinstein & Berger, 4 *Weinstein's Evidence* Sec. 803(8)[01] (1988) (quoting Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974)). This exclusion is in

general accord with cases decided prior to the adoption of the rules of evidence. *See, e.g., State v. Jackson*, 287 N.C. 470, 482, 215 S.E.2d 123, 130 (1975) (search warrant and supporting affidavit inadmissible hearsay; admission deprived criminal defendant of right of confrontation and cross-examination, and permitted State to strengthen its case with incompetent evidence; officer did not testify); *State v. Spillars*, 280 N.C. 341, 352, 185 S.E.2d 881, 888 (1972) (same). *Cf. United States v. Coleman*, 631 F.2d 908, 912 (D.C. Cir. 1980) (recognizing distinction between records containing a *summary* of the government's case against a criminal defendant and other police records such as those needed to establish chain of custody).

Although we conclude that the summaries were inadmissible as substantive evidence, this does not mean that Harper was so prejudiced by that evidence that he is entitled to a new trial. *See State v. Locklear*, 322 N.C. 349, 360, 368 S.E.2d 377, 384 (1988). This was a direct sales case. The undercover officer testified that Harper was the man he saw at the green house and from whom he purchased marijuana on two occasions, during daylight hours. Given this direct evidence, we cannot say that a reasonable possibility exists that a different result would have obtained had the summaries not been admitted. *See* N.C. Gen. Stat. Sec. 15A-1443(a) (1988); *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981).

For the reasons stated, we overrule this assignment of error.

II

[3] Harper contends that the trial judge erred in failing to admit in evidence Defendant's Exhibit 1, the record from a case against another resident of the boarding house, showing that the State took a voluntary dismissal of the charges against her. This contention is without merit. The fact that the State took a voluntary dismissal in a separate case was irrelevant in the action against Harper. Irrelevant evidence is inadmissible. N.C. Gen. Stat. 8C-1, R. Evid. 402 (1988).

III

[4] Harper next asserts that the judge erred in permitting testimony regarding the presence in the courtroom of two of the women from the green house. The undercover officer had already identified the women when he testified about the series of events at the green house, and, in response to questions by the district

attorney, he testified that he did not notify the women to appear at trial and did not know they would be there. Harper did not object to this testimony. The district attorney later asked a detective who worked on the case if he had asked the women to appear in court, and he said no. Harper's relevancy objection was overruled. When Harper took the stand, he testified that he did not ask the women to be there but that "[t]hey came for the goodness of them."

Harper now argues that the questions elicited irrelevant testimony and "called on the jury to engage in suspicion and conjecture as to why [the women] were present." We agree. This evidence was irrelevant because "it did not have 'any tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *State v. Brown*, 319 N.C. 361, 366, 354 S.E.2d 225, 227 (1987) (quoting Sec. 8C-1, R. Evid. 401). However, admission of irrelevant evidence will be treated as harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded. *See State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987); Sec. 15A-1443(a). In light of the direct evidence against him, Harper has failed to show that there was a reasonable possibility that the outcome of the trial would have been different without the error.

IV

[5] Harper asserts that the judge erred in refusing to repeat certain instructions in response to a question raised by the jury during deliberations. The jury asked this question: "The defendant's attorney brought up the fact that the defendant has a scar on his face in his closing argument. Can this be considered in as much as it was not presented in evidence during the trial?" The trial judge then instructed the jury, in essence, that arguments of counsel were not to be considered as evidence, but that jurors could consider anything they observed in the courtroom during the course of the trial. Harper does not argue that these instructions were erroneous; instead he contends that the judge should have repeated instructions given to the jury in the original charge regarding (1) the burden of proof in general and (2) the State's burden of proving the identity of the defendant as the perpetrator of the crime.

N.C. Gen. Stat. Sec. 15A-1234(a)(1) (1988) permits the trial judge to give additional instructions in response to a question by the jury after deliberations have begun. If additional instructions are given, the judge "*may* also . . . repeat other instructions to avoid giving undue prominence to the additional instructions." Sec. 15A-1234(b) (emphasis added). The trial judge is not required to repeat instructions correctly given during the original charge, but may do so in his discretion. *See State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). The judge is in the best position to determine whether instructions should be repeated, and, in the absence of error in the original charge, " 'needless repetition is undesirable and has been held erroneous on occasion.' " *Id.* (citation omitted). Here, it did not appear from the jurors' question that they were confused about the burden of proof. Nor were the additional instructions of a nature to give undue emphasis to the State's case. Accordingly, we hold that the judge did not abuse his discretion in denying Harper's request to repeat the instructions.

V

Harper challenges the judge's ruling sentencing him to two consecutive five-year prison terms.

A

At the sentencing hearing, the judge found only one aggravating factor, prior conviction of a crime punishable by more than 60 days' confinement. Finding no factors in mitigation, the judge concluded that the aggravating factors outweighed the mitigating factors, and imposed the maximum five-year sentence for both of the crimes charged. The judge then ordered that the sentences run consecutively.

[6] Harper argues that his single prior conviction was for a relatively minor crime (misdemeanor assault with a deadly weapon) and, therefore, that the judge abused his discretion in finding it as an aggravating factor. We reject this contention. With minor exceptions not relevant here, the legislature has determined that conviction of *any* criminal offense punishable by more than 60 days' confinement is an aggravating factor. *See* N.C. Gen. Stat. Sec. 15A-1340.4(a)(1)(o) (1988). We cannot substitute our judgment for the legislature's by holding that the offense Harper was convicted of was so inconsequential that it should not have been found to be

an aggravating factor. *See State v. Parker*, 319 N.C. 444, 448, 355 S.E.2d 489, 491 (1987).

[7] Harper also contends that the judge erred in finding no factors in mitigation. Harper asserts that the judge should have found the following to be nonstatutory mitigating factors: (1) Harper's age (43 years) at the time of the offense; (2) Harper's status as a lifelong resident of Wilmington with only one minor conviction; and (3) the small amount of marijuana involved in the drug sales. We disagree. The consideration of nonstatutory mitigating factors is within the trial judge's discretion. *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988). The judge's failure to find nonstatutory mitigating factors, even when supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent a showing of an abuse of that discretion. *See State v. Spears*, 314 N.C. 319, 322-23, 333 S.E.2d 242, 244 (1985).

B

[8] Harper next argues that the cumulative effect of the consecutive sentences is disproportionate to his crimes, and as such, that his sentence violates the Eighth Amendment prohibition of cruel and unusual punishment. *See, e.g., State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). We are compelled to disagree, however, because the decision whether to impose consecutive sentences was discretionary with the trial judge, and we cannot say that here it could not have been the result of a reasoned decision. *See* N.C. Gen. Stat. Sec. 15A-1354(a) (1988).

A defendant may be sentenced for each specific criminal act he commits, and consecutive sentences do not represent an unusual punishment in North Carolina. *Ysaguire*, 309 N.C. at 786-87, 309 S.E.2d at 441. Here, there was no error in the findings of aggravation and mitigation, and each sentence imposed was within the statutory maximum. *See State v. Ahearn*, 307 N.C. 584, 597-98, 300 S.E.2d 689, 697-98 (1983); *see also State v. Higginbottom*, 312 N.C. 760, 763, 324 S.E.2d 834, 837 (1985) (punishment within statutory maximum not cruel and unusual unless punishment provisions in the statute itself are unconstitutional). This case is not, as Harper contends, an "exceedingly unusual non-capital case" in which the sentence imposed was so grossly disproportionate to the crime charged that it violates the constitutional proscription of cruel and unusual punishment. *See Ysaguire*, 309 N.C. at 786, 309 S.E.2d at 441. This assignment of error is overruled.

C

[9] Harper last contends that the trial judge erred in permitting the district attorney to express at the sentencing hearing his opinion regarding the reputation of the green house as a place where drugs were available, and to refer to a passage from *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501 (1981), discussing generally the reputation of the same "green house" involved here. We agree. "[I]n a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay." *State v. Weldon*, 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985). However, the judge stated that he would not charge the reputation of the green house to Harper, and nothing in the record suggests that he did. As discussed above, Harper's sentence was within the maximum prescribed for his offenses and was sufficiently supported by the finding of one factor in aggravation and no factors in mitigation.

VI

We hold that the trial received by the defendant James Harper was without prejudicial error.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. REUBEN CARL WALL

No. 8920SC4

(Filed 17 October 1989)

1. Narcotics § 2 (NCI3d)— sale and delivery of cocaine—person to whom sale made—fatal variance between indictment and proof

There was a fatal variance between an indictment which alleged sale and delivery of cocaine by defendant to undercover officer McPhatter and evidence which showed sale and delivery of cocaine by defendant to nightclub patron Riley, and evidence

was insufficient to show that defendant had knowledge that Riley was buying or taking delivery for McPhatter.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 41, 42; Indictments and Information §§ 260 et seq.

2. **Narcotics § 1.3 (NCI3d)— possession with intent to sell or deliver—charge not dependent on completed sale or delivery**

There was no merit to defendant's contention that, if the sale and delivery charges failed, the charge of possession with intent to sell or deliver must fail as well, since it is the intent of defendant which is the gravamen of the offense of possession with intent to sell or deliver, and a completed sale or delivery of controlled substances therefore need not be shown in order to convict defendant of possession with intent to sell or deliver.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 41, 42; Indictments and Information §§ 260 et seq.

3. **Narcotics § 4.6 (NCI3d)— possession with intent to sell or deliver—instruction not improper**

Reversal of defendant's conviction was not required where the trial court instructed the jury on the possible verdict of guilty of possession of cocaine with intent to sell *or* deliver, but the indictment charged possession with intent to sell *and* deliver, since the discrepancy did not impermissibly lower the State's burden of proof.

Am Jur 2d, Trial §§ 626, 627, 715-717, 925.

4. **Criminal Law § 1102 (NCI4th)— possession with intent to sell and deliver cocaine—greater culpability because of increased access to customers—improper nonstatutory aggravating factor**

In a prosecution for possession with intent to sell and deliver cocaine the trial court erred in finding as a nonstatutory aggravating factor that defendant was more culpable because he was in a crowded nightclub which he owned and operated, since increased access to potential customers does not increase defendant's culpability.

Am Jur 2d, Criminal Law § 539.

APPEAL by defendant from *Gudger, Judge*. Judgments entered 3 August 1988 in Superior Court, RICHMOND County. Heard in the Court of Appeals 30 August 1989.

Defendant was indicted for possession with intent to sell and deliver cocaine, sale of cocaine to Robert McPhatter and delivery of cocaine to Robert McPhatter. The incident on which the indictment was based allegedly occurred on 16 January 1988. At trial the State's evidence tended to show that an undercover officer (McPhatter) entered defendant's establishment and approached the bar where defendant was working. McPhatter testified that he purchased a can of beer from defendant and asked him if he (McPhatter) could buy some marijuana. According to McPhatter's testimony, the defendant said he did not have any marijuana but expected some to come in later that night. McPhatter also testified that while there he spoke with one Tabatha Riley and asked her where he could buy some cocaine. McPhatter testified that he gave Ms. Riley $25 to purchase cocaine and that he observed Ms. Riley approach the defendant. McPhatter testified that he saw Ms. Riley give the defendant $25 and defendant give Ms. Riley a small bag of white powder. Ms. Riley then returned to McPhatter and gave him the bag of powder. An SBI chemist testified that analysis indicated the powder substance was cocaine. Lieutenant Webb of the Richmond County Sheriff's Department was working with McPhatter on an undercover operation during this time. Webb testified that he received the bag of white powder from McPhatter and forwarded it to the SBI for analysis.

At the close of the State's evidence defendant moved to dismiss all counts in the indictment. Defendant argued that counts two and three (sale and delivery) allege that defendant sold and delivered cocaine to McPhatter while all the evidence showed that the sale and delivery by defendant, if any, was to Ms. Riley. Defendant also moved to dismiss the charge of possession of cocaine with intent to sell and deliver. Defendant's motions were denied.

Defendant offered evidence. Tabatha Riley testified that McPhatter gave her $25 to buy cocaine, that she then went to defendant and bought a pack of rolling papers for $1 and then she went over to Calvin Baldwin and bought the cocaine from him. Ms. Riley also testified that while these transactions were taking place, McPhatter's view of her was obstructed by a wall between her and where he was standing. The defendant testified that McPhatter approached

him and asked if he could buy some cocaine. Defendant testified that he told McPhatter that he did not have any. Defendant also testified that later he sold a pack of rolling papers to Ms. Riley and told her that McPhatter was "the law." Calvin Baldwin testified that earlier that evening, Derise Covington had given him four bags of cocaine and some marijuana. Baldwin also testified that he gave Ms. Riley two bags of the cocaine on the evening in question without payment because Ms. Riley told him that she had already paid Derise Covington. The defendant also presented testimony from a licensed private investigator, Mr. Allen, who testified regarding statements made to him by Ms. Riley, Mr. Baldwin and the defendant. These prior statements were offered for corroboration.

In rebuttal the State recalled Lieutenant Webb. Webb testified that Ms. Riley made a prior statement to him in which she said she had given the $25 to defendant for the cocaine.

At the close of all the evidence defendant renewed his motion to dismiss the charges. Defendant's motion was denied. The jury found defendant guilty of all three charges. After finding aggravating and mitigating factors the trial court imposed consecutive terms of five years imprisonment for the possession conviction and three years imprisonment for the sale and delivery of cocaine. From judgment imposed on the verdict, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Henry T. Drake for defendant-appellant.

EAGLES, Judge.

Defendant's arguments regarding the guilt phase of his trial can be reduced to two contentions. First, defendant contends there is a fatal variance between the allegations in the indictment and proof of the sale and delivery charges because the indictment names McPhatter as the purchaser of the cocaine from Wall on the sale and delivery charges while the proof tends to show that Riley was the purchaser. Defendant also argues there was no evidence presented to show defendant knew Riley was buying and receiving the cocaine as agent for another. Defendant argues that for this reason the trial court erred in: (1) failing to dismiss the sale and delivery charges; (2) instructing the jury regarding agency; and

(3) failing to arrest judgment. Defendant also argues that, because the substantive crimes were so "intertwined" factually, if the sale and delivery conviction is vacated, the possession conviction must be vacated as well.

We agree in part with defendant's argument regarding his motion to dismiss. Accordingly, we vacate the judgment on the sale and delivery charges. We are not persuaded that we must also vacate the judgment on the possession charge.

Second, defendant contends that the indictment charging possession states that defendant possessed cocaine with the intent to "sell *and* deliver" while the trial court's charge to the jury allowed a conviction if the jury found defendant possessed cocaine with the intent to "sell *or* deliver." Defendant argues that the instructions given by the trial court impermissibly lowered the State's burden of proof. We disagree.

Defendant also asserts that the trial court erred when it found as a nonstatutory aggravating factor that: "[d]efendant operated the Midnight Express where beer is sold and dance hall is maintained under conditions rendering his possession of controlled substances for purpose of sale, particularly aggravating because of large public dependence and exposure to opportunity for abuse of controlled substances." We agree that the trial court erred and accordingly remand for resentencing.

I. Guilt Phase

[1] The two counts of the indictment in question charged the defendant with selling and delivering cocaine to McPhatter. The evidence showed, however, that the sale and delivery was to Riley. The law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known. *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974), *citing State v. Bennett*, 280 N.C. 167, 185 S.E.2d 147 (1971). A defendant must be convicted, if at all, of the particular offense charged in the indictment. *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894, *cert. denied, Faircloth v. North Carolina*, 444 U.S. 874, 62 L.Ed. 2d 102, 100 S.Ct. 156 (1979). The State's proof must conform to the specific allegations contained in the indictment. If the evidence fails to do so, it is insufficient to convict the defendant of the crime as charged. *Id.* Therefore,

a challenge to a fatal variance between the indictment and proof may be raised by a motion to dismiss for insufficient evidence. *Id.; State v. Law*, 227 N.C. 103, 40 S.E.2d 699 (1946).

In order to survive defendant's motion to dismiss the charges of selling and delivering cocaine to McPhatter, at a minimum, the evidence would have to show two things: (1) that defendant had knowledge Riley was buying or taking delivery of the cocaine for another person; and (2) that the person named in the indictment was that other person. *See State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 652 (1985); *State v. Black*, 34 N.C. App. 606, 608, 239 S.E.2d 276, 277 (1977), *disc. rev. denied*, 294 N.C. 362, 242 S.E.2d 632 (1978). Defendant's guilty knowledge may be shown by circumstantial evidence. *State v. Rozier*, 69 N.C. App. 38, 50, 316 S.E.2d 893, 901, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). In reviewing the denial of a motion to dismiss we examine the evidence in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element exists. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). Our review of the transcript reveals there is no substantial evidence that defendant knew Riley was acting on behalf of another. Therefore, defendant's motion to dismiss the sale and delivery charges should have been allowed.

Here there is evidence that McPhatter approached defendant and asked for cocaine. There is also some evidence that defendant knew Riley had been with McPhatter. However, this is insufficient basis to submit to the jury the issue of whether defendant knew Riley was acting on behalf of McPhatter. The State's argument that a transaction that occurs in a crowded nightclub is in the "presence" of one located at the other end of the building is unpersuasive. We note that the State is at liberty to obtain another bill of indictment charging defendant with sale and delivery to Riley. *See State v. Sealey*, 41 N.C. App. 175, 176, 254 S.E.2d 238, 240 (1979); *State v. Ingram*, 20 N.C. App. at 466, 201 S.E.2d at 534.

[2] We find defendant's argument regarding the effect of a dismissal of the sale and delivery charges on the possession charge unpersuasive. These alleged offenses are not so factually "intertwined" that the conviction for possession with intent to sell or deliver must be vacated as well. Defendant's reliance on *State v. Creason*,

313 N.C. 122, 326 S.E.2d 24 (1985) is misplaced. Defendant asserts that if the sale and delivery charges fail, the charge of possession with intent to sell or deliver must fail as well. However, in *Creason* the court stated that "[i]t is the *intent* of the defendant that is the gravamen of the offense" of possession with intent to sell or deliver. *Id.* at 129, 326 S.E.2d at 28 [emphasis in original]. Therefore, a completed sale or delivery of controlled substances need not be shown in order to convict defendant of possession with intent to sell or deliver. Defendant's arguments to the contrary are without merit.

[3] Defendant next argues that the discrepancy between the offense alleged in the indictment and the instruction given the jury requires reversal. The indictment alleged that defendant "unlawfully, willfully and feloniously did possess with intent to sell *and* deliver cocaine." [Emphasis added.] The trial court instructed the jury on the possible verdict of guilty of possession of cocaine with intent to sell *or* deliver. Defendant asserts that the difference between the indictment and the court's instruction impermissibly lowered the State's burden of proof. We disagree.

> As this court has stated before,
>
> [i]t is proper for a jury to return a verdict of possession with intent to sell *or* deliver under G.S. 90-95(a)(1). Such a verdict is no less proper when the indictment charges possession with intent to sell *and* deliver since the conjunctive "and" is acceptable to specify the exact bases for the charge.

State v. Mercer, 89 N.C. App. 714, 715-16, 367 S.E.2d 9, 10-11 (1988). For these reasons, defendant's assignment of error is overruled.

II. Sentencing Phase

[4] The trial court found as a nonstatutory aggravating factor that

> defendant operated the Midnight Express where beer is sold and dance hall is maintained under conditions rendering his possession of controlled substances for purpose of sale, particularly aggravating because of large public dependence and exposure to opportunity for abuse of controlled substances.

Defendant asserts that this nonstatutory factor includes an inherent element of the offense of possession with intent to sell or deliver. "[C]ircumstances that are inherent in the crime convicted of may

not be used as aggravating factors." *State v. Coffey*, 65 N.C. App. 751, 760, 310 S.E.2d 123, 129 (1984). Defendant argues that the trial court used possession of a controlled substance as one aspect of the aggravating factor. Defendant also argues that the judge's reference to "abuse of controlled substances has to mean a sell [sic] or delivery" and charges of sale and delivery of cocaine were joined offenses. Defendant argues this was an improper reference to defendant's "course of conduct." *See State v. Flowers*, 84 N.C. App. 696, 354 S.E.2d 240, *disc. rev. denied*, 319 N.C. 675, 356 S.E.2d 782 (1987). We disagree. However, we conclude that the trial court erred in finding the aggravating factor.

The court's basis for finding the aggravating factor was the place where defendant was located when he possessed cocaine with intent to sell or deliver. The gist of the trial court's finding is that defendant was more culpable because he was in a crowded nightclub which he owned and operated. The trial court concluded that these circumstances gave defendant access to more potential customers. "Evidence which increases a defendant's culpability may properly be considered as an aggravating factor." *State v. McKinney*, 88 N.C. App. 659, 665, 364 S.E.2d 743, 747 (1988), *citing State v. Perry*, 316 N.C. 87, 110-11, 340 S.E.2d 450, 464-65 (1986); G.S. 15A-1340.3. We do not agree that increased access to potential customers increases the defendant's culpability. Because the trial court erred in making this finding, we remand for a new sentencing hearing. *See State v. Chatman*, 308 N.C. 169, 180-81, 301 S.E.2d 71, 78 (1983).

For the reasons stated, defendant's conviction of sale and delivery of cocaine is vacated. In defendant's conviction for possession with intent to sell or deliver, we find no error but because of error in the sentencing, we remand for resentencing.

The results are:

As to charges of sale and delivery of cocaine—vacated.

As to charge of possession with intent to sell or deliver—no error in the conviction but remanded for resentencing.

Judges JOHNSON and GREENE concur.

THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JOHN WESLEY LYNCH; THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JAMES THOMAS LYNCH; AND THOMAS J. LYNCH, INDIVIDUALLY, PLAINTIFFS v. ROBERT W. NEWSOM, III, ADMINISTRATOR OF THE ESTATE OF SUSIE NEWSOM LYNCH; AND ROBERT W. NEWSOM, III, INDIVIDUALLY, DEFENDANTS

THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JOHN WESLEY LYNCH; THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JAMES THOMAS LYNCH; AND THOMAS J. LYNCH, INDIVIDUALLY, PLAINTIFFS v. ROBERT W. NEWSOM, III, AND THOMAS P. RAVENEL, CO-EXECUTORS OF THE ESTATE OF ROBERT WESLEY NEWSOM, JR.; ROBERT W. NEWSOM, III, AND THOMAS P. RAVENEL, CO-EXECUTORS OF THE ESTATE OF FLORENCE SHARP NEWSOM; ROBERT W. NEWSOM, III, ADMINISTRATOR OF THE ESTATE OF SUSIE NEWSOM LYNCH; AND ROBERT W. NEWSOM, III, DEFENDANTS

THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JOHN WESLEY LYNCH; THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JAMES THOMAS LYNCH; AND THOMAS J. LYNCH, INDIVIDUALLY, PLAINTIFFS v. FRANCES N. MILLER, EXECUTRIX OF THE ESTATE OF HATTIE A. CARTER NEWSOM; ROBERT W. NEWSOM, III AND THOMAS P. RAVENEL, CO-EXECUTORS OF THE ESTATE OF ROBERT WESLEY NEWSOM, JR.; ROBERT W. NEWSOM, III AND THOMAS P. RAVENEL, CO-EXECUTORS OF THE ESTATE OF FLORENCE SHARP NEWSOM; ROBERT W. NEWSOM, III, ADMINISTRATOR OF THE ESTATE OF SUSIE NEWSOM LYNCH; FRANCES NEWSOM MILLER; ODELL CARTER, MOZELLE CARTER SHELBY; ROBERT W. NEWSOM, III; ROBERT W. NEWSOM, III, TESTAMENTARY TRUSTEE UNDER THE WILL OF HATTIE A. CARTER NEWSOM; NANCY MILLER DUNN; NANCY MILLER DUNN, TESTAMENTARY TRUSTEE UNDER THE WILL OF HATTIE A. CARTER NEWSOM; DAVID MILLER, DEBRA MILLER PARHAM; AND LATHAM LEE MILLER, DEFENDANTS

No. 8818SC516

(Filed 17 October 1989)

Descent and Distribution § 6 (NCI3d)— slaying of children by mother—interest of children in mother's estate

The trial court erred by granting summary judgment for defendants in a declaratory judgment action to determine the interest of plaintiff administrator's sons in the estates of their mother, Susie Newsom Lynch, their maternal grandparents, Florence Sharp Newsom and Robert Wesley Newsom, Jr., and their greatgrandmother, Hattie A. Carter Newsom, where Susie Newsom Lynch died intestate and her estate includes interests willed to her by her parents and grandmother; Susie Newsom Lynch was alleged to have acted in concert with others to

have intentionally killed or to have been culpably negligent in causing the deaths of her sons, Florence Sharp Newsom and Robert Wesley Newsom, Jr., and Hattie A. Carter Newsom; and the children were alleged to have survived their mother. None of the survival issues raised by the pleadings was resolved by the evidence; and, although the mother was not adjudicated as the "slayer" of the children under N.C.G.S. § 31A-3, that statute merely authorized an additional means of preventing some wrongdoers from profiting from their wrongs and did not abrogate any of the procedures devised by law to prevent one from profiting from his own wrong.

Am Jur 2d, Descent and Distribution §§ 101 et seq.

APPEAL by plaintiff and cross-appeal by defendants from *Albright, Judge*. Judgments entered 22 January 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 January 1989.

Plaintiff's appeal is from Judge Albright's dismissal of these three declaratory judgment actions by summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. An earlier order by Judge Rousseau denying defendants' motions to dismiss the complaints under Rule 12(b)(6), North Carolina Rules of Civil Procedure, for not stating a claim for which relief can be granted is not challenged. The actions were brought to determine the interest of plaintiff administrator's deceased sons, James Thomas Lynch and John Wesley Lynch, in the estates of their mother, Susie Newsom Lynch, their maternal grandparents, Florence Sharp Newsom and Robert Wesley Newsom, Jr., and their great-grandmother, Hattie A. Carter Newsom. The children, then nine and ten years old, and their mother died in Guilford County on 3 June 1985 in an automobile driven by Frederick R. Klenner, Jr., who was fleeing from law enforcement officers attempting to arrest him for murdering the three decedent Newsoms in Forsyth County two weeks earlier. During the chase, which lasted about twenty-five minutes, Klenner and his pursuers exchanged gunfire several times, either Susie Newsom Lynch or Klenner gave each child a lethal dose of cyanide and shot it through the head, and Klenner set off a bomb that blew up the car and killed him and her. Susie Newsom Lynch, divorced from plaintiff, died intestate and her estate includes interests willed to her by her parents and grandmother. Subject to conditions that have not been judi-

cially interpreted and require no discussion here, the will of each parent made her a beneficiary of the residual estate in the event the other parent died first, and the will of her grandmother bequeathed her $5,000 and made her a beneficiary of the residuary estate in the event her parents died first. All the actions are based upon allegations, denied by defendants, that each child survived his mother and that she in concert with others either intentionally killed or was culpably negligent in causing the deaths of the children and all three Newsoms. The action against the estate of Hattie A. Carter Newsom is based upon the further allegation that Hattie A. Carter Newsom predeceased Robert Wesley Newsom, Jr.

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

Henson Henson Bayliss & Teague, by Perry C. Henson, for defendant appellees, cross-appellants Administrator of the Estate of Susie Newsom Lynch and Co-Executors of the Estates of Florence Sharp Newsom and Robert Wesley Newsom, Jr.

John W. Hardy for defendant appellees, cross-appellants Co-Executors of the Estates of Robert Wesley Newsom, Jr. and Florence Sharp Newsom.

Wesley Bailey for defendant appellee, cross-appellant Executrix of the Estate of Hattie A. Carter Newsom.

Robert W. Newsom, III, pro se.

PHILLIPS, Judge.

Since it had been determined earlier that the complaints state claims for which relief can be granted, the hearing for summary judgment was conducted upon defendants' contention that no genuine issue of material fact exists in these cases in that the material facts upon which his claims depend cannot be proven. In sustaining the motions and dismissing the actions the court in effect ruled that the pleadings, affidavits and other materials considered establish as a matter of law that defendants' contention has merit. The following legal principles, rudimentary to the authority of a trial court to summarily dismiss a civil action under Rule 56 of our Rules of Civil Procedure, are pertinent: The burden of establishing that there is no material factual issue to litigate and summary judgment is appropriate is always upon the movant. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797

(1976). In a summary judgment hearing a nonmovant plaintiff is not required to go forward, as at trial, and show in the first instance that he can prove his case; until a movant shows that its motion has merit nothing is required of the nonmovant. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *First Federal Savings & Loan Association of New Bern v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972). In order to show that a motion for summary judgment has merit the movant's own forecast of proof, if not contradicted or disputed, "must be such as to establish his right to judgment as a matter of law." *Moore v. Fieldcrest Mills, Inc., supra* at 470, 251 S.E.2d at 422. When these principles of law are applied to the record in these cases it is obvious that the judgments dismissing the actions were erroneously entered, and we vacate them.

The material facts that these defendants had to disprove or show cannot be established before being entitled to judgment as a matter of law were that the children survived Susie Newsom Lynch and her wrongdoing caused or contributed to their deaths and those of the Newsoms. For if either child survived his mother, who died intestate, he had a right to share in or receive her net estate including what she was entitled to receive under the wills of her parents and grandmother; and even if Susie Newsom Lynch survived the children, if she did so by wrongfully causing their deaths, and if her wrongdoing caused or contributed to the deaths of her parents and grandmother, her estate could not profit from those wrongs. *In re Ives Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958). Obviously, defendants have not established as a matter of law that the material facts above stated cannot be proven. For in the hearing they did not even address the allegation that Susie Newsom Lynch's wrongdoing caused or contributed to the deaths of the children; or the allegation that she caused or contributed to the deaths of the three Newsoms; or the allegation that Hattie Carter Newsom predeceased Robert Wesley Newsom, Jr.; and though they did present materials to the court which indicate that Susie Newsom Lynch survived the children, that forecast of proof was contradicted by plaintiff's materials.

On the issue of the children's survival defendants' showing consisted principally of an affidavit by the Chief Medical Examiner for the State to the effect that the autopsy findings as to the conditions of the bodies and the nature of the injuries indicate in his opinion that the children died before their mother. This

affidavit was effectively met by the affidavit of Dr. Modesto Scharyj, the Medical Examiner for Forsyth County, a longtime Professor of Pathology at the Medical School of Wake Forest University, to the effect that in his opinion the autopsy findings do not indicate that either child was dead when the explosion which killed Susie Newsom Lynch occurred, but indicate that she died before her son, John Wesley Lynch. By their cross-appeal defendants argue that Dr. Scharyj is not qualified to express such an opinion and the court erred in receiving it. The argument has no basis: The doctor's affidavit indicates that he is eminently qualified to make deductions from autopsy findings; for it indicates, *inter alia*, that he is both learned and experienced in the medical science of pathology, has supervised more than 10,000 autopsies, and that his opinions are based upon the very same autopsy findings that defendants' expert opined from. Thus, all the survival issues raised by the pleadings remain to be determined; none has been resolved.

On the other major factual issues in the cases—the alleged wrongdoing of Susie Newsom Lynch in causing the deaths of the children and the Newsoms—defendants only showed that she has not been adjudicated as the "slayer" of the children or the Newsoms under G.S. 31A-3 and that no action to have her so adjudicated was brought by plaintiff within a year of their deaths. But they did not show, or attempt to show, that Susie Newsom Lynch did not cause the deaths involved; and the only materials bearing at all on this factual issue were some laboratory reports from the Chief Medical Examiner's office presented by plaintiff which merely show that wipings taken from her hands indicate that she may have fired a gun before dying. That no action was brought under the slayer statute to declare Susie Newsom Lynch the slayer of the children and the Newsoms is not disputed by plaintiff, and from this established fact defendants argue that plaintiff is barred from proving that her wrongdoing contributed to those deaths. This argument is based upon a misunderstanding of the slayer statute, Article 3, Chapter 31A of our General Statutes. As our Supreme Court made clear in *Quick v. United Benefit Life Insurance Co.*, 287 N.C. 47, 213 S.E.2d 563 (1975): This enactment merely authorizes an additional means of preventing some wrongdoers from profiting from their wrongs; it authorizes an action, if brought within the year, to establish by simplified proof the ineligibility of a slayer to share in the property of his victim; it applies only to felonious killings; it did not abrogate any of the

many procedures devised by the common law to prevent one from profiting by his own wrong; a litigant's failure to file an action under the slayer statute within a year of the death involved only bars him from filing such an action and availing himself of the presumptions and evidentiary shortcuts authorized by that statute, it does not affect his common law right to prove in any appropriate action, if he can, that the alleged wrongdoer's culpable negligence caused the death. Thus, plaintiff's failure to proceed under the slayer statute does not bar him from showing in these actions, if he can, that Susie Newsom Lynch's culpable negligence proximately contributed to the deaths of the children and the Newsoms and that her estate cannot profit from those wrongs.

In vacating the judgments dismissing the actions and remanding them to the Superior Court for further proceedings in accord herewith, we note again for emphasis that this is not an adjudication of the childrens' rights under either of the wills involved. Their rights, if any, under those wills are uncertain and will remain uncertain until the material facts in controversy are established and the Newsom wills are judicially interpreted. What has been adjudicated is that the record does not establish as a matter of law that no genuine issues of material fact exist in these actions and that the judgments dismissing the actions are erroneous.

Vacated and remanded.

Judges COZORT and GREENE concur.

ELLA McCRAW SNOW BY AND THROUGH HER ATTORNEY IN FACT, MAXINE SNOW DOCKERY AND ELLA McCRAW SNOW v. WILLIAM T. EAST AS ADMINISTRATOR OF THE ESTATE OF CLARICE M. McMICKLE AND THE ESTATE OF CLARICE M. McMICKLE

No. 8817SC1387

(Filed 17 October 1989)

1. **Accord and Satisfaction § 1 (NCI3d)— services rendered by plaintiff to deceased sister—check from administrator to plaintiff—no payment in full for all services**

In an action to recover over $40,000 from deceased's estate for services rendered by plaintiff to her sister prior to the sister's death, a check for $133.72 tendered by defendant administrator of the estate and cashed by plaintiff did not constitute accord and satisfaction of any and all debts the sister owed plaintiff at the time of her death, since plaintiff and defendant had no discussion at any time that the check covered the cost of anything except the money plaintiff loaned her sister and the pajamas and robe she purchased for her sister; words written by defendant on the face of the check, "In Full Food, Clothing, etc.," could be construed to support plaintiff's belief; and it was not at all clear that defendant intended the check to cover full payment "of a disputed claim."

Am Jur 2d, Accord and Satisfaction §§ 33-35, 44.

2. **Quasi Contracts and Restitution § 2.1 (NCI3d)— services rendered plaintiff's deceased sister—no recovery on quantum meruit claim**

The trial court properly granted summary judgment for defendant on plaintiff's quantum meruit claim on the basis that a contract for payment for services never existed between plaintiff and her sister since plaintiff offered no evidence that she and her sister had ever discussed payment for services which plaintiff rendered; there was no evidence of deceased's intent to pay plaintiff; and, because plaintiff and deceased were sisters, the services plaintiff performed were presumed gratuitous absent any evidence to the contrary.

Am Jur 2d, Restitution and Implied Contracts §§ 26, 30-33, 53.

APPEAL by plaintiff from *Mills (F. Fetzer), Judge.* Judgment entered 12 September 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 23 August 1989.

On 8 June 1988, plaintiff filed a cause of action against defendants William T. East, administrator, and the Estate of Clarice M. McMickle to recover the sum of $42,219.27 plus interest and attorney's fees for services rendered by plaintiff to her sister, Clarice M. McMickle, from 1983 until the time of Mrs. McMickle's death on 22 August 1987. These services included providing food, shelter, electricity, telephone, heat, transportation and all other necessities and were, according to plaintiff, provided by her upon the reasonable expectation that she would be compensated for these services by Mrs. McMickle. Plaintiff alleged that the value of these services was $47,400.00, and that between 1981 until the time of her death in 1987, Mrs. McMickle paid plaintiff $5,180.73, leaving a balance due of $42,219.27.

At least two days prior to Mrs. McMickle's death, plaintiff loaned some money to Mrs. McMickle and purchased pajamas and a robe for her. After Mrs. McMickle's death, defendant William T. East was appointed administrator of her estate. On 26 September 1987, defendant tendered a check to plaintiff in the amount of $133.72, upon which he noted that this was "In Full [For] Food, Clothing, etc." Plaintiff had no conversation with defendant East that this check was intended to cover the costs of all services rendered and raised no issue regarding the specific services the check covered at that time. Plaintiff subsequently cashed the check. Plaintiff testified during a deposition on 29 July 1988 that this ($133.72) was the amount of money Mrs. McMickle owed her and did not say anything to defendant about additional monies owed because she was bereaved and did not think to mention the additional sum.

Plaintiff submitted a claim to defendant as administrator for Mrs. McMickle's estate for $42,219.27, which was denied by defendant on 15 March 1988. Plaintiff subsequently brought this action, and defendant answered and asserted affirmative defenses of compromise and settlement, accord and satisfaction, account stated, statute of limitations, laches and estoppel. Defendant included a Motion for Summary Judgment in his answer and subsequently filed a separate Motion for Summary Judgment on 15 August 1988. Defendant filed no affidavits or other documents with his Motion

for Summary Judgment. Plaintiff responded to defendant's motion on 12 September 1988, and filed with the Clerk of Superior Court affidavits of plaintiff and her daughter, Maxine Snow Dockery. Service of the affidavits upon defendant's counsel was accomplished, by agreement of the parties, by plaintiff's counsel leaving a copy of the affidavits in the mailbox at defendant's counsel's home one or two days prior to the hearing.

A hearing on defendant's motion was held 12 September 1988. Defendant relied upon a deposition of the plaintiff and an affidavit of her daughter, Mrs. Dockery, in support of his Motion for Summary Judgment. Plaintiff testified in her deposition that she and Mrs. McMickle had no written agreement that she [Mrs. McMickle] would pay plaintiff any money for goods and services rendered, and that plaintiff "just figured that she would pay at least half of the expenses, plus rent." Plaintiff also testified that she never had any conversation with defendant East that Mrs. McMickle owed plaintiff more money than the $133.72 for which she was paid.

Mrs. Dockery averred in an affidavit that on 26 September 1987, plaintiff requested defendant to reimburse her for pajamas, a robe and money for which plaintiff had loaned Mrs. McMickle a few days before Mrs. McMickle's death. Mrs. Dockery also stated that there was no discussion between plaintiff and defendant on that date that the check for $133.72 was for food, room, electricity, board, transportation or any other services.

The trial court granted summary judgment in favor of defendant on 12 September 1988 based upon the lack of evidence that Mrs. McMickle was indebted to plaintiff and the notations on the check for $133.72 that it was payment in full for "Food, Clothing, etc." From this judgment, plaintiff appeals.

Max D. Ballinger for plaintiff-appellant.

Wyatt Early Harris Wheeler & Hauser, by William E. Wheeler, for defendant-appellee.

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment. A motion for summary judgment under G.S. 1A-1, Rule 56(c) "shall be rendered . . . if the pleadings, depositions, . . . 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." 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, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must 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).

[1] Plaintiff contends that the check defendant tendered to plaintiff and cashed by plaintiff did not constitute accord and satisfaction of any and all debts Mrs. McMickle owed plaintiff at the time of Mrs. McMickle's death. We agree.

Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, it establishes that plaintiff and defendant did not have any discussion at any time that the check for $133.72 covered the cost for anything except the money plaintiff loaned Mrs. McMickle and the pajamas and robe she purchased for Mrs. McMickle. Defendant's reliance on *Sanyo Electric, Inc. v. Albright Distributing Co.*, 76 N.C. App. 115, 331 S.E.2d 738, *disc. rev. denied*, 314 N.C. 668, 335 S.E.2d 496 (1985) is misplaced. Defendant is correct in his assertion that *Sanyo* stands for the proposition that the law of accord and satisfaction in North Carolina does not require a complete discussion of the alleged claim, a summary of the amounts owed, or a detailed agreement concerning payments therefor, and that all that is required is "some indication on the check that it is tendered in full payment." *Id.* at 117, 331 S.E.2d at 740. Cashing a check tendered in full payment of a disputed claim establishes, as a matter of law, an accord and satisfaction. *Id.*

However, in the case *sub judice*, the evidence tends to show that plaintiff believed that the check for $133.72 was full payment only for the clothes and loan to Mrs. McMickle a few days prior to Mrs. McMickle's death. Plaintiff stated in her deposition that there was no discussion between defendant and plaintiff at the time the check was written or subsequently that the sum covered any other expenses on behalf of Mrs. McMickle.

Moreover, the words written by defendant on the face of the check may be construed to support plaintiff's belief. Defendant wrote, "In Full Food, *Clothing*, etc." (Emphasis added.) The term "etc." can be interpreted as the loan plaintiff made to Mrs. McMickle, rent, fuel, electricity, transportation or any other expense. In *Sanyo*, the check in question was accompanied by a letter stating that "This check is delivered to you in full, final and complete settlement of all amounts . . . ." *Id.* at 117-18, 331 S.E.2d at 740. It is not at all clear that defendant intended this check to cover full payment "of a disputed claim" as is required by *Sanyo*. In fact, at the time defendant wrote the check for $133.72, there was no other claim at all. If there is no claim, then there can be no accord and satisfaction.

[2] Plaintiff next argues that the trial court erred in granting summary judgment on the basis that a contract for payment for services never existed between plaintiff and Mrs. McMickle. As to this contention, we disagree.

Plaintiff maintains that she and Mrs. McMickle had an implied contract and may therefore recover under a *quantum meruit* theory. In *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E.2d 548 (1954), our Supreme Court stated:

> The circumstances must be such as to warrant the inference that the services were rendered and received with the mutual understanding that they were to be paid for. 'The *quantum meruit* must rest upon an implied contract.' *Lindley v. Frazier*, 231 N.C. 44, 55 S.E.2d 815. It must be made to appear that at the time the services were rendered, payment was intended on the one hand and expected on the other. *Brown v. Williams*, 196 N.C. 247, 145 S.E. 233; *Francis v. Francis*, 223 N.C. 401, 26 S.E.2d 907. The plaintiff must show by the greater weight of the evidence that both parties, at the time the labor was done or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same. *Young v. Herman*, 97 N.C. 280; *Staley v. Lowe*, 197 N.C. 243, 148 S.E. 240; *Lindley v. Frazier, supra; Lowrie v. Oxendine*, 153 N.C. 267, 69 S.E. 131.
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> . . .
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> If the services were rendered as a pure gratuity or in discharge of a moral obligation, no promise to pay is implied and no presumption of such promise arises. (Citation omitted.)

240 N.C. at 585, 83 S.E.2d at 551.

When one family member performs services for another within the family, those services are presumed to have been gratuitous, performed from a sense of moral obligation and with no expectation of payment. *See* 2 Brandis on North Carolina Evidence sec. 232 (1982). Even when the relationship is not sufficiently close to raise a presumption of gratuitous services, in order to recover, plaintiff must "show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for, ..." *Brown v. Hatcher*, 268 N.C. 57, 60, 149 S.E.2d 586, 589 (1966) (citations omitted).

Applying the above principles to the case *sub judice*, we find that we cannot infer from any of the evidence that plaintiff and Mrs. McMickle had an implied contract.

First, plaintiff stated in her deposition that she "*just figured* that she [Mrs. McMickle] would pay at least half of the expenses plus rent" (emphasis added). Plaintiff acknowledged that there was no written agreement and there was no evidence that she and Mrs. McMickle had even discussed payment for services.

Second, there is no evidence of Mrs. McMickle's intent to pay plaintiff. The general rule under a *quantum meruit* theory is that the payment for services must be intended by one party and expected by the other. *Id.* Here, plaintiff presented no evidence that Mrs. McMickle ever intended to pay her for her services. Plaintiff stated in her deposition that Mrs. McMickle paid her over $5,000.00 during the period she lived with plaintiff. Plaintiff presented no explanation or evidence, however, as to the basis for these payments.

Finally, we find that because plaintiff and Mrs. McMickle were sisters, the services plaintiff performed for Mrs. McMickle are presumed gratuitous absent any evidence to the contrary.

For the reasons set forth above, we find that the trial court did not err in granting summary judgment in favor of defendant.

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. THOMAS EDWARD DALTON

No. 8827SC1414

(Filed 17 October 1989)

1. **Criminal Law § 75.10 (NCI3d)— defendant's comprehension of Miranda rights—cross-examination proper**

The State's cross-examination of defendant regarding his comprehension of his Miranda rights did not violate his constitutional right to remain silent since the cross-examination was not directed to defendant's exercise of such rights but to his waiver of those rights in voluntarily making his statement to the investigating officer.

Am Jur 2d, Witnesses §§ 468, 471-476, 492, 495, 497.

2. **Criminal Law § 86.3 (NCI3d)— credibility of defendant—evidence of prior convictions admissible**

There was no merit to defendant's contention that the State's use of his prior convictions was improper in that the State did not establish that the convictions were punishable by more than sixty days' confinement, since defendant first brought his prior convictions to the jury's attention in his own testimony; without objection on cross-examination defendant admitted his prior convictions; and when defendant denied that he had pled guilty to the charges against him in another state, the State, as a basis for attacking his credibility, was entitled to show on rebuttal that defendant had in fact pled guilty to those charges.

Am Jur 2d, Witnesses §§ 492, 525, 569 et seq.

3. **Criminal Law § 86.3 (NCI3d)— denial of prior conviction—record of prior conviction admissible in contradiction**

A witness's denial of a prior conviction on cross-examination may be contradicted by introduction of the record of the prior conviction. N.C.G.S. § 8C-1, Rule 609(a).

Am Jur 2d, Evidence §§ 320-333.

4. Criminal Law § 87.1 (NCI3d)— taking indecent liberties with child—fifteen-year-old prosecuting witness—leading questions proper

In a prosecution for taking indecent liberties with a child the trial court did not err in allowing the State to ask leading questions of the fifteen-year-old prosecuting witness on direct examination.

Am Jur 2d, Witnesses §§ 429-431.

5. Criminal Law § 1079 (NCI4th)— two mitigating factors—one aggravating factor—severity of sentence

In a prosecution for taking indecent liberties with a child, the trial court did not err in finding in mitigation defendant's honorable discharge from military service and his character at work, finding in aggravation defendant's prior convictions, and imposing a sentence of seven years' imprisonment rather than the presumptive sentence of three years' imprisonment.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from *Sitton, Claude S., Judge.* Judgment entered 18 August 1988 in CLEVELAND County Superior Court. Heard in the Court of Appeals 29 August 1989.

Defendant was charged by indictment with the offenses of second-degree rape, second-degree sexual offense, and taking indecent liberties with a child. The evidence at trial tended to establish that defendant had recently moved to North Carolina from Nebraska to take employment with the Cleveland County Mental Health Department. Defendant's mother and teenage daughter resided with him. On 12 December 1987, the victim, a fourteen-year-old girl, was at defendant's home to spend the night with defendant's daughter. They spent the evening watching television while defendant was away at a local bar. Sometime after midnight defendant returned. The girls were still awake. Defendant prepared two rounds of rum and coke for each of them. Thereafter, they all laid upon the floor to watch more television. Defendant's daughter soon fell asleep, and defendant then made sexual advances upon the victim.

The jury acquitted defendant on the charges of second-degree rape and second-degree sexual offense, but convicted him on the charge of taking indecent liberties with a child. Following the sen-

tencing hearing, the court imposed a term of seven years' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General LaVee Hamer Jackson, for the State.

Bridges, Morgan, and Gilbert, P.A., by Forrest Donald Bridges, for defendant-appellant.

WELLS, Judge.

Defendant has brought forward four assignments of error challenging the mode and subject matter of examination at trial, one assignment of error challenging the jury instructions, and one assignment of error challenging the sentence imposed. We find no error.

[1] Defendant first assigns as error the trial court's permitting the State to cross-examine him regarding his comprehension of his Miranda rights. Defendant argues that the State's purpose in pursuing this line of questioning was to point out to the jury that, as a former police officer, defendant's exercise of his right to remain silent was evidence of guilt. Defendant contends that his rights under the Fourteenth Amendment to the United States Constitution were thereby violated. We disagree.

A criminal defendant has a right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966). The due process clause of the Fourteenth Amendment to the United States Constitution bars the use, for impeachment purposes, of a defendant's post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610 (1976); *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989). The United States Supreme Court has, however, limited the application of *Doyle* to those cases in which "the trial court has permitted *specific inquiry or argument respecting the defendant's post-Miranda silence.*" *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102 (1987) (emphasis added). In this case, the record discloses that defendant, *on direct examination*, testified that he voluntarily gave a statement to the investigating officer regarding the charges against him, after receiving the required Miranda warnings. Defendant further testified on direct examination that he ended his statement because the officer "believed [the victim], and I felt at that time that anymore that I said to him would not be in my benefit." The record also shows that the State made no specific inquiry respecting defendant's post-Miran-

da silence. Rather, the State's cross-examination regarding defendant's understanding of his Miranda rights was clearly directed, not to defendant's exercise of such rights, but to defendant's *waiver* of those rights in voluntarily making his statement to the investigating officer. As the United States Supreme Court has stated:

> *Doyle* does not apply to cross-examination that merely inquires into [prior statements]. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson v. Charles, 447 U.S. 404 (1980) (Per Curiam). We thus conclude that the State's cross-examination of defendant comported with the applicable constitutional requirements. This assignment of error is overruled.

Defendant next assigns as error the State's cross-examination of him regarding his prior convictions and the State's introduction on rebuttal consisting of public records of these prior convictions. Impeachment by evidence of prior convictions is governed by Rule 609 of the North Carolina Rules of Evidence. That Rule provides:

> (a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

N.C. Gen. Stat. § 8C-1, Rule 609(a) (1988). To be admissible, the conviction must have occurred within the previous ten years. *Id.*, Rule 609(b).

To put this issue in appropriate context, we first note that in his direct examination, defendant testified that he had been previously convicted in Peoria Heights, Illinois of conduct unbecoming a police officer and "other charges arising out of that." On cross-examination, defendant was asked the following questions without objection and gave the indicated answers:

> Q. Isn't it true that within the past ten years, you pled guilty or was [sic] convicted of nine different felonies up in Peoria Heights, Illinois?

A. I pled *nolo contendre* [sic] to whatever charges the department wished to put against me at that time. I didn't debate any point.

. . .

Q. As a result of pleading *nolo contendre* [sic], you received a sentence, didn't you?

A. Yes, sir, I did.

When the district attorney began to further pursue defendant's *nolo contendere* plea, he was interrupted by the court and after a bench conference, the district attorney agreed not to pursue that line of questioning. The trial court then instructed the jury not to consider "any matter or any statement made about [a] *nolo contendere* plea" and took the further precaution of asking the jury whether they could follow his instructions and "disregard any comment based on that." By a show of hands, the jury indicated a positive response.

On further cross-examination, defendant specifically denied that he had *pled guilty* to the Illinois charges. In its rebuttal, the State was allowed, over defendant's objection, to introduce public records from the Circuit Court of the Tenth Judicial Circuit of Illinois in case number 80CF2236 which showed that defendant had entered a guilty plea to seven counts of official misconduct and two counts of theft on 14 July 1980, and that on 2 September 1980 he was sentenced to probation for a period of thirty months.

[2] Defendant first argues in support of this assignment of error that the State's use of defendant's prior convictions was improper in that the State did not establish that the convictions were punishable by more than sixty days' confinement as required by Rule 609(a). It is true that the records of defendant's prior convictions do not specifically disclose that the offenses were punishable by confinement of greater than sixty days. We nevertheless reject this argument. First, we again note that defendant first brought his prior convictions to the jury's attention in his own testimony. Second, we note that, without objection on cross-examination, defendant admitted his prior convictions. Third, we are persuaded that when defendant denied that he had pled guilty to the charges against him in Illinois, the State, as a basis for attacking his credibility, was entitled to show on rebuttal that defendant had in fact pled guilty to those charges.

[3] Defendant further argues in support of this assignment of error that the State was bound by his answer on cross-examination denying his guilty pleas in the 1980 action and therefore could not properly introduce the public records of his prior convictions in rebuttal. We disagree. Prior to the adoption of the North Carolina Rules of Evidence, a witness' denial of a prior conviction on cross-examination could not be contradicted by the introduction of extrinsic evidence. *Brandis on North Carolina Evidence* § 112 (1982). The official commentary to the rules makes it clear that Rule 609(a) was intended to change the former practice and allow the record of the prior conviction to be introduced, regardless of the witness's denial. Therefore, defendant's objection on this ground to the admission of this evidence during the State's rebuttal was properly overruled by the court.

[4] By his third assignment of error, defendant challenges the court's permitting the State to ask leading questions of the prosecuting witness on direct examination. Under Rule 611 of the North Carolina Rules of Evidence, leading questions are not normally permissible on direct examination, "except as may be necessary to develop [the witness'] testimony." N.C. Gen. Stat. § 8C-1, Rule 611(c) (1988). The Rules of Evidence, however, also provide that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Id., Rule 611(a). It is within the discretionary power of the trial court to allow leading questions on direct examination, and rulings on the use of such questions are reversible only for an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986). The record discloses that at the time of the crime the prosecuting witness was only fourteen years old. She was fifteen years old at the time of trial. Her testimony, in open court, pertained to sexual matters of a delicate, sensitive, and embarrassing nature. It is well established that leading questions on direct examination are permissible under such circumstances to develop the witness's testimony. *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527, *cert. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). We therefore find no abuse of discretion and overrule this assignment of error.

Defendant's fourth and fifth assignments of error are considered in tandem. Defendant asserts that the trial court erred both in allowing the State to question defendant and his mother regarding a female friend of defendant and by emphasizing in the jury instructions the use of alcohol by the prosecuting witness. The record establishes that as to the former contention, all of defendant's objections to the State's line of questioning were sustained; as to the latter contention, the instructions complained of pertained to the charge of second-degree sexual offense, of which defendant was acquitted. Because defendant has not demonstrated error, neither of these assignments constitutes a proper ground for appeal, and they are both overruled. N.C. Gen. Stat. § 15A-1442 (1988).

[5] Finally, defendant assigns as error the trial court's weighing of aggravating and mitigating factors under the Fair Sentencing Act in determining the sentence imposed. Defendant was convicted of taking indecent liberties with a child, a Class H felony. N.C. Gen. Stat. § 14-202.1 (1986). The presumptive sentence for this offense is three years' imprisonment. *Id.* § 15A-1340.4 (1988). The maximum sentence allowable is ten years' imprisonment. *Id.* § 14-1.1 (1986). Following the sentencing hearing, the trial court found two factors in mitigation, namely, defendant's honorable discharge from military service and his good character at work. Against these, the court weighed one factor in aggravation—defendant's prior convictions—and imposed a sentence of seven years' imprisonment.

Defendant first argues that the sentence is improper because there was no evidence introduced that the prior convictions carried a punishment of more than sixty days' confinement as required by N.C. Gen. Stat. § 15A-1340.4(a)(1). As we noted earlier in this opinion, defendant admitted during the trial that he had been convicted of nine different felonies in Illinois. We take judicial notice that under Illinois law no felony is punishable by a sentence of less than a term of one year. *38 Illinois Corrections Code*, Para. 1005-8-1. We therefore reject this argument.

Defendant argues alternatively in support of this assignment of error that the court increased his sentence, not as a result of the prior convictions as a statutory aggravating factor, but rather as a result of the court's unfavorable impression of defendant's inconsistent testimony regarding his pleas in the former action. This argument is wholly without merit. The record of the sentencing hearing is devoid of even a hint that the court based its

decision to increase defendant's sentence on anything other than the prior convictions which it found as an aggravating factor under N.C. Gen. Stat. § 15A-1340.4. Defendant has demonstrated no abuse of discretion; therefore, we will not disturb the balance struck by the trial court. *State v. Daniels*, 319 N.C. 452, 355 S.E.2d 136 (1987).

For the reasons stated, we find

No error.

Judges PHILLIPS and PARKER concur.

PEARLINE JOHNSON AND HUSBAND, JOHN WILLIAM JOHNSON v. WADE H. STANLEY

No. 8811DC1197

(Filed 17 October 1989)

Easements § 6.1 (NCI3d)— failure to show hostile character of pathway use—no prescriptive easement

The absence of evidence showing the hostile character of plaintiffs' use of a pathway on defendant's land entitled him to judgment as a matter of law in plaintiffs' action to establish a prescriptive easement.

Am Jur 2d, Easements and Licenses §§ 39 et seq.

APPEAL by plaintiffs from Judgment entered 9 June 1988 in JOHNSTON County District Court by *Judge Elton C. Pridgen.* Heard in the Court of Appeals 11 May 1989.

Lucas & Bryant, P.A., by W. Robert Denning, III, and Robert W. Bryant, Jr., for plaintiff-appellants.

Narron, O'Hale, Whittington & Woodruff, P.A., by James W. Narron, for defendant-appellee.

BECTON, Judge.

The central issue in this appeal is whether plaintiffs, John and Pearline Johnson, acquired a prescriptive easement over the

lands of defendant, Wade H. Stanley. For the reasons that follow, we affirm the order granting summary judgment for Mr. Stanley.

I

These are the pertinent facts. Mr. and Mrs. Johnson own an 18-acre farm in Johnston County which, until 1986, was farmed by tenants. The Johnson farm adjoins the farm of Mr. Stanley, which in turn borders a public highway. For more than 60 years, the primary means of reaching the Johnson farm from the highway was by a pathway which traversed Mr. Stanley's land and the land of others. In January 1986, Mr. Stanley erected a barricade across the pathway, preventing access to the farm along that route. The barricade, which Mr. Stanley constructed because the Johnsons' tenants had been disturbing his family with late-night traffic and noise, was built across the pathway at the place that his land joined the Johnsons'. An alternative access to the Johnson farm was provided by a second path which, although it was wide enough for a car or an ordinary tractor, was too narrow to accommodate large farming equipment. As a result the Johnsons were unable to rent out their acreage for farming; however, the farmhouse on the land continued to be rented, and was reached by traveling the second path.

Mr. and Mrs. Johnson brought this suit seeking injunctive relief and damages, alleging in their complaint that they had acquired a prescriptive easement over Mr. Stanley's land. The Johnsons specifically alleged that they made repairs to the pathway at their own expense and that their use of the land gave Mr. Stanley notice that it was being used under a claim of right. Mr. Stanley moved for summary judgment on the ground that the Johnsons' use of his land was not hostile, a prerequisite to establishing a prescriptive easement. In support of his motion Mr. Stanley presented evidence that repairs to the pathway were performed only on the Johnsons' land, not his. Mr. and Mrs. Johnson offered no contradictory evidence, and Mr. Stanley's motion was granted.

II

The Johnsons contend on appeal that their continuous use and periodic repair of the pathway constituted adverse, hostile, open and notorious use, entitling them to an easement by prescription. Mr. Stanley contends, on the other hand, that he was entitled to judgment as a matter of law because an essential element of

the Johnsons' claim to a prescriptive easement—hostility—is missing. We agree with Mr. Stanley.

A

We turn first to the general rules regarding prescriptive easements. A prescriptive easement or right-of-way over the land of another, being acquired in the manner of adverse possession, is disfavored in the law. *See Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981). Entitlement to an easement by prescription is restricted because a landowner's " 'mere neighborly act' " of allowing someone to pass over his property may ultimately operate to deprive the owner of his land. *Id.* (citation omitted). For this reason, mere use alone is presumed to be permissive, and, unless that presumption is rebutted, the use will not ripen into a prescriptive easement. *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974).

To establish entitlement to an easement, the claimant must prove by the greater weight of the evidence each of the following essential elements: (1) that the use was *adverse, hostile, or under a claim of right*; (2) that the use was open and notorious such that the true owner had notice of the claim; (3) that the use was continuous and uninterrupted for twenty years or more; and (4) that there was substantial identity of the easement for the twenty-year period. *Potts*, 301 N.C. at 666, 273 S.E.2d at 287-88. Only the first element is in dispute here.

The three components of the first element are, for the most part, synonymous. "Adverse" means "[h]aving opposing interests," Black's Law Dictionary 49 (5th ed. 1979), and "[t]he term adverse use . . . implies a use . . . that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim. . . ." *Warmack v. Cooke*, 71 N.C. App. 548, 552, 322 S.E.2d 804, 807-08 (1984), *disc. rev. denied*, 313 N.C. 515, 329 S.E.2d 401 (1985) (citing *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912)).

The requirement that the use be "hostile" before a prescriptive easement is established does not mean that animosity must exist between the claimant and the true owner; " '[a] "hostile" use is simply a use of such a nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.' " *Dickinson*, 284 N.C. at 581, 201 S.E.2d

at 900 (quoting *Dulin v. Faires*, 266 N.C. 257, 145 S.E.2d 873 (1966). The term "claim of right" is widely considered to be merely a restatement of the hostility requirement. *See, e.g., Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984); *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892, 898 (1979); *H.L. Brown & Assocs., Inc. v. McMahon*, 525 S.W.2d 553, 558 (Tex. Civ. App. 1975). A "claim of right" is an intention to claim and use land as one's own. Black's Law Dictionary at 225. Notice to the true owner of the existence of the alleged easement is "crucial to the concept of holding under a claim of right." *Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d 82, 85-86 (1981). Notice of a claim of right may be given in a number of ways, including holding under color of title, *see id.* at 541, 279 S.E.2d at 86, or by open and visible acts such as repairing or maintaining the way over another's land. *See, e.g., Potts*, 301 N.C. at 668, 273 S.E.2d at 289 (plaintiffs smoothed, graded and gravelled road); *Dickinson*, 284 N.C. at 583, 201 S.E.2d at 901 (plaintiffs performed slight maintenance to keep road passable); *Perry v. Williams*, 84 N.C. App. 527, 529, 353 S.E.2d 226, 228 (1987) (plaintiff's agent placed brickbats and rocks in holes in road).

In the absence of positive evidence evincing an adverse, hostile use or claim of right over another's land sufficient to put the owner on notice, the presumption of permissive use is not rebutted, and the claimant is not entitled to a prescriptive easement. *See Amos v. Bateman*, 68 N.C. App. 46, 51, 314 S.E.2d 129, 131-32 (1984); *Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 304 S.E.2d 259 (1983). "A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Dickinson*, 284 N.C. at 580, 201 S.E.2d at 900.

With these principles in mind, we turn now to the question of whether Mr. Stanley was entitled to summary judgment.

B

A party is entitled to summary judgment only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, R.Civ. P. 56(c) (1983). Summary judgment should be granted for the moving party if he meets the burden of proving that an essential element

of the opposing party's claim is nonexistent, and the opposing party then fails to produce evidence demonstrating that genuine fact issues do remain for trial. *See Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 223, 333 S.E.2d 299, 302 (1985); *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 204 (1989).

Here, Mr. Stanley submitted the deposition of Mrs. Johnson, his own deposition and affidavit, and the Johnsons' answers to interrogatories. Together these materials showed unequivocally that repairs to the pathway were made on the Johnsons' land, rather than on Mr. Stanley's land. At her deposition, Mrs. Johnson repeatedly identified the area where the repairs were made as "right below [Mr. Stanley's] land" on the Johnsons' side of the barricade. Mr. and Mrs. Johnson submitted no evidence showing that any repairs were made on Mr. Stanley's land. Thus, apart from the Johnsons' use of the pathway as a means of ingress and egress, there is no evidence of any acts which should have put Mr. Stanley or his predecessors on notice that Johnsons' use was adverse, hostile, or under a claim of right. As stated above, mere use alone is insufficient to establish a prescriptive easement. *See Amos*, 68 N.C. App. at 50, 314 S.E.2d at 132. Accordingly, we hold the absence of evidence showing the hostile character of the use of the pathway on Mr. Stanley's land entitled him to judgment as a matter of law. *Cf. Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 471, 325 S.E.2d 27, 30 (1985) (landowner entitled to directed verdict when essential element of prescriptive easement claim missing).

In deciding as we do, we are fully cognizant that the barricade prevents the Johnsons from renting out their land for farming since the second path is at present too narrow to permit farming equipment to pass. This fact alone does not entitle them to a prescriptive easement as a matter of right. *Cf. Presley v. Griggs*, 88 N.C. App. 226, 233-34, 362 S.E.2d 830, 834-35 (1987) (prescriptive easement found in farm road which provided sole means of access *and* to which repairs were made). This fact may, however, provide the basis for bringing a special proceeding to establish a cartway across Mr. Stanley's land pursuant to N.C. Gen. Stat. Sec. 136-69 (1986). *Cf. Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 152 (1890) (claimant entitled to cartway over land of another because existing path connecting his land to a public road was impassable). In making this point, we emphasize that nothing in this opinion should be construed to affect the outcome of such an action, should the Johnsons choose to bring one.

The judgment of the trial court is

Affirmed.

Judges PHILLIPS and LEWIS concur.

IN RE: CRYSTAL LYNN HAYDEN

No. 8922DC107

(Filed 17 October 1989)

1. Parent and Child § 2.3 (NCI3d)— child abuse and neglect— mother's out-of-court statements to social workers—testimony by social workers properly admitted

In a hearing to determine if a child was abused and neglected social workers were properly permitted to testify pursuant to N.C.G.S. § 8C-1, Rule 801(d) as to respondent's wife's out-of-court statements to them that respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior, since the wife was a party to this action, and her statements to the social workers about her husband's conduct could only be reasonably considered as admissions by her that the child was subjected to conduct in her presence which could be found to be abusive and neglectful.

Am Jur 2d, Evidence §§ 508 et seq., 610-612.

2. Evidence § 33.2 (NCI3d); Parent and Child § 2.3 (NCI3d)— child abuse and neglect—child's memory of previous day's events—hearsay statement inadmissible

In a hearing to determine if a child was abused and neglected, a hearsay statement of the child which pertained to her memory of the previous day's events and was offered solely for the purpose of proving such events was clearly excluded by N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence §§ 493, 500.

3. Evidence § 33 (NCI3d)— child's statement—inadmissibility under residual hearsay exception—notice requirements not complied with

A child's statement was not admissible under the N.C.G.S. § 8C-1, Rule 803(24) residual hearsay exception, since the Rule's notice requirements were not complied with.

Am Jur 2d, Evidence §§ 493, 500.

4. Parent and Child § 2.3 (NCI3d); Evidence § 50.2 (NCI3d)— child—burns—physician's testimony as to cause properly admitted

In a hearing to determine if a child was abused and neglected the trial court did not err in admitting the opinion testimony of the examining physician that burns on the child were not the result of accident. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Expert and Opinion Evidence §§ 243 et seq.

5. Parent and Child § 2.3 (NCI3d)— child burned—medical treatment refused by father—sufficiency of evidence of abuse and neglect

Evidence before the trial court was sufficient to support its findings of abuse and neglect where the evidence tended to show that the child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; no accidental cause was established, and the child in fact stated that respondent burned her; the burns were serious, requiring prompt medical attention; respondent did not seek treatment for the child's injuries and refused to permit the social worker to do so; and the child was taken for treatment only upon the intervention of the sheriff's department.

Am Jur 2d, Infants §§ 16, 17.

APPEAL by respondent-father from *Harbinson, Kimberly T., Judge.* Judgment entered 26 October 1988 in ALEXANDER County District Court. Heard in the Court of Appeals 19 September 1989.

On 2 September 1988 a juvenile petition pursuant to N.C. Gen. Stat. § 7A-560 was filed by the Alexander County Department of Social Services against Frank Jones, respondent-appellant, and Tonia Jones, parents of the juvenile, Crystal Lynn Hayden, alleging abuse and neglect as defined by G.S. § 7A-517. The evidence at

the 26 October proceeding in the district court tended to establish that at about 7:30 p.m. on 1 September 1988, the Iredell County Department of Social Services received a telephone call alleging that a child at the Jones' residence had been seriously burned and was in need of medical care. A social worker immediately investigated and found the child, Crystal Hayden, age three, and her siblings to be solely in the care of respondent, the mother being at work. The social worker examined the child and observed burns under her left arm, other burns down her chest, and pronounced redness on her cheek and mouth. When asked how the child had been burned, respondent stated that the burns were caused by a curling iron which his wife had left on that morning. He denied inflicting the burns. The social worker informed respondent that the injuries appeared to be serious and urged him to seek medical treatment for the child. Respondent replied that he would do so, upon the mother's return. Follow-up calls later that evening by the social worker to area hospitals revealed that the child had not been taken for treatment.

The next morning, the mother called the social worker and informed her that the parents were treating the child at home. The case was transferred to the Alexander County Department of Social Services, it being determined that the Joneses resided in that county, and a second social worker went out to the family's home. This social worker also met with respondent, who again denied that he had inflicted the burns. A request for permission to take the child for free medical treatment was denied. The social worker then sought assistance from the Alexander County Sheriff, obtaining authorization to take the child for treatment, over respondent's continued opposition. The examining physician determined that the child had suffered a deep second-to-third-degree burn under her arm, possibly requiring skin grafting, further second-degree burns on her face, and first-degree burns on her chest. While in the doctor's office, the child stated to the medical assistant—in the hearing of both the doctor and the social worker—that, "My daddy burned me . . . because I was bad."

From the facts found by clear and convincing evidence, the court concluded that the child was abused and neglected and ordered that she be placed in the legal custody of the Alexander County Department of Social Services, physical custody to be retained by the mother. The court further ordered the mother not to allow any contact between the child and respondent, pending the outcome

and disposition of criminal charges against him which arose out of the incident. Respondent appeals from that order.

Edward Jennings for respondent-appellant.

William A. Sigmon for petitioner-appellee.

Martin L. Kesler, Jr. for the Guardian ad Litem.

WELLS, Judge.

Respondent brings forth two assignments of error challenging the court's rulings on the admissibility of evidence and one assignment of error challenging the sufficiency of the evidence. We reject respondent's arguments and affirm the order below.

[1] Respondent first assigns as error the court's rulings admitting testimony of the two social workers as to certain inculpatory out-of-court statements made by respondent's wife and excluding testimony as to an alleged exculpatory statement made by the child. This raises the question of whether the evidentiary rules governing hearsay testimony, set forth at N.C. Gen. Stat. § 8C-1, Rules 801, *et seq.* (1988) of the North Carolina Rules of Evidence, were properly applied. Pertinent to this appeal are the following:

> Rule 802.
>
> Hearsay is not admissible except as provided by statute or by these rules.
>
> Rule 801.
>
> (d) Exception for Admissions by a Party-Opponent.—A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement[.]
>
> Rule 803.
>
> The following are not excluded by the hearsay rule . . . .
>
> (3) . . . [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . *but not including a statement of memory or belief to prove the fact remembered or believed*[.]

. . .

> (24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness . . . . 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 . . . to the adverse party sufficiently in advance or offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

(Emphasis added.)

At the hearing, the social workers were permitted to testify, over respondent's objections, as to his wife's out-of-court statements to them that respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior. Respondent argues that these statements should have been excluded under Rule 802 in that they are hearsay, not within any exception. We disagree. Mrs. Jones was a party to this action which was brought to determine whether her child, Crystal, was abused and neglected. Her statements to the social workers about Mr. Jones' conduct can only be reasonably considered as admissions by her that Crystal was subjected to conduct in her presence which could be found to be abusive and neglectful. Within the context of this juvenile petition case, we hold that her statements were properly admitted pursuant to the provisions of Rule 801(d).

[2, 3] Turning to the court's ruling excluding testimony as to the alleged out-of-court statement of the child, the record discloses that, pursuant to its *in camera* examination of the child, the court ruled that she was not competent to testify. Respondent thereafter attempted to offer the wife's testimony that on the morning after the incident, the child stated to the wife that she had burned herself on the previous day. In support of this proffer, respondent argues that the child's statement falls within the Rule 803(3) hearsay exception permitting out-of-court statements of then existing mental, emotional, or physical condition to be introduced into evidence. Alternatively, respondent urges that the child's statement is admissible under the Rule 803(24) residual hearsay exception. We reject both arguments. As to the former, Rule 803(3), by its own terms, excludes "a statement of memory or belief to prove the fact remembered or believed." The proffered hearsay

statement of the child, because it pertained to a memory of the previous day's events and was offered solely for the purpose of proving such events, is clearly excluded by the Rule. As to the latter contention, a condition precedent to admissibility under the Rule 803(24) residual hearsay exception is the proponent's satisfaction of that Rule's notice requirements. The record discloses that these were not complied with; therefore, this testimony was properly excluded. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). This assignment of error is overruled.

[4] By his second assignment of error, respondent challenges the court's ruling admitting the opinion testimony of the examining physician that the burns were not the result of accident. 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 factfinder "in drawing certain inferences from facts, and the expert is better qualified than the [factfinder] 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.

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse and neglect under the Juvenile Code. *See* N.C. Gen. Stat. §§ 7A-549 (authority of medical professionals in abuse cases), -551 (physician-patient privilege not grounds for excluding evidence of abuse or neglect), -639 (predisposition medical reports required), -647 (judge may order medical examination to determine needs of child for disposition). The record in this case discloses that the examining physician, a duly licensed practitioner in North Carolina, is board certified in family medicine, has extensive experience in pediatrics, and has been enlisted by the North Carolina Child Medical Evaluation Program. His testimony was detailed, precisely explaining the nature

of the burns, how such burns are medically evaluated, and how they are treated. He further testified that the number, location, and severity of the burns was inconsistent with a medical etiology of accidental causation. Such testimony was clearly helpful to the court as factfinder and was properly admitted. We therefore overrule this assignment of error.

[5] Finally, respondent contends that the evidence was insufficient to support the court's findings that the child was abused and neglected. The Juvenile Code, in pertinent part, defines an abused child as

> [a]ny juvenile less than 18 years of age whose parent or other person responsible for his care:
>
> a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ[.]

N.C. Gen. Stat. § 7A-517(1) (Supp. 1988). A neglected child is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; . . . or who is not provided necessary medical care . . . or who lives in an environment injurious to his welfare[.]

Id., § 7A-517(21). Allegations of abuse and neglect must be proved by clear and convincing evidence. *Id.*, § 7A-635. Applying these standards, we have no difficulty concluding that the evidence before the trial court was sufficient to support its findings of abuse and neglect. The child, while in respondent's sole care, suffered multiple burns over a wide portion of her body. No accidental cause was established, and the child in fact stated that respondent burned her. The burns were serious, requiring prompt medical attention. Respondent did not seek treatment for the child's injuries and refused to permit the social worker to do so. Indeed, the child was taken for treatment only upon the intervention of the Sheriff's Department, over respondent's opposition. This assignment of error is overruled.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA EX REL. LACY H. THORNBURG, ATTORNEY GENERAL, PLAINTIFF v. TAVERN AND OTHER BUILDINGS AND LOTS AT 1907 N. MAIN ST., KANNAPOLIS, N.C., LOTS NOS. 10, 11, 12, 13, 14, AND 15 OF BLOCK L, BK. OF MAPS, P. 558, ROWAN COUNTY REGISTRY AND BEING PROPERTY DESCRIBED IN DEED BOOK 613, P. 812, ROWAN COUNTY REGISTRY DEEDED TO DAVID L. BENNICK; SEE ALSO PARCEL 166, LOTS 10-13, TAX MAP 166, TWP. 13, DEFENDANT, AND CAROLYN B. BENNICK, DEFENDANT-INTERVENOR

No. 8919SC294

(Filed 17 October 1989)

1. **Penalties § 1 (NCI3d)— RICO Act forfeiture—proceeding civil and not criminal—no improper burden of proof on intervenor**

In a proceeding for forfeiture of a lounge pursuant to the provisions of the RICO Act, there was no merit to intervenor's contention that forfeiture statutes are essentially criminal and her constitutional rights were therefore denied when the trial court placed on her the burden of satisfying the jury that she was an innocent party, since the purpose of forfeiture is not punishment for a criminal act but is instead to deter unlawful activity, to prevent unjust enrichment, to restore to the lawful economy means of production unlawfully diverted therefrom, and to compensate persons injured by unlawful activity, and the remedy prescribed by N.C.G.S. § 75D-5 and the one utilized in this case is a civil in rem proceeding.

Am Jur 2d, Forfeitures and Penalties §§ 13, 16, 18, 36, 38.

2. **Penalties § 1 (NCI3d)— forfeiture—intervenor as innocent party—no improper burden of proof on intervenor**

There was no merit to intervenor's contention in a RICO Act forfeiture proceeding that she should not bear the burden of proving her "innocence," since the only way an "innocent party" issue will be raised is by the voluntary intervention of some claimant to the property, and N.C.G.S. § 75D-5 provides that intervenors claiming to be innocent parties have the burden of proof on that issue.

Am Jur 2d, Forfeitures and Penalties §§ 13, 16, 18, 36, 38.

3. Penalties § 1 (NCI3d)— lounge subject to forfeiture—State as RICO lienor—protection pursuant to registration statute

Regardless of whether or not intervenor in a forfeiture proceeding was an innocent party, she had no interest in a lounge superior to that of the State since her claim to the lounge arose out of a deed to her recorded after the RICO action was instituted and notice of lis pendens filed, and N.C.G.S. § 75D-5(l)(1) states that the State is a RICO lienor against the forfeited property and is thus entitled to the protection of the registration statute, N.C.G.S. § 47-18(a).

Am Jur 2d, Lis Pendens §§ 40-44.

APPEAL by defendant-intervenor from *Rousseau (Julius A., Jr.), Judge.* Order entered 27 October 1988 in Superior Court, ROWAN County. Heard in the Court of Appeals 21 September 1989.

This civil action seeks the forfeiture of real estate known as the "Hideaway Lounge" pursuant to the provisions of Chapter 75D of the North Carolina General Statutes, the North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO). This real property involved was deeded to David L. Bennick by deed recorded 20 July 1984. The State alleged that he used this property in a "pattern of racketeering activity" that involved sales of cocaine. Carolyn B. Bennick, his wife, in intervening asserts that she is an innocent party as defined in N.C.G.S. § 75D-5(i) and owns the property under a deed from David L. Bennick, recorded after the action was filed. At trial the jury returned a verdict against the intervenor-appellant and judgment of forfeiture was entered against the real property.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Isham B. Hudson, Jr., for the State.

Ford, Parrott & Hudson, by John T. Hudson and Larry G. Ford, for intervenor-appellant.

LEWIS, Judge.

Appellant argues that the RICO Act violates the defendant-intervenor's rights under the fourteenth amendment of the United States Constitution and Article I, Section 19 of the Law of the Land Clause of the North Carolina Constitution. Defense counsel at trial did not address the constitutionality of the civil RICO

statute nor was an objection made on constitutional grounds. No exception appears in the record regarding these assignments of error. Rule 10, N.C.R.A.P. The North Carolina Supreme Court in *State v. Elam* stated that the Court of Appeals acted properly in declining to discuss the merits of constitutional arguments which had not been raised at trial. 302 N.C. 157, 159-60, 273 S.E.2d 661, 663-64 (1981). We decline to discuss constitutional arguments here.

[1, 2] In instructing the jury, the trial judge placed the burden on the intervenor to satisfy the jury that she was an "innocent party," i.e., that she did not have actual or constructive knowledge of a pattern of racketeering activities on the premises. The appellant-intervenor argues that this burden denies her substantive due process of law because forfeiture statutes are essentially criminal. This argument is without merit. The legislative intent of the North Carolina General Assembly in enacting G.S. Section 75D is clear and is described specifically in Section 75D-2. That purpose is not punishment for a criminal act but is instead to deter unlawful activity, to prevent unjust enrichment, to restore to the lawful economy means of production unlawfully diverted therefrom, and to compensate persons injured by unlawful activity. The remedy prescribed by G.S. Section 75D-5 and the one utilized in this case is a civil in rem proceeding. The intervenor also argues that she should not bear the burden of proving her "innocence" because that burden is allocated to the State "by implication from the language of the statute" and "because of consideration of policy, fairness, and common sense." Nothing in G.S. chapter 75D requires the State to make any person a party defendant or to allege or prove that any person claiming an interest in the property is "innocent" to effect forfeiture. The only way, therefore, that an "innocent party" issue will be raised is by the voluntary intervention of some claimant to the property. The burden of proof of any exemption or exception is normally upon the person claiming it. *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 468, 117 S.E.2d 479, 486 (1960). The General Assembly has clearly indicated by the provisions of G.S. Section 75D-5 that intervenors claiming to be innocent parties have the burden of proof on that issue.

The appellant further contends that her substantive due process rights have been violated because the State seized all of the property described in the deed instead of just the building in which the illegal activities were conducted. The lots described in the deed are contiguous parcels of land and the exact location of the

"Hideaway" is not specified. Since we cannot determine what portions of the property were devoted to the operation of the "Hideaway" as all the lots were described as one parcel of land, we will not here undertake to divide the property.

The intervenor-appellant also alleges that the trial court committed reversible error by denying the intervenor's motion to dismiss at the close of the plaintiff's evidence and motion for judgment notwithstanding the verdict because the plaintiff failed to present sufficient evidence of racketeering activities under N.C.G.S. Section 75D. Appellant-intervenor did not make a motion for directed verdict at the close of all the evidence and therefore could not make a motion for judgment notwithstanding the verdict under Rule 50(b) of the Rules of Civil Procedure. *Gibbs v. Duke*, 32 N.C. App. 439, 443, 232 S.E.2d 484, 486, *disc. rev. denied*, 292 N.C. 640, 235 S.E.2d 61 (1977). The appellant asks this Court to waive her trial counsel's failure to move for a directed verdict under "the residual power and supervisory jurisdiction given to [the Court of Appeals] by Rule 2, N.C.R.A.P." We find nothing in this situation to merit invoking Rule 2. Moreover, the evidence was more than sufficient to justify the jury's consideration of the issues and to support the verdict. *See* G.S. Section 75D-3(b) and (c). The jury was properly permitted to consider the question of whether appellant had constructive knowledge of cocaine sales at the Hideaway.

[3] Thus, the State has won this case on the grounds stated above. We further hold that the State was also entitled to its motion for judgment notwithstanding the verdict. Following jury verdicts in its favor, the State moved for j.n.o.v. pursuant to Rule 50(b) of the Rules of Civil Procedure. The basis of that motion was that the State is entitled to the Hideaway under G.S. Section 75D as against *any* claim of appellant-intervenor arising out of a deed from David L. Bennick to appellant-intervenor. The trial judge denied the State's motion. A deed from David L. Bennick to appellant-intervenor dated 3 November 1986 was not recorded until 24 February 1987. The RICO action was instituted and a notice of lis pendens was filed on 19 February 1987. The State moved for j.n.o.v. on the grounds that, regardless of whether or not the intervenor was an innocent party, she had no interest in the Hideaway superior to that of the State since her claim to the Hideaway arose out of a deed to her recorded after the RICO action was instituted and notice of lis pendens filed.

This issue requires the determination of whether or not the State was a "lien creditor." Intervenor-appellant argues that the State is not a lien creditor because the State is not a purchaser for value; she contends that was not a bargained-for exchange nor have services been rendered or a debt incurred resulting from an exchange for goods or services, such as a contractor's lien, mechanic's lien, or tax lien. We find that the words of the statute indicate that the State is entitled to a RICO lien. N.C.G.S. Section 75D-5(l)(1) provides in pertinent part:

> The title of the State to the forfeited property shall: a. In the case of real property . . . , relate back to the date of filing of the RICO lien notice in the official record of the county where the real property . . . is located, and if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens in the official records of the county where the real property . . . is located and, if no RICO lien notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property . . . is located. (Underlining supplied).

This statute clearly states that the State is a RICO lienor against the forfeited property and is thus entitled to the protection of the registration statute, N.C.G.S. Section 47-18(a). The State's title to the property derived from this forfeiture proceeding relates back to the date of the institution of this action when the notice of lis pendens was filed pursuant to G.S. Section 75D-5(l)(1)(a). The State's title is thus superior to the interest of the intervenor which derived from a deed from her husband recorded after the institution of the RICO action. The State's motion should have been granted. Our holding does not otherwise alter the judgment in the trial court.

No error.

Judges PHILLIPS and COZORT concur.

MARY E. BROOKS, PLAINTIFF APPELLANT v. WACHOVIA BANK & TRUST CO. AND GATE CITY MOTORS, INC., DEFENDANT APPELLEES

No. 8818SC1407

(Filed 17 October 1989)

Uniform Commercial Code § 46 (NCI3d)— car repossessed by lender —transfer to dealer—car not sold within 90 days—lender not liable

A lender who repossesses a car and transfers it to a dealer under a repurchase agreement is not liable for the dealer's failure to sell the car within ninety days of repossession as required by N.C.G.S. § 25-9-505(1).

Am Jur 2d, Secured Transactions §§ 211, 212.

APPEAL by plaintiff from Judgment of *Judge Russell G. Walker, Jr.*, entered 19 September 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 24 August 1989.

Central Carolina Legal Services, by Stanley B. Sprague and Sorien K. Schmidt, for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jill R. Wilson, for defendant appellee.

COZORT, Judge.

This case presents a question of first impression in North Carolina: whether a lender who repossesses a car and transfers it to a dealer under a repurchase agreement is liable for the dealer's failure to sell the car within ninety days of repossession as required by N.C. Gen. Stat. § 25-9-505(1). We hold that the lender is not liable.

On 19 November 1987 plaintiff Mary Brooks brought this action against defendants Wachovia and Gate City Motors alleging, among other things, that both were responsible for failing to sell her car within ninety days after it had been repossessed, "thereby causing plaintiff the loss of use of her money" and subjecting the defendants to the penalties provided in N.C. Gen. Stat. § 25-9-507. Wachovia's answer denied responsibility for the sale and cross claimed, in the event of an adverse judgment, for complete indemnity from Gate City. On 18 August 1988 Wachovia moved for summary judgment on all claims against it. On 19 September 1988

the trial court granted partial summary judgment, dismissing the plaintiff's "claim pursuant to N.C. Gen. Stat. § 25-9-505 as it pertains to Wachovia." When the case went to trial, the plaintiff settled with and voluntarily dismissed her claims against defendant Gate City. The presiding judge directed a verdict in favor of defendant Wachovia on the remaining claims against it. On 7 October 1988 the plaintiff gave notice of appeal from the order of summary judgment. Only the issue raised by that judgment is before the court.

Plaintiff's dispute with defendant derived from her purchase of a 1983 Mercury Cougar. On 25 February 1983 plaintiff (the debtor) signed a Note and Purchase Money Security Agreement with Gate City (the dealer) for the balance of the sale price. In accordance with its common practice, the dealer assigned this chattel paper to Wachovia (the lender) and entered into a reassignment (repurchase) agreement whereby, in the event of default by the debtor and repossession by the lender, the dealer would repurchase the car from the lender and receive a reassignment of the chattel paper.

The dealer, as agent for Globe Life Insurance Co. (Globe), also sold plaintiff credit life and credit disability insurance. In April 1985 Ms. Brooks became ill, and, except for the months of September and October 1985, she remained ill and disabled during 1985 and 1986. Because of Ms. Brooks' disability, Globe, pursuant to its insurance contract, made payments on her behalf to Wachovia. These payments were routinely late. When the account was delinquent in May and July 1985, Wachovia took possession of the car, but each time it was redeemed.

In October 1986 Wachovia notified Ms. Brooks that she was again in default and that the car would be repossessed unless payment was made. On 20 October 1986 the car was tendered to Wachovia. On 23 October 1986 Wachovia informed Ms. Brooks by certified mail that the car had been repossessed and, unless redeemed, would be sold after 3 November 1986. At the time of repossession, payments made by the plaintiff and by Globe on her behalf totaled sixty percent or more of the car's cash price. Between 4 November and 6 November 1986 Gate City repurchased the car, and Wachovia reassigned the chattel paper and transferred the car's title to Gate City. On 24 March 1987 Gate City sold the car for approximately $5,000.00.

This transaction, involving a debtor, a secured party, and a person liable to the secured party under a repurchase agreement, is governed by Article Nine of the Uniform Commercial Code (U.C.C.). The applicable provisions are set forth in N.C. Gen. Stat. §§ 25-9-505(1) and 25-9-504(5):

> § 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation.
>
> (1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under G.S. 25-9-504, and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under G.S. 25-9-507(1) on secured party's liability.
>
> § 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.
>
> * * * *
>
> (5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

Plaintiff's argument on appeal is that imposing liability on defendant would further the "purpose of G.S. Section 25-9-505(1), which is to require a quick sale of repossessed collateral, thereby preventing the collateral from deteriorating in value." When the dealer is contractually obligated to the lender under a repurchase agreement, plaintiff contends that the "lender's knowledge that it would be liable for the minimum statutory damages of G.S. Section 25-9-507 would encourage it to quickly turn over the collateral to the dealer, thereby reducing the chances that the collateral would deteriorate in value." Plaintiff asserts that lenders rather than dealers usually repossess vehicles and that, because the ninety-day deadline required by U.C.C. Section 9-505(1) runs from the date of repossession, "repossessing lenders *always* contribute to the

time that elapses between repossession and sale." (Emphasis in plaintiff's brief.) Thus, plaintiff argues that lenders, situated as was the defendant in this case, should be deemed to share control with dealers in meeting the ninety-day deadline. Plaintiff cites no authority to support this proposition, and we are not persuaded that it should be adopted here.

When the lender repossesses collateral, reassigns the debtor's chattel paper, and transfers the collateral to the dealer, courts have held that the lender has surrendered control over the collateral's disposition and is not liable for the dealer's failure to fulfill the duties specified in U.C.C. Section 9-504(3). In *Joyce v. Cloverbrook Homes, Inc.*, 81 N.C. App. 270, 273, 344 S.E.2d 58, 60 (1986), this Court held that only the dealer, after acquiring collateral pursuant to a repurchase agreement with the lender, is liable for failure to comply with the notice requirement concerning foreclosure sales contained in U.C.C. § 9-504(3). In *Stoppi v. Wilmington Trust Co.*, 518 A.2d 82 (1986), the plaintiff debtor (Gerald Stoppi) sued the lender (Wilmington Trust) and the dealer (LHI) for failure to give the notice required by U.C.C. § 9-504(3). The lender repossessed the debtor's mobile home and sent written notice on 28 January 1983 that the collateral would be sold after 17 February 1983. On 29 March 1983 the lender reassigned the chattel paper and title to the mobile home to the dealer pursuant to a standing repurchase agreement. The Supreme Court of Delaware reasoned that

> [t]he last sentence in Section 9-504(5) makes clear that a reassignment of collateral from the bank back to the seller, pursuant to the repurchase agreement, is not a sale or disposition of the collateral under the Code. Thus, the transfer from Wilmington Trust back to LHI does not activate the notice provisions of Section 9-504(3).
>
> * * * *
>
> Wilmington Trust was the secured party when it sent that January 28 letter but ceased to be after LHI repurchased the installment contract. At that point . . . Wilmington Trust had been discharged. LHI became the secured party and as a secured party who conducted the private sale, it was LHI who was required by the statute to provide notice of that intention.

Stoppi v. Wilmington Trust Co., 518 A.2d 82, 85 (1986) (citations omitted) (quoting *Stoppi v. Larry's Homes, Inc.*, Del.Super., C.A. No. 84C-JN-74, slip op. at 4-5 (19 March 1986) (WESTLAW, DE-CS database); *accord Allard v. Ford Motor Credit Co.*, 422 A.2d 940, 942-43 (1980); *Community Management Association v. Tousley*, 505 P.2d 1314, 1317 (1973); *see also* J. White & R. Summers, Uniform Commercial Code §§ 25-9, 25-12 (3d ed. 1988).

By analogy to the lender's liability under U.C.C. Section 9-504(3), we conclude that where the lender gives due notification of repossession of a motor vehicle and transfers the vehicle, its title, and the chattel paper secured by the vehicle to the dealer, pursuant to a repurchase agreement, the lender has no shared control over disposition of the vehicle and is not liable for the dealer's failure to comply with the requirements of U.C.C. Section 9-505(1). Accordingly, on the facts before us, we hold that defendant Wachovia is not liable for the failure of Gate City to sell plaintiff's car within ninety days of its repossession as required by N.C. Gen. Stat. § 25-9-505(1).

The trial court's order of 19 September 1988 entering partial summary judgment for defendant is

Affirmed.

Judges ARNOLD and BECTON concur.

SCOTT STEVENSON v. BRENDA JEAN PARSONS D/B/A KANUGA ANIMAL CLINIC

No. 8829DC1335

(Filed 17 October 1989)

1. Declaratory Judgment Act § 3 (NCI3d)— declaratory judgment action—covenant not to compete—actual controversy between parties

The record showed an actual controversy between the parties as to the validity of a covenant not to compete where plaintiff, who was already employed by defendant, entered into a covenant not to compete with defendant on 31 July

1985; the agreement would bar plaintiff, a veterinarian, from competing with defendant in a radius of ten miles for five years following termination of his employment with defendant; plaintiff gave notice to defendant in June of 1987 of his intent to terminate his employment; plaintiff intends to open a veterinary practice within ten miles of Hendersonville within the proscribed five-year period; plaintiff has entered into a contract to purchase real property within which to operate his clinic; defendant's attorney notified plaintiff on 11 January 1988 in writing that defendant would promptly initiate legal action; and defendant has filed a complaint seeking injunctive relief and monetary damages and has obtained temporary injunctive relief. N.C.G.S. § 1-253.

Am Jur 2d, Master and Servant § 106.

2. Master and Servant § 11.1 (NCI3d) — covenant not to compete — summary judgment improper

Summary judgment for plaintiff declaring invalid a covenant not to compete was improper where plaintiff's evidence was that he was hired on 1 July 1985 with no discussion of a covenant not to compete; plaintiff was given no increase in pay or benefits or any other form of consideration when he signed the covenant on 31 July 1985; and defendant's forecast tended to show that plaintiff was hired on "prediscussed terms," including salary, benefits, and signing the covenant not to compete.

Am Jur 2d, Master and Servant § 106.

APPEAL by defendant from *Greenlee, Loto, Judge.* Order entered in HENDERSON County District Court 15 July 1988. Heard in the Court of Appeals 22 August 1989.

Plaintiff filed this declaratory judgment action in the District Court on 3 February 1988, alleging that an actual controversy existed between the parties and that litigation was unavoidable. The relief sought was a declaration that a covenant not to compete with defendant, his employer, was void for failure of consideration. Defendant properly answered, denying the allegations. Following discovery, plaintiff moved for summary judgment, which was granted on 15 July 1988, declaring the covenant not to compete to be void.

From this judgment, defendant has appealed.

Hogan and Hogan, by Robert L. Hogan and Lawrence A. Hogan, for plaintiff-appellee.

Waymon L. Morris for defendant-appellant.

WELLS, Judge.

Defendant brings forward two arguments: First, defendant contends that plaintiff has failed to show that an actual controversy existed between the parties and that litigation was unavoidable; and second, that there is an issue of fact as to whether the covenant not to compete was based on valuable consideration. We reject defendant's first argument, but agree with the second and therefore remand for further proceedings.

Declaratory Judgment

[1] The authority of our courts to render a declaratory judgment in a case such as the one now before us is set forth in the provisions of the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.* (1983).

G.S. § 1-253.

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for[.]

G.S. § 1-254.

> Any person interested under a . . . written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a . . . contract, . . . may have determined any question of construction or validity arising under the . . . contract . . . , and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

G.S. § 1-264.

> This [Act] is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.

While the statute does not expressly so provide, our Supreme Court has held on a number of occasions that courts have jurisdiction to render declaratory judgments only when it is shown that an actual controversy exists between parties having adverse interest in the matter in dispute. *See Gaston Board of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984), and cases cited therein. To satisfy the jurisdictional requirement of an actual controversy, it must appear that litigation is unavoidable. *Gaston Board, supra.*

In this case, plaintiff's complaint contains the following pertinent allegations. On 31 July 1985, plaintiff, who was then employed by defendant, entered into a covenant not to compete with defendant, the terms of which would bar plaintiff, who is a veterinarian, from competing with defendant in the practice of veterinary medicine within a radius of ten miles for a period of five years following termination of his employment with defendant. The covenant not to compete was without consideration. In June 1987, plaintiff gave notice to defendant of his intent to terminate his employment. Plaintiff intends to open a veterinary medicine clinic within ten miles of Hendersonville within the proscribed five-year period, and has entered into a contract to purchase real property on which to operate his clinic. On 11 January 1988, defendant's attorney notified plaintiff in writing that defendant would promptly initiate legal action to enforce the covenant not to compete in the event plaintiff intended to open a veterinary medicine clinic, in violation of the covenant not to compete.

At the time summary judgment was entered, defendant had, in fact, filed a complaint in the superior court asserting that Stevenson had opened a clinic in violation of the covenant not to compete. Defendant sought injunctive relief and monetary damages in her action, and, in fact, obtained a temporary injunction on 27 June 1988.

The record before the trial court and before us thus shows an actual controversy between these parties as to the validity of the covenant not to compete and that litigation was not only unavoidable but had actually begun. We therefore reject defendant's argument on this question.

Summary Judgment

[2] Non-competition agreements may be enforced upon a showing that the agreement is (1) in writing, (2) made part of a contract

of employment, (3) based on valuable consideration, (4) reasonable as to time and territory, and (5) not against public policy. *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989). When the employment relationship is established before the covenant not to compete is executed, there must be separate consideration to support the covenant, such as a pay raise or other employment benefits or advantages for the employee. *See Whittaker General, supra* and cases cited therein. On this issue, the forecast of evidence before the trial court was in conflict.

Plaintiff's forecast tended to show that at the time he began his employment with defendant on 1 July 1985, there had been no discussion between him and defendant about a covenant not to compete, and that at the time plaintiff signed the covenant on 31 July 1985 he was given no increase in pay or benefits, or any other form of consideration.

On the other hand, defendant's forecast tends to show that plaintiff was hired by her on "prediscussed terms," including salary, benefits, and signing the covenant not to compete.

Defendant's position is therefore that plaintiff, having agreed at the time of his employment to enter into such a covenant, his initial employment was the consideration supporting the covenant. In *Robbins and Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984), we recognized an agreement not to compete entered into at the time of employment *as a part of the employment contract* (emphasis supplied) was supported by valuable consideration, although the written covenant not to compete was executed later. We hasten to point out, however, that our reading of *Robbins and Weill* persuades us that the terms of such an oral covenant later executed in writing must have been agreed upon at the time of employment in order for the latter written covenant to be enforceable.

Summary judgment is appropriate only where the materials before the trial court show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure. There being a genuine issue in this case as to whether the covenant not to compete between the parties was supported by valuable consideration, summary judg-

ment was improvidently entered and this case must be remanded for appropriate further proceedings.[1]

Reversed and remanded.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. MARVIN EARL SMAW

No. 893SC135

(Filed 17 October 1989)

1. Criminal Law §§ 1156, 1124 (NCI4th)— robbery—aggravating factors—use of weapon

The trial court did not err when sentencing defendant for common law robbery by finding in aggravation that he used a deadly weapon at the time of the crime where defendant claimed that he was unaware that his codefendant had the gun and that his codefendant's statement to the contrary was insufficient to establish that defendant was other than a minor participant in the crime. Defendant was a principal in the crime and his codefendant's use of the gun was therefore imputed to defendant. The informal evidentiary procedures used at the sentencing hearing are not dispositive of the question of the credibility of the State's evidence. N.C.G.S. § 15A-1340.4(a)(1)i.

Am Jur 2d, Criminal Law §§ 598, 599; Robbery §§ 82-84.

2. Criminal Law §§ 1156, 1098 (NCI4th)— common law robbery—aggravating factor—use of weapon

The trial court did not err when sentencing defendant for common law robbery by finding in aggravation that defendant used a deadly weapon in the performance of the crime. The use of a deadly weapon has never been an element of proof

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1. We note that the record filed here shows that on 15 June 1988, defendant in this case filed a Rule 42(a) motion to consolidate this case with her action against plaintiff in this case now pending in the superior court. Such consolidation appears to us to be appropriate.

required to establish common law robbery in North Carolina. N.C.G.S. § 15A-1340.4(a).

Am Jur 2d, Criminal Law §§ 598, 599; Robbery §§ 82-84.

3. Criminal Law § 1218 (NCI4th)— robbery—mitigating factor—passive participant

The trial court did not err when sentencing defendant for common law robbery by not finding in mitigation that he was a passive participant in the crime.

Am Jur 2d, Criminal Law §§ 598, 599; Robbery §§ 82-84.

APPEAL by defendant from *Winberry, Charles B., Judge*. Judgment entered 12 October 1988 in PITT County Superior Court. Heard in the Court of Appeals 19 September 1989.

Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit common law robbery. Pursuant to a plea bargain with the State, defendant pleaded guilty to the offense of common law robbery in return for which the two original charges were dismissed.

The evidence introduced at the sentencing hearing tended to establish that on 16 April 1988 defendant Smaw, Tyrone Hopkins, and Darrell Lowrey entered into a plan to snatch purses. Defendant drove the three of them from Washington, North Carolina to the Pitt Plaza Mall in Greenville, North Carolina. Once there, defendant and Hopkins waited in the car while Lowrey approached the victim and her daughter, who were shopping at the mall. Lowrey put a gun to the victim's head, took her purse containing some three hundred dollars, and ran back to defendant's car. The three then fled in the car, defendant driving. Upon arrest, defendant admitted his complicity. He had no prior criminal record.

The court found as a statutory aggravating factor that defendant used a deadly weapon at the time of the crime. It found as statutory mitigating factors that defendant had no record of criminal convictions and that, at an early stage of the criminal process, he voluntarily acknowledged his wrongdoing in connection with the offense to a law enforcement officer. Upon finding the aggravating factor to outweigh the mitigating factors, the court sentenced defendant to a term of eight years' imprisonment. From this sentence, defendant appeals.

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

J. Graham Clark, III for defendant-appellant.

WELLS, Judge.

Because defendant pleaded guilty, the sole issue presented by this appeal is whether his sentence for a term of imprisonment beyond the statutory presumptive term is supported by the evidence introduced at the sentencing hearing. N.C. Gen. Stat. § 15A-1444(a1) (1988). Common law robbery is punishable as a Class H felony, N.C. Gen. Stat. § 14-87.1 (1988), bearing a presumptive term of 3 years' imprisonment, *id.*, § 15A-1340.4(f)(6), and a maximum term of 10 years' imprisonment, *id.*, § 14-1.1(a)(8). For felony convictions other than Class A or B felonies, G.S. § 15A-1340.4(a) requires the trial court to impose the statutory presumptive term of imprisonment "unless, after consideration of aggravating or mitigating factors, or both, [the court] decides to impose a longer or shorter term[.]" To be considered by the court, such factors must be reasonably related to the purpose of sentencing and proved by a "preponderance of the evidence[.]" *Id.* The State has the burden of proof on aggravating factors, while the burden of proof on mitigating factors rests upon the defendant. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). Although the trial court has wide latitude in determining whether aggravating and mitigating factors exist, *id.*, it may not consider evidence necessary to establish an element of the offense as proof of a factor in aggravation. N.C. Gen. Stat. § 15A-1340.4(a).

[1] Defendant first challenges the court's findings as a statutory aggravating factor under G.S. § 15A-1340.4(a)(1)(i) that he "used a deadly weapon at the time of the crime." He contends that he was unaware that his codefendant had the gun and that this codefendant's lone statement to the contrary was insufficient to establish that defendant was other than a minor participant in the crime. Defendant also urges that the informal evidentiary procedures used at the sentencing hearing lessened the credibility of the State's evidence on this point. Defendant miscasts the issue. By being present at the scene of the crime, with the intent to see it take place, and by performing the overt act of assisting in its commission by driving the getaway car, defendant became a principal in the crime. *See State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980)

(and cases cited therein). His codefendant's use of the gun in perpetrating the crime is therefore imputed to defendant. *Id.; see also State v. Kelly*, 243 N.C. 177, 90 S.E.2d 241 (1955). More importantly, there is no indication that the Legislature in its enactment of G.S. § 15A-1340.4 sought to change this well-established rule with respect to the statutory aggravating factor in issue by adding *scienter* as an element to be found by the court. *See* G.S. § 15A-1340.4(a)(1)(i); *cf.*, G.S. § 15A-1340.4(a)(1)(g) ("The defendant *knowingly* created a risk of death[.]"). (Emphasis added.) We certainly will not do so. The question of defendant's awareness of the gun is thus not dispositive. In addition, the informal evidentiary procedures used at the sentencing hearing are not dispositive of the question of the credibility of the State's evidence, inasmuch as G.S. § 15A-1334(b) expressly suspends application of the formal rules of evidence to a sentencing hearing. We therefore hold the State's evidence sufficient to support the court's finding as a statutory aggravating factor that defendant used a deadly weapon at the time of the crime.

[2] Defendant, however, argues in the alternative that the gun could not be used as evidence to support a finding of a factor in aggravation because its use in the crime rendered it evidence of an element of the offense of common law robbery by putting the victim in fear. We are unpersuaded. Put simply, the use of a deadly weapon has never been an element of proof required to establish common law robbery in North Carolina. *See, e.g., State v. Melvin*, 57 N.C. App. 503, 291 S.E.2d 885, *cert. denied*, 306 N.C. 748, 295 S.E.2d 484 (1982) (and cases cited therein). Consequently, the State's evidence proving defendant's use of the gun as an aggravating factor was not barred by G.S. § 15A-1340.4(a).

[3] Finally, defendant challenges the court's failure to find as a statutory mitigating factor that he was a passive participant or minor player in the crime. In raising this issue on appeal, defendant has the burden of proving that the evidence in support thereof is "substantial, uncontradicted, and manifestly credible." *State v. Canty, supra.* A court is not compelled to find a statutory mitigating factor unless the evidence offered at the sentencing hearing "so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *Id.* Applying these principles to the facts before the trial court, we determine that defendant has not overcome his burden and that the court below properly declined to find this statutory factor in mitigation.

Affirmed.

Judges JOHNSON and ORR concur.

IN THE MATTER OF: DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, PETITIONER v. WALTER J. FEATHERSTON, SR., AND NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION, RESPONDENTS

No. 8910SC93

(Filed 17 October 1989)

Master and Servant § 108.1 (NCI3d)— state trooper's association with felons—no substantial misconduct—right to unemployment compensation

The trial court properly upheld the Employment Security Commission's ruling that claimant, a former state trooper, was not disqualified from receiving unemployment benefits where claimant negotiated the sale of an automobile and car rack to a person whom he knew to be a convicted drug dealer; claimant was counseled regarding this transaction and his associations with other known felons and he thereafter ceased all associations which may have been questioned under the departmental rule; claimant was subsequently discharged; and claimant's conduct did not rise to the level of substantial fault under N.C.G.S. § 96-14(2A) absent his repetition of the violation after a warning.

Am Jur 2d, Unemployment Compensation § 38.

APPEAL by petitioner from *Allen, J. B., Jr., Judge*. Judgment entered 24 October 1988 in WAKE County Superior Court. Heard in the Court of Appeals 12 September 1989.

Walter J. Featherston, Sr., claimant, who was discharged from his employment as a state trooper, filed for unemployment benefits beginning on 13 December 1987. The claims adjuster ruled that claimant was discharged for misconduct connected with his employment and disqualified him from receiving benefits. Claimant appealed to the referee who determined that claimant was not discharged for work-related misconduct and therefore was qualified for unemployment benefits. The Department of Crime Control and

Public Safety (Employer) appealed to the Employment Security Commission which affirmed the decision of the referee. Employer then appealed to the Wake County Superior Court.

In the proceeding held during its 24 October 1988 civil session, the court adopted the findings of the Commission. These findings were that employer had a departmental rule, in force at the time of claimant's employment, which stated:

> Members [of the Highway Patrol] shall avoid regular or continuous associations or dealings with persons who [sic] they know, or should know, are racketeers, sexual offenders, gamblers, suspected felons, persons under criminal investigation or indictment, or who have a reputation in the community for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties.

In October 1986, claimant negotiated the sale of an automobile and car rack to a person whom he knew to be a convicted drug dealer. Claimant was counseled in November 1986 regarding this transaction and his associations with other known felons, and he thereafter ceased all associations which may have been questioned under the departmental rule. On 26 February 1987, claimant was questioned by his superiors regarding his former associations. No further action was taken by employer until claimant's discharge on 23 September 1987.

After examining the record and reviewing the evidence therein, the court found the facts to be supported by competent evidence and concluded that the law had been correctly applied. From the judgment affirming the decision of the Commission, employer appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for petitioner-appellant.

Hensley, Huggard, Seigle, Obiol, and Bousman, by John A. Obiol, for respondent-appellee Featherston.

C. Coleman Billingsley, Jr. for respondent-appellee Employment Security Commission.

WELLS, Judge.

An appeal from a decision of the Employment Security Commission raises but two questions for review: (1) whether the evidence before the Commission supports its findings of fact and (2) whether

the facts found sustain the Commission's conclusions of law. *Intercraft Industries v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982). Employer lodged no exception to the Commission's findings of fact, therefore, those findings are presumed supported and are binding on appeal. N.C. Gen. Stat. § 96-15(i) (1988); *Hagen v. Peden Steel and Employment Sec. Comm.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982). Consequently, the only issue before us is whether the Commission's findings of fact support its conclusion of law that claimant was not discharged for misconduct or substantial fault connected with his employment.

A claimant will be disqualified from receiving unemployment benefits if he is discharged from employment "for misconduct connected with his work." N.C. Gen. Stat. § 96-14(2). Misconduct under this standard is defined as

> conduct evincing such willful or wanton disregard of an employer's interest as is found in *deliberate* violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an *intentional* and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id. (Emphasis added.) A claimant may also be disqualified from receiving benefits if discharged from employment "for substantial fault on his part connected with his work not rising to the level of misconduct." *Id.* § 96-14(2A). Under this lower standard, substantial fault includes

> those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job *but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee*[.]

Id. (Emphasis added.) These statutes are to be strictly construed in favor of the claimant, and the employer has the burden of proving that the claimant is disqualified. *Barnes v. The Singer Co.*, 324 N.C. 213, 376 S.E.2d 756 (1989).

Measuring the Commission's findings against these standards, we conclude that the superior court properly upheld the Commission's ruling that claimant was not disqualified from receiving un-

employment benefits. Although claimant's associations arguably placed him in violation of the departmental rule prohibiting dealings with criminals, such conduct would not rise to the level of substantial fault under G.S. § 96-14(2A) absent claimant's repetition of the violation *after* a warning. No such repetition occurred here. Upon being counseled regarding the departmental rule, claimant ceased all of his objectionable associations. Because we determine that claimant's conduct is not within the more liberal standard of a substantial fault analysis under G.S. § 96-14(2A), we need not reach the question of whether his conduct falls within the stricter standard of misconduct under G.S. § 96-14(2).

Affirmed.

Judges PHILLIPS and PARKER concur.

PIEDMONT AND WESTERN INVESTMENT CORPORATION v. CARNES-MILLER GEAR CO., INC., JOHN E. ROBERTSON, TRUSTEE, AND FIRST UNION NATIONAL BANK

No. 8920SC59

(Filed 17 October 1989)

Corporations § 23 (NCI3d)— corporation not in existence—title not conveyed by corporation's deed

In an action to quiet title the trial court properly entered summary judgment for defendants since plaintiff corporation was dissolved and had no legal existence on the date of the conveyance to it, and the deed therefore could not operate to convey title to plaintiff.

Am Jur 2d, Corporations §§ 2891-2895.

APPEAL by plaintiff from *Crawley, Jack B., Jr., Judge.* Order entered 27 October 1988 in STANLY County Superior Court. Heard in the Court of Appeals 31 August 1989.

Plaintiff Piedmont and Western Investment Corporation instituted this civil action against defendants Carnes-Miller Gear Company, Inc., John E. Robertson, Trustee, and First Union National Bank, on 23 April 1987. Plaintiff filed a verified complaint to quiet

title to a 4.11 acre tract of real estate located in Stanly County. Over the course of eighteen months answers, a counterclaim, amendments and affidavits were filed. On 10 October 1988 defendant Carnes-Miller Gear moved for summary judgment. Defendants First Union and John E. Robertson, Trustee, filed alternative motions for summary judgment or dismissal on 17 October 1988. The basis for these motions was that plaintiff corporation was not in existence on the date it attempted to take title to the 4.11 acres in question.

Plaintiff appeals from the trial court's grant of defendants' motions for summary judgment.

Morton & Phillips, by James A. Phillips, Jr.; and Michael W. Taylor, for plaintiff-appellant.

Morton and Grigg, by Ernest H. Morton, Jr., for defendant-appellee Carnes-Miller Gear Co., Inc.

Hamel, Helms, Cannon & Hamel, by Christian R. Troy and Reginald S. Hamel, for defendants-appellees John E. Robertson, Trustee, and First Union National Bank.

WELLS, Judge.

The pertinent facts are as follows: The 4.11 acre tract in question was originally part of a conveyance from S. Craig Hopkins and wife, Jewel B. Hopkins and William C. Tucker and wife, Karen W. Tucker, to Elton S. Hudson and wife, Sonia S. Hudson. This deed described two tracts of land and was recorded in Stanly County on 14 September 1979. On 12 May 1980 a deed by Elton S. Hudson and wife to Carnes-Miller Gear was recorded in Stanly County. This deed described only the 4.11 acre tract. On 12 June 1981 a deed by Elton S. Hudson and wife to Cossette S. Furr was recorded in Stanly County. This deed described the two tracts of land originally conveyed to the Hudsons by S. Craig Hopkins and wife and William C. Tucker and wife. This deed makes no mention of the 4.11 acre tract previously conveyed to Carnes-Miller Gear. On 10 May 1982 a deed by Cossette S. Furr to Piedmont and Western Investment Corporation was recorded in Stanly County. This deed described the two tracts of land conveyed to Cossette S. Furr by the Hudsons. There was no mention of the 4.11 acre tract previously conveyed to Carnes-Miller Gear. On 23 December 1986 a deed of trust by Carnes-Miller Gear to John E. Robertson, Trustee, for First Union National Bank was recorded in Stanly

County. The deed of trust described the 4.11 acres in question. It is the conveyance to the plaintiff corporation from Cossette S. Furr which the defendants' summary judgment motions alleged as ineffective.

The issue before us is whether the trial court erred in granting defendants' motions for summary judgment.

The party moving for summary judgment is entitled to such judgment if it can show, through pleadings, affidavits, and other materials before the court, that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983 & Supp. 1988); *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). In this case the defendants were entitled to summary judgment if the facts show that plaintiff corporation had no legal existence at the time of the conveyance from Cossette S. Furr.

It is undisputed that Piedmont and Western Investment Corporation was originally issued a corporate charter by the Secretary of State of North Carolina on 3 May 1968. This charter was subsequently suspended by the Secretary of State pursuant to N.C. Gen. Stat. § 105-230 (1973) (current version at § 105-230 (1985 & Supp. 1988)) on 19 September 1975. (This statute was amended in 1987, however, the amendment does not affect this case.) On 28 June 1982 a new charter was issued by the Secretary of State to Piedmont and Western Investment Corporation.

G.S. § 105-230 provides for cancellation of a corporation's charter for failure to file any report or return or to pay any tax or fee as required by the Department of Revenue. By taking action pursuant to G.S. § 105-232 (1985 & Supp. 1988), the suspended charter may be reinstated. If a suspended charter is not reinstated within five years, the corporation is automatically dissolved. N.C. Gen. Stat. § 55-114(a)(4) (1982 & Supp. 1988).

Plaintiff corporation's original charter was dissolved on 19 September 1980. Some eighteen months later on 18 March 1982 Cossette S. Furr attempted to convey property to plaintiff corporation. At the time of the attempted conveyance the plaintiff corporation was dissolved and had no legal existence. To be operative as a conveyance, a deed must designate as grantee [a living or] a legal person. *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948); *See also Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963).

Because the plaintiff corporation had no legal existence on the date of the conveyance the deed could not operate to convey title to plaintiff.

Our decision is in accord with other jurisdictions which have addressed the identical situation. *See, e.g., James v. Unknown Trustees, Successors and Assigns of Three-in-One Oil and Gas Company*, 203 Okla. 312, 220 P.2d 831 (1950) (A valid deed requires a grantee with a legal existence and cannot be made to a corporation which at the time is dissolved and has ceased to exist.); *Klortine v. Cole, et al.*, 121 Or. 76, 252 P. 708, 254 P. 200 (1927); (A dissolved corporation has no capacity to take title and any such attempted conveyance is null and void.). *See also* Annotation, *Death, or Extinction of Corporate Existence of Grantee, or One of the Grantees, Prior to Execution of Deed*, 148 A.L.R. 252 (1944).

While G.S. § 55.114(b) does provide that a dissolved corporation continues to function for the limited purpose of winding up its affairs, we reject plaintiff's contention that the acquisition of new property is incident to the winding up process. Likewise, plaintiff-corporation's reincorporation on 28 June 1982 did not retroactively validate the conveyance. A reincorporated corporation succeeds only to property owned by the original corporation prior to the loss of its charter. G.S. § 55-164.1 (1982).

In order to prevail in its action to quiet title plaintiff had to show the strength of its own title rather than rely on the weakness of defendant Carnes-Miller's title. *See Seawell v. Fishing Club*, 249 N.C. 402, 106 S.E.2d 486 (1959); *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593 (1955). Therefore, we do not address the questions regarding defendant's title raised on appeal.

The decision of the trial court is

Affirmed.

Judges PHILLIPS and PARKER concur.

RAY WATERHOUSE, PLAINTIFF v. CAROLINA LIMOUSINE MANUFACTURING, INC., D/B/A CAROLINA COACHBUILDERS, DEFENDANT v. SOUTHWESTERN NORTH CAROLINA PLANNING AND ECONOMIC DEVELOPMENT COMMISSION AND SCRONCE AUTOMOTIVE SUPPLY, INC., INTERVENORS

No. 8930SC35

(Filed 17 October 1989)

Execution § 5 (NCI3d)— lien perfection based on possession of collateral—interruption by sheriff's levy

Where one creditor's lien perfection was based only on possession of the collateral, and there was no exception by any of the parties to the trial court's adjudication that the sheriff's levy constituted an interruption of the creditor's possession, that part of the judgment became the law of the case, and the trial court therefore erred in finding that the creditor with possession had priority over the creditor with the sheriff's levy.

Am Jur 2d, Creditors' Bills §§ 86, 91-93.

APPEAL by plaintiff from *Downs, Judge*. Judgment entered 12 October 1988 in Superior Court, JACKSON County. Heard in the Court of Appeals 30 August 1989.

This is an action to determine lien priorities between two creditors of Carolina Limousine (hereinafter "Carolina"), namely, plaintiff Ray Waterhouse (hereinafter "Waterhouse") and intervenor Southwestern North Carolina Planning and Economic Development Commission (hereinafter "Southwestern"). Another creditor, Scronce Automotive Supply, Inc., is no longer a party to this action.

The uncontested facts are that in September of 1985 Carolina executed a promissory note in favor of Southwestern. The parties also executed a security agreement and financing statement. The financing statement and security agreement identified as collateral certain equipment owned by Carolina and operated at its Buster Brown Plant. Southwestern filed the financing statement in the Jackson County Register of Deeds' Office but failed to file the document with the Secretary of State as required by G.S. 25-9-401(1)(c). Carolina defaulted on the note. Southwestern took physical possession of the equipment identified as collateral by padlocking the Buster Brown Plant building on 4 December 1987.

On 14 March 1988 Waterhouse sued on a note executed in his favor and obtained a judgment against Carolina. On 6 April 1988 execution was issued by the Clerk of Court of Jackson County. On 12 April 1988 a deputy sheriff posted a "Notice of Levy" document on the exterior of the padlocked Buster Brown Plant.

Based on the evidence the trial court made findings of fact and conclusions of law. Among other things the court concluded that "Southwestern made a good faith effort to accomplish the necessary filing." The trial court also found that the sheriff's posting of the notice of levy "was sufficient as a levy on the personal property in the Buster Brown Plant. Such levy constituted an interruption in the possession of said property by Southwestern." However, the trial court also concluded that "Southwestern's lien on said property takes precedence over the lien claimed by the Plaintiff [Waterhouse]." Waterhouse appeals.

Stephen L. Barden, III, for plaintiff-appellant.

Philo and Spivey, by Samuel C. Briegel, Steven E. Philo and David C. Spivey, for intervenor-appellee.

EAGLES, Judge.

Waterhouse excepted to the trial court's conclusions regarding Southwestern's good faith effort to file and Southwestern's priority. Because of Southwestern's failure to file the financing statement with the Secretary of State, Southwestern's security interest in Carolina's equipment was not perfected by filing. Both parties agree that Southwestern's interest was perfected, if at all, by possession, which occurred on 4 December 1987. Therefore, the trial court's conclusion regarding good faith efforts to file is not dispositive; filing is not the basis on which Southwestern's perfecting of its security interest rests.

Southwestern asserts it perfected its security interest by physically possessing the collateral. Under the Uniform Commercial Code a security interest in goods is perfected without filing when the secured party takes possession of the collateral. G.S. 25-9-302(1)(a); G.S. 25-9-305. This perfected status "continues only so long as possession is retained." G.S. 25-9-305. Here, the trial court concluded that the posting of the notice of levy "constituted an interruption in the possession of [the collateral] by Southwestern." Although the issue of whether a levy by the sheriff interrupts a creditor's

possession has apparently not been answered in North Carolina, other states with statutory provisions identical or sufficiently similar to our G.S. 25-9-305 have answered the question. They have held that a prior perfected interest is superior to the interest of a judgment creditor who has obtained a lien. *See Grain Merchants of Indiana, Inc. v. Union Bank and Savings Co.*, 408 F.2d 209 (7th Cir. 1969), *cert. denied*, 396 U.S. 827, 24 L.Ed. 2d 78, 90 S.Ct. 75 (1969); *Rocky Mountain Ass'n. of Credit Mgmt. v. Hessler Mfg. Co.*, 37 Colo. App. 551, 553 P.2d 840 (1976); *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967); *General Motors Acceptance Corp. v. Stotsky*, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (1969); *William Iselin & Co. v. Burgess & Leigh, Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659 (1967). In one case remarkably similar to the instant case the court found that a creditor who had perfected his security interest in goods by possession had priority over the sheriff who, at a later date, levied on the goods for delinquent personal property taxes of the debtor. *Walter F. Heller & Co. v. Salerno*, 168 Conn. 152, 362 A.2d 904 (1975).

Upon proper presentation to this court, when a ruling below is based on a misapprehension of applicable law, we will remand the cause in order that it may be considered in its true legal light. *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979). Here, however, no exception was taken to the conclusion of the trial court that the levy constituted an interruption of Southwestern's possession. Where there is no exception by any of the parties to the adjudication of a particular matter presented for decision, that part of the judgment to which there is no exception becomes the law of that case. *North Carolina Nat. Bank v. Barbee*, 260 N.C. 106, 112, 131 S.E.2d 666, 671 (1963); *Kessler v. North Carolina Nat. Bank*, 256 N.C. 12, 17, 122 S.E.2d 807, 811 (1961). Therefore, the law of this case is that Southwestern's possession was interrupted by Waterhouse's levy.

Because Southwestern's lien perfection was based only on possession of the collateral and the sheriff's levy interrupted that possession in this case, the trial court erred in finding that Southwestern had priority over Waterhouse. We therefore reverse the judgment of the trial court and remand for entry of judgment in favor of Waterhouse.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

CHAMP RICE AND WIFE, SOPHIA RICE, PLAINTIFF-APPELLANTS v. DOUGLAS GORDON RANDOLPH AND WIFE, JANICE DIANE RANDOLPH, DEFENDANT-APPELLEES

No. 8824SC1172

(Filed 17 October 1989)

Easements § 11 (NCI3d); Dedication § 2.1 (NCI3d)— subdivision easement—dedication by plat—extinguishment of easement—necessary parties

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil, and the record owners of lots in the subdivision, who have user rights in the easement; furthermore, proof of abandonment by one lot owner, or proof of possession adverse to one lot owner for the prescribed statutory period, does not extinguish an easement dedicated per plat and expressly granted to owners of lots in a subdivision.

Am Jur 2d, Easements and Licenses §§ 15, 103-105, 110, 116.

APPEAL by plaintiffs from Judgment of *Judge C. Walter Allen* entered 18 February 1988 in MADISON County Superior Court. Heard in the Court of Appeals 20 April 1989.

Ball, Kelley & Arrowood, P.A., by Ervin L. Ball, Jr., for plaintiff appellants.

Huff and Huff, by Stephen E. Huff, for defendant appellees.

COZORT, Judge.

Plaintiffs brought suit to enjoin defendants from interfering with plaintiffs' user rights in an easement or right of way created by deeds referencing a recorded plat of a subdivision in which the parties' land is located. Defendants raised abandonment of the easement as a defense and also counterclaimed for a declaration of their rights to the land described in their deed, which purported to convey fee ownership to a tract of land consisting of a portion of lot 1 in the subdivision as well as a portion of the easement. Defendants claimed ownership of that portion of the easement by

virtue of seven years' adverse possession under color of title and, alternatively, by twenty years' adverse possession.

A jury answered the questions of abandonment and adverse possession in favor of defendants, and the trial court entered judgment decreeing defendants owners of the property described in their deed free and clear of any claims of plaintiffs to the right of way shown on the subdivision plat and further enjoining plaintiffs from interfering with or going upon defendants' property.

On appeal, plaintiffs present several assignments of error regarding the sufficiency of the evidence to sustain defendants' theories of abandonment and adverse possession, and the applicability of N.C. Gen. Stat. § 1-38 to a claim which seeks to extinguish a valid outstanding easement. We need not address these contentions, however, as we believe that the verdict and judgment must be vacated because necessary parties were absent from the action.

Rule 19 of the North Carolina Rules of Civil Procedure requires that "those who are united in interest must be joined as plaintiffs or defendants." N.C. Gen. Stat. § 1A-1, Rule 19(a) (1988). A person is united in interest with a party when that person's presence is necessary for the court to determine the claim before it without prejudicing the rights of a party or the rights of another who is not before the court. *Ludwig v. Hart*, 40 N.C. App. 188, 252 S.E.2d 270, *cert. denied*, 297 N.C. 454, 256 S.E.2d 807 (1979). Necessary parties are those who have or claim material interests in the subject matter of a controversy, and those interests will be directly affected by an adjudication of the controversy. *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972). When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 203 (1983). A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void. *Ludwig*, 40 N.C. App. at 190, 252 S.E.2d at 272.

The parties in the instant action seek to resolve the question of whether an easement has been extinguished. The record discloses that the easement was created when lots were sold and conveyed by reference to a plat which showed a division of a tract of land into lots with an easement or roadway bordering on the north. The record further discloses that plaintiffs own lots 6 through 20, that defendants own a portion of lot 1, and that the re-

mainder of the lots (lots 2 through 5 and the remainder of lot 1) are owned by a third party or parties.

We believe that a dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil (*see Johnson v. Skyline Tel. Membership Corp.*, 89 N.C. App. 132, 365 S.E.2d 164 (1988)), and the record owners of lots in the subdivision, who have user rights in the easement, *see Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964). Those owners of interests in the easement have a material interest in the subject matter of the controversy, and their interest will be directly affected by the court's decision. *See Mykoff v. Rubenfeld*, 149 A.D.2d 574, 540 N.Y.S.2d 266 (1989). *Cf. Van Ettinger v. Pappin*, 180 Mont. 1, 588 P.2d 988 (1978) (owners of allegedly servient estate are indispensable parties to action where existence of easement is in dispute); *Barren v. Dubas*, 295 Pa. Super. 443, 441 A.2d 1315 (1982) (same). Furthermore, proof of abandonment by one lot owner, or proof of possession adverse to one lot owner for the prescribed statutory period, does not extinguish an easement dedicated per plat and expressly granted to owners of lots in a subdivision. *See O'Hara v. Wallace*, 83 Misc. 2d 383, 371 N.Y.S.2d 570 (1975), *modified*, 52 A.D.2d 622, 382 N.Y.S.2d 350 (1976).

We therefore vacate the verdict and judgment below and remand so that a new trial may be had upon joinder of all necessary parties.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

TOWN OF SWANSBORO v. GUYON ODUM AND WIFE, SHIRLEY ODUM

No. 894SC89

(Filed 17 October 1989)

Municipal Corporations § 30.2 (NCI3d) — extraterritorial zoning ordinance — failure of town to follow statutory requirements

The trial court correctly ruled that plaintiff's extraterritorial zoning ordinance was void and ineffective as against defendants when plaintiff failed to comply with statutory requirements in that its notice of a public hearing failed to apprise defendants or any other property owners within the affected area of the nature and character of the proposed actions, failed to describe in any way the area in question, and failed to comport with the clear requirements of N.C.G.S. § 160A-364 in that it was not published in two successive calendar weeks; plaintiff's ordinance was adopted in a proceeding held over eight months subsequent to its initial hearing and without either further public hearing or notice; and plaintiff never recorded a boundary description as required by N.C.G.S. § 160A-360(b).

Am Jur 2d, Zoning and Planning §§ 49-59.

APPEAL by plaintiff from *Reid, David E., Jr., Judge.* Judgment entered 6 September 1988 in ONSLOW County Superior Court. Heard in the Court of Appeals 12 September 1989.

Plaintiff filed suit on 5 December 1986 alleging *inter alia* that defendants' real property was located within the zoning jurisdiction of plaintiff pursuant to an ordinance adopted on 20 September 1985, and that subsequent to its enactment, defendants placed a mobile home on their property in violation thereof. The relief sought was an order to require defendants to remove their mobile home. Defendants answered, admitting ownership of both the realty and mobile home, but by their second defense challenged the validity of plaintiff's zoning ordinance.

In the nonjury proceeding in the superior court, the evidence adduced tended to establish that defendants' property was located outside the corporate limits of the Town of Swansboro. At the time defendants first acquired this property, 21 November 1982, plaintiff had adopted a comprehensive zoning ordinance which cov-

ered only property situated within town limits. In January 1983, plaintiff attempted for the first time to exercise zoning jurisdiction for areas outside its corporate limits, and published the following notice in the Jacksonville Daily Newspaper on 15 January 1983:

PUBLIC HEARING NOTICE

> The Swansboro Town Board of Commissioners will hold a public hearing on January 27, 1982 [sic] at 7 o'clock p.m. at the Swansboro Town Hall. The purpose of the public hearing shall be to answer questions and receive input as to extra-territorial jurisdiction as authorized by G.S. 160A-360.
>
> Patti Sue Chandler
> Town Clerk
>
> Jan. 15, 25, 1983.

This notice was published again on 25 January 1983. No action, however, was taken on this matter at the 27 January public hearing. Minutes of meetings for 7 and 21 April 1983 reflected plaintiff's decision to submit the issue of asserting zoning jurisdiction beyond town limits to a public referendum. No such referendum was ever held.

On 8 September 1983, without holding any further public hearings and without publishing any additional notices regarding the extension of zoning beyond town limits, plaintiff adopted its extra-territorial zoning ordinance prohibiting mobile homes in residential areas within a one-mile zone outside the town limits. This ordinance was incorporated into a resolution adopted by plaintiff on 20 September 1985, under which the present suit was brought. Neither the ordinance nor any map or written description delineating the boundaries of extraterritorial jurisdiction and the property covered thereby was ever recorded by the Onslow County Register of Deeds.

The court determined that plaintiff failed to follow the statutory requirements of N.C. Gen. Stat. §§ 160A-360, 364 pertaining to zoning beyond town limits, and thus ruled plaintiff's ordinance void and ineffective as against defendants. From the judgment denying the relief sought, plaintiff appeals.

Joseph E. Stroud, Jr. for plaintiff-appellant.

Richard L. Stanley for defendants-appellees.

WELLS, Judge.

We note at the outset that plaintiff's first argument is directed in its entirety to matters that were not properly preserved and brought forward under N.C. R. App. P., Rule 10(a). Therefore, we do not consider it. We further note that plaintiff failed to discuss its fifth assignment of error in the brief. We thus deem it abandoned. N.C. R. App. P., Rule 28(a). Plaintiff consolidates its remaining assignments of error into a single argument challenging the court's determination that the zoning ordinance in issue was void in that plaintiff failed to comply with statutory requirements.

A city has no power to zone except as conferred by statute. *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E.2d 352 (1971). N.C. Gen. Stat. § 160A-360(a) (1987) permits a city to exercise zoning jurisdiction "within a *defined* area extending not more than one mile beyond its limits." (Emphasis added.) Before exercising such jurisdiction, however, the City must hold a public hearing, notice of which must be published in a newspaper of general circulation "once a week for two *successive* calendar weeks[.]" N.C. Gen. Stat. § 160A-364. (Emphasis added.) Such notice "must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed." *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977). Moreover, a detailed delineation of the boundaries specified in an ordinance adopted under the statute, set forth in the form of a map, written description, or combination thereof, "shall be recorded in the office of the register of deeds of each county in which any portion of the [affected] area lies." N.C. Gen. Stat. § 160A-360(b).

Plaintiff did not satisfy these requirements. Its notice of the 27 January 1983 public hearing failed to apprise defendants—or any other property owners within the affected area—of the nature and character of the proposed actions, failed to describe in any way the area in question, and failed to comport with the clear requirements of G.S. § 160A-364 in that it was not published in two successive calendar weeks. Furthermore, plaintiff's ordinance was adopted in a proceeding held over eight months subsequent to its initial hearing, and without either further public hearing or notice. Finally, plaintiff never recorded a boundary description as required by G.S. § 160A-360(b). We thus conclude that the court below correctly ruled plaintiff's ordinance void and ineffective as against defendants. The judgment is therefore

Affirmed.

Judges PHILLIPS and PARKER concur.

J. LEE PEELER & CO., INC. v. HAROLD T. MAKEPEACE AND HELEN S. MAKEPEACE

No. 8814SC1415

(Filed 17 October 1989)

Limitation of Actions § 7 (NCI3d) — action to establish constructive trust — fraud or mistake alleged — three-year statute of limitations applicable

The three-year statute of limitations of N.C.G.S. § 1-52 rather than the ten-year limitation of N.C.G.S. § 1-56 applied to bar plaintiff's action to establish a constructive trust based on a claim of defendants' unjust enrichment as a result of their fraud or mistake in the sale of common stock.

Am Jur 2d, Limitation of Actions § 101.

APPEAL by plaintiff from order entered 17 November 1988 in DURHAM County Superior Court by *Judge Henry W. Hight, Jr.* Heard in the Court of Appeals 24 August 1989.

William V. McPherson, Jr. for plaintiff-appellant.

Manning, Fulton & Skinner, by Michael T. Medford, for defendant-appellees.

BECTON, Judge.

In this civil action plaintiff, J. Lee Peeler & Co., Inc., a stock brokerage firm, seeks to fasten a constructive trust on proceeds received by defendants from the sale of common stock and on 125 shares of common stock retained by defendants, the Makepeaces. The trial court allowed the Makepeaces' motion under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and dismissed the action with prejudice because plaintiff's claims were barred by the applicable statute of limitations of N.C. Gen. Stat. Sec. 1-52(9). Plaintiff appeals, contending that the action to impose a construc-

tive trust is governed by the ten-year period in N.C. Gen. Stat. Sec. 1-56. We disagree with plaintiff and affirm the trial court.

I

On 30 May 1978, the defendant husband placed an order to sell 1,000 shares of United Guaranty Corporation stock (United Guaranty), with Peeler as broker. Peeler executed the order. A stock dividend of one-share-for-four had been declared and paid earlier by United Guaranty. As a result of that dividend, every four shares traded through 30 May 1978 had to include an additional share. Peeler alleges that defendant husband knew or had reason to know that this requirement meant that he was obligated to tender 1,250 shares of United Guaranty stock in order to sell 1,000 shares.

Defendant husband tendered 1,125 shares of United Guaranty stock with an order to transfer title to 125 of those shares to his wife. Peeler's staff was unaware of defendant husband's obligation to tender 1,250 shares and made the transfer of title that defendant husband requested. Peeler alleges that defendant husband defrauded him of the 125 shares and $4,280 in proceeds of sales attributable to shares which he did not deliver. In the alternative, Peeler alleges that defendant husband mistakenly thought that his order to sell 1,000 shares of United Guaranty stock only obligated him to deliver 1,000 shares. On 27 May 1988, Peeler brought suit to have a constructive trust fastened to the proceeds and the 125 shares. Defendant's subsequent motion to dismiss was granted on the ground that the statute of limitations barred the action.

II

Section 1-56 states, "An action for relief *not* otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued." (Emphasis added.) However, Section 1-52(9) states that an action "[f]or relief on the ground of fraud or mistake" must be brought within three years.

Peeler contends that his claim is timely and relies on *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949). In *Jarrett*, the beneficiaries of certain stock sued the trustee for selling the stock. They sought to recover the property and sought an accounting. The action did not sound in fraud or mistake, nor did a specific

statute of limitations apply to it. Thus, the court applied the umbrella provisions of Section 1-56.

This case is distinguishable from *Jarrett*. Peeler specifically alleges fraud, or, alternatively, mistake as the basis for imposing a constructive trust. Thus, Peeler's ability to obtain the remedy of a constructive trust will depend upon his ability to bring an action to prove fraud or mistake. *See Little v. Bank of Wadesboro*, 187 N.C. 1, 121 S.E. 185 (1924). As Judge Haynsworth of the Fourth Circuit stated, "There is no suggestion of classification on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought." *New Amsterdam Casualty Company v. Waller*, 301 F.2d 839, 844 (4th Cir. 1962). The case at bar is premised on a claim of the defendants' unjust enrichment as the result of their fraud or mistake. Thus, Peeler's action is "otherwise limited," Sec. 1-56, and the three-year limitation set forth in Sec. 1-52 applies.

Affirmed.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 OCTOBER 1989

BENFIELD v. BENFIELD No. 8925DC54	Caldwell (85CVD1044)	Affirmed
BOWES v. HARRISON CONSTRUCTION No. 8930DC75	Macon (86CVD208)	No Error
CANTER v. ANDREWS No. 8923SC224	Wilkes (87CVS490)	No Error
CHARLES v. CHARLES No. 8921DC401	Forsyth (87CVD5901)	Affirmed
CORAM v. DARNELL No. 8823SC1413	Yadkin (87CVS259)	Vacated & Remanded
FOWLER, INC. v. BLEVINS No. 8914DC128	Durham (86CVD1338)	Affirmed
HOLMES v. CARTER No. 8926SC471	Mecklenburg (87CVS7987)	Affirmed
IN RE ESTATE OF BOSKEY v. FONVILLE No. 893SC121	Craven (88E287)	Affirmed
IN RE LUNSFORD No. 8929DC284	McDowell (86J58)	Appeal Dismissed
IN RE NESMITH No. 8913DC257	Columbus (88SPC134)	Affirmed
LAMBDIN v. NANTAHALA VILLAGE No. 8830DC524	Swain (86CVD80)	Modified & Affirmed
MOTOR FUELS AUDIT ASSESSMENT v. U-FILL' ER-UP No. 8810SC1356	Wake (88CVS3251)	Reversed
RASH v. RASH No. 8916DC360	Robeson (87CVD1679)	Affirmed
SARANT v. SARANT No. 8912DC124	Cumberland (86CVD5666)	Affirmed
SISTARE v. HOISINGTON No. 8812SC898	Cumberland (86CVS1402)	New Trial
STATE v. AMMONS No. 8927SC268	Lincoln (87CRS5448)	No Error

STATE v. AUTREY No. 8924SC365	Avery (88CRS159)	No Error
STATE v. BAYKOWSKI No. 8921SC456	Forsyth (88CRS12292)	No Error
STATE v. BROWN No. 8919SC348	Rowan (87CRS1828) (87CRS1829)	No Error
STATE v. BURNETTE No. 8816SC1088	Robeson (87CRS14838)	No Error
STATE v. COBB No. 8927SC467	Gaston (88CRS7276) (88CRS519)	New Trial No Error
STATE v. COOK No. 885SC1408	Pender (88CRS0291)	Vacated & Remanded
STATE v. DAMMONS No. 8911SC385	Lee (88CRS4544)	No Error
STATE v. DREWYORE No. 886SC1083	Halifax (87CRS6173) (88CRS343)	No Error
STATE v. HAIRE No. 8926SC414	Mecklenburg (88CRS61311) (88CRS61315) (88CRS61317) (88CRS61319)	No Error
STATE v. JOHNSON No. 8914SC470	Durham (85CRS36343) (85CRS36345) (85CRS36346)	Affirmed
STATE v. LEE No. 8912SC215	Cumberland (88CRS16914)	No Error
STATE v. LOCKLEAR No. 8926SC267	Mecklenburg (87CRS38699)	No Error
STATE v. LYNCH No. 8927SC374	Gaston (87CRS15824) (87CRS15825) (87CRS15826) (87CRS15827) (87CRS15828) (87CRS15829) (87CRS15830) (87CRS15831) (87CRS15834)	No Error

STATE v. LYNCH No. 8927SC320	Gaston (87CRS15830) (87CRS15831) (87CRS15834)	No Error
STATE v. MEEKS No. 8914SC324	Durham (87CRS23199)	No Error
STATE v. MEEKS No. 8926SC319	Mecklenburg (88CRS014255)	Affirmed
STATE v. MOORE No. 899SC567	Franklin (88CRS1346)	(1) As to breaking or entering, no error; sentence vacated, remanded for resentencing. (2) As to larceny, no error; sentence vacated, remanded for resentencing. (3) As to possession of stolen goods, judgment vacated, remanded for entry of judgment of dismissal.
STATE v. SMITH No. 8927SC498	Gaston (87CRS10020)	No Error
STATE v. SUMLIN No. 8926SC521	Mecklenburg (88CRS20334) (88CRS20430) (88CRS20432)	Affirmed
STATE v. SUTTON No. 8918SC116	Guilford (87CRS59202)	No Error
STATE v. TAMAYO No. 884SC1395	Onslow (87CRS11401)	Affirmed
STATE v. WAHID No. 8919SC333	Rowan (88CRS5492)	No Error
STATE v. WATKINS No. 8920SC76	Stanly (87CRS3319)	No Error
STATE EX REL. REED v. TAYLOR No. 893DC309	Craven (85CVD826)	Affirmed
WHITAKER v. WHITAKER No. 8823DC1066	Yadkin (88CVD23)	Affirmed in part, vacated & remanded in part, dismissed in part.
WISE v. SHOAF No. 8822SC1365	Davidson (87CVS1709)	Reversed & Remanded

THOMAS H. PRIVETTE v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DAVID S. JANOWSKI, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, AND AMIR S. RESVANI, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES

No. 8815SC1217

(Filed 7 November 1989)

1. **Rules of Civil Procedure § 12 (NCI3d)— motion to dismiss—no conversion to summary judgment motion**

The trial court was not required to convert defendants' Rule 12(b)(6) motion to dismiss into one for summary judgment under Rule 56 where the trial court did not consider matters outside the pleadings but considered only the amended complaint, memoranda submitted on behalf of the parties and arguments of counsel.

Am Jur 2d, Summary Judgment § 13.

2. **Master and Servant § 10.2 (NCI3d)— breach of employment contract—insufficiency of complaint**

Plaintiff's allegation that he was discharged without just cause was insufficient to state a claim against UNC-CH for breach of an employment contract where plaintiff failed to allege that his employment was for a definite period. Plaintiff's contention that the UNC-CH Personnel Guide applies to his dismissal was without merit where plaintiff failed to allege that his employment contract expressly included the Personnel Guide and failed to include in his complaint the relevant terms of the Personnel Guide or attach the Personnel Guide to the complaint as an exhibit.

Am Jur 2d, Master and Servant §§ 27, 45, 46.

3. **Master and Servant § 10.2 (NCI3d)— wrongful discharge—insufficiency of complaint**

Plaintiff's allegation that UNC-CH discharged him because he associated with an out-of-favor member of the UNC-CH research faculty failed to state a claim for wrongful discharge of an employee at will.

Am Jur 2d, Master and Servant § 54.

4. Master and Servant § 13 (NCI3d)— tortious interference with employment contract—insufficiency of complaint

Plaintiff's complaint was insufficient to state a claim against the individual defendants for tortious interference with plaintiff's contract of employment as a research technician for the lab at the UNC-CH Center for Alcoholic Studies where it alleged that one defendant was the director of the Center and the second defendant was the assistant director of the Center's lab, since the complaint showed on its face that both defendants had a legitimate professional interest in plaintiff's performance of his duties and therefore had a proper motive for their actions.

Am Jur 2d, Master and Servant §§ 45, 46.

5. Constitutional Law § 17 (NCI3d)— freedom of expressive association—insufficiency of complaint to allege violation

Plaintiff's allegation that defendants, acting under color of State law, harassed and terminated plaintiff as a research technician for the lab at the UNC-CH Center for Alcoholic Studies because of plaintiff's association with an out-of-favor member of the research faculty was insufficient to state a claim under 42 U.S.C. § 1983 for a violation of his right to freedom of expressive association.

Am Jur 2d, Constitutional Law §§ 533 et seq.

6. Master and Servant § 10 (NCI3d)— at-will employee—no right to hearing before discharge

An at-will employee had no property interest in continued employment cognizable under the due process clause and thus was not entitled to a hearing before being discharged.

Am Jur 2d, Constitutional Law §§ 839, 845; Master and Servant § 27.

7. Constitutional Law § 17 (NCI3d)— employee dismissal—interference with admission to medical school—no protected property interest

Plaintiff's allegation that his dismissal as a research technician at the UNC-CH Center for Alcoholic Studies affected his "right to seek and be considered for admission into the University's Medical School" failed to state a claim under 42

U.S.C. § 1983 based on a property interest protected by procedural due process.

Am Jur 2d, Constitutional Law §§ 813-815.

8. **Constitutional Law § 17 (NCI3d)— employee dismissal—injury to reputation—inadequacy of grievance procedure—insufficient allegations**

Assuming that plaintiff sufficiently alleged that defendants dismissed him as a research technician at UNC-CH on the basis of an unsupported charge which could wrongfully injure plaintiff's reputation so that he was entitled to a hearing after his dismissal, plaintiff's complaint was insufficient to state a claim under 42 U.S.C. § 1983 for a violation of his procedural due process rights where it contained a conclusory allegation that the UNC Grievance Procedure was inadequate to provide sufficient redress for him but failed to allege the provisions of the Grievance Procedure.

Am Jur 2d, Pleading § 69.

9. **Conspiracy § 2 (NCI3d)— civil conspiracy—insufficiency of complaint**

Plaintiff's complaint was insufficient to state a claim for civil conspiracy arising out of his discharge from employment by defendants where it failed to allege any unlawful act by defendants or any lawful act done in an unlawful way.

Am Jur 2d, Conspiracy §§ 49 et seq.

10. **Damages § 12.1 (NCI3d)— punitive damages—dismissal where underlying claims dismissed**

Plaintiff's claim for punitive damages was properly dismissed where the underlying claims were not enforceable as stated.

Am Jur 2d, Damages § 741.

APPEAL by plaintiff from *Farmer (Robert L.), Judge.* Judgment entered 6 August 1988 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 May 1989.

Faison & Brown, by Charles Gordon Brown and John C. Schafer, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Edwin M. Speas, Jr., Special Deputy Attorney General, for the State.

GREENE, Judge.

Plaintiff (hereafter "Privette" or "plaintiff") appeals the dismissal of his complaint in which he asserted multiple claims allegedly arising out of his discharge from employment by defendants. Defendants are the University of North Carolina at Chapel Hill (UNC), Dr. David S. Janowski [sic] ("Janowsky"), individually and officially, and Dr. Amir S. Resvani ("Resvani"), individually and officially.

The facts, as alleged in the complaint, reveal that Privette in January 1986 was employed as "research technician for the Lab at the University's Center for Alcoholic Studies. His duties involved performing scientific experiments under the direction of Dr. R. D. Myers" (hereafter "Myers"). While Privette "reported directly to Dr. Myers concerning the scientific aspect of his work," other research in the Lab was supervised by Resvani who also "had responsibility for some administrative aspects of the Lab." In early 1987, the defendants "began a pattern of harrassment [sic] against Privette because of his association with Dr. Myers." The "Defendants encouraged the research technicians under Rezvani's [sic] supervision to make false accusations against Dr. Myers and, because of Privette's association with Dr. Myers, also against Privette."

The complaint further alleges that:

> In retaliation for Privette's continued association with Dr. Myers and his initiation of the grievance procedure concerning the Defendants' harassment, the Defendants conspired to terminate Privette's employment with the University, prevent him from obtaining employment with the University in another capacity, prevent him from gaining admission into the University Medical School, and prevent him from seeking legal redress for the Defendants' violation of his rights.

On 19 June 1987, Janowsky told Privette that because he had failed to properly clean a "surgery table" he "would be terminated." Plaintiff alleged that the "Defendants conspired to make Privette's work area appear to be in much worse condition than the other work areas so that the Defendants would have an excuse for

terminating Privette." "Janowsky told Privette that Janowsky would keep his own file on Privette and that he would use it against Privette if he had the opportunity, and that Janowsky would do whatever he could do to keep Privette out of the University's Medical School." On 23 June 1987, "Janowsky informed Privette that he was terminated effective June 19." "During the summer of 1987, Privette inquired about numerous jobs at the University. Although many persons expressed interest in employing Privette, in each case his application was eventually rejected. Upon information and belief, the applications were turned down after the employers had consulted with the individual Defendants or other University officials." "Upon information and belief, and as a part of a continuing effort to harass Privette, the Defendants have made defamatory statements about Privette to potential employers and told them not to employ Privette as part of a continuing effort to harass Privette."

Based on the facts alleged in the complaint, Privette made the following separate claims for relief:

Count I—Conspiracy

45. Each of the allegations set forth in paragraphs 1 through 44 is realleged herein.

46. The unlawful conduct and practices described herein were acts committed pursuant to a common scheme, enterprise, or agreement among the Defendants and others, the object of which was to commit unlawful acts or to use lawful acts to achieve unlawful results harmful to Privette.

47. Each of the Defendants and others were co-conspirators, and as co-conspirators each was the agent of the others in the perpetuation of unlawful conduct or practices which proximately caused injuries to Privette.

Count II—Deprivation of Civil Rights

(42 U.S.C. Section 1983)

48. Each of the allegations set forth in paragraphs 1 through 47 is realleged herein.

49. At all times relevant to this lawsuit Privette has had substantial liberty and property interest in his continued employment as a research technician at the lab, the right to seek and

be considered for other employment at the University and elsewhere, the right to seek and be considered for admission into the University's Medical School, the right to seek legal redress through the University's Grievance Procedure and other legal remedies, the freedom of association, and the freedom of expression.

50. At all times relevant to this lawsuit, the Defendants have acted under color of state law.

51. The Defendants acted arbitrarily and capriciously in harassing and terminating Privette. The Defendants have also violated Privette's rights to seek legal redress and his rights to freedom of association and freedom of expression.

52. Janowski [sic] and Rezvani [sic] have acted in bad faith and with ill will and malice towards Privette in violating his rights.

53. Privette has incurred substantial injuries as a result of the Defendants' violation of his rights.

Count III—Interference with Contractual Relations

54. Each of the allegations set forth in paragraphs 1 through 53 is realleged herein.

55. Between January of 1986 and June of 1987 Privette had a valid contract of employment with the University which conferred rights and privileges upon Privette.

56. Janowski [sic] and Rezvani [sic] had knowledge of the contract between Privette and the University.

57. Janowski [sic] and Rezvani [sic] intentionally induced the University to terminate Privette in violation of his contract of employment.

58. Janowski [sic] and Rezvani [sic] lacked any justification for their acts.

59. The acts of Janowski [sic] and Rezvani [sic] have proximately caused Privette to incur substantial damages.

Count IV—Intentional Infliction of Emotional Distress

60. Each of the allegations set forth in paragraphs 1 through 59 is realleged herein.

61. The acts of the Defendants amount to extreme and outrageous conduct.

62. The Defendants acted with the intent to cause Plaintiff to suffer severe emotional distress, or with reckless indifference as to the likelihood that Privette would suffer severe emotional distress.

63. The Defendants' acts have caused Privette to suffer severe emotional distress.

64. The Defendants' acts have proximately caused Privette to suffer substantial damages.

Count V—Wrongful Discharge

65. Each of the allegations set forth in paragraphs 1 through 64 is realleged herein.

66. Pursuant to the University's Personnel Guide, Privette could be discharged only for just cause.

67. At all times that Privette was employed by the University, he served the University faithfully and diligently, conducted himself properly, and performed all the duties incident to his employment honestly and with reasonable diligence, care and attention.

68. The Defendants discharged Privette without just cause.

69. The Defendants' wrongful discharge of Privette was the proximate cause of damages incurred by Privette.

Count VI—Breach of Contract

70. Each of the allegations set forth in paragraphs 1 through 69 is realleged herein.

71. Between January of 1986 and June of 1987, Privette had a valid and enforceable contract of employment with the University.

72. The Defendants breached Privette's contract of employment with the University.

73. The Defendants' breach of Privette's employment contract was the proximate cause of damages incurred by Privette.

Count VII—Punitive Damages

74. Each of the allegations set forth in paragraphs 1 through 73 is realleged herein.

75. The aforesaid actions were done intentionally, willfully, wantonly, or with a heedless and reckless disregard of Privette's rights, entitling Privette to recover punitive damages in an amount sufficient to punish the Defendants and deter similar conduct in the future.

In his prayer for relief, the plaintiff requested back pay, punitive damages and injunctive relief to enjoin the defendants from interfering with "any application by the Plaintiff for employment with any person or entity, including the University because of Plaintiff's exercise of his civil rights." The plaintiff also requested injunctive relief to prohibit the defendants from interfering with or adversely affecting "any application by the Plaintiff for admission to any school or program of the University, or any other college or university. . ." Finally, the plaintiff requested that "the University's personnel file be purged of any notes or documents which relate in any way to the Defendants' wrongful conduct or the Plaintiff's exercise of his civil rights. . ."

The plaintiff later moved to amend his complaint to add:

53A The University's Grievance Procedure would not provide adequate redress for Privette's claims and requested remedies, and would not provide an orderly procedure for an appeal to the Superior Court for review of the final administrative action. Thus, Privette has no adequate remedy under state law which provides due process.

On 18 July 1988, the trial court allowed the plaintiff's motion to amend his complaint and "[u]pon consideration of the amended complaint, memoranda submitted on behalf of the parties, and arguments of counsel," granted defendants' Rule 12(b)(6) Motion to Dismiss. In the alternative, after considering affidavits "attached to defendants' motion for partial summary judgment, the amended complaint, the memoranda submitted on behalf of the parties, and the arguments of counsel," the trial court granted summary judgment for the defendants as to Count II, Count III, Count V, and Count VI of the amended complaint.

The issues presented are whether the trial court properly dismissed I) the breach of contract claim; II) the wrongful discharge claim; III) the interference with contractual relations claim; IV) the intentional infliction of emotional distress; V) the deprivation of civil rights claim; VI) the conspiracy claim; and VII) the punitive damages claim, pursuant to Rule 12.

[1] We first determine the trial court was not required to convert the Rule 12 motion into one for summary judgment under Rule 56. N.C.G.S. § 1A-1, Rule 12(b)(6) (1983); N.C.G.S. § 1A-1, Rule 56 (1983). N.C.G.S. § 1A-12(b) (if "matters outside the pleading" are presented to the court, Rule 12 motions are converted to Rule 56 motions). While matters outside the pleadings were introduced, the record is clear the trial court did not consider these affidavits in ruling on the Rule 12 motion. The trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties and arguments of counsel. "Memoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes" of converting a Rule 12 motion into a Rule 56 motion. 5 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 1366 at 682 (1969). The record does not contain a copy of the memoranda submitted by the attorneys to the trial court and we are unable to determine if the memoranda contained any factual matters not contained in the pleadings. However, the plaintiff does not contest the issue and we therefore accept the memoranda as legal memoranda, not including factual matters outside the pleadings.

In reviewing the Rule 12 dismissal, we accept all the well-pleaded facts, not conclusions of law, as true. *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986); *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (unwarranted deductions of facts are not admitted). "[W]hen the complaint on its face reveals the absence of fact sufficient to make a good claim," dismissal of the complaint under Rule 12 is proper. *Jackson*, 318 N.C. at 175, 347 S.E.2d at 745.

I

Breach of Contract

[2] The complaint alleges an employment contract existed between defendant UNC and plaintiff, and plaintiff did not state a claim for

breach of contract against defendants Janowsky and Resvani, either in their individual or official capacities. *Smith v. State*, 289 N.C. 303, 332, 222 S.E.2d 412, 431 (1976) (in breach of contract claim, only principal, not agents, are liable for breach). Furthermore, we determine that as the plaintiff's alleged contract with UNC was terminable at will, Privette has failed to allege a breach of contract claim against UNC.

"[W]hen a contract of employment does not fix a definite term the employment is terminable without cause at the will of either party." *Sides v. Duke University*, 74 N.C. App. 331, 336, 328 S.E.2d 818, 823, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). The fact that Privette alleged that he was discharged "without just cause" is immaterial as he did not allege that his employment was for a definite period. *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987). Privette alleges no more than a unilateral expectation of continued employment.

Privette argues that regardless of his failure to allege a "definite term" of employment, that UNC's Personnel Guide applies to his dismissal. Firstly, Privette failed to allege that his employment contract expressly included UNC's Personnel Guide. *Rosby v. Gen'l Baptist State Convention*, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988) (employment manual not part of employment contract unless expressly included). Secondly, plaintiff did not include in his complaint the relevant terms of the personnel guide or attach the personnel guide to the complaint as an exhibit.

Accordingly, as the complaint 'reveals the absence of fact sufficient to make a good claim,' we affirm the trial court's dismissal of Privette's breach of contract action against all defendants.

II

Wrongful Discharge

[3] As a general rule, an employee-at-will has no claim for relief for wrongful discharge. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 262, 335 S.E.2d 79, 85, *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). However, the doctrine is not without limits and a valid claim for relief exists for wrongful discharge of an employee-at-will if the contract is terminated "for an unlawful reason or purpose that contravenes public policy." *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826.

Privette alleged that UNC discharged him because he associated with Myers, an allegedly out-of-favor member of the UNC research faculty. We determine that this allegation, while possibly asserting an arbitrary reason for discharge, does not assert an unlawful reason. *Id.* (employee-at-will's employment can be terminated for "arbitrary or irrational reason"); *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 382 S.E.2d 836, 840 (1989) (employee-at-will's employment can be terminated for "indifferent and illogical" reasons). Furthermore, the plaintiff does not allege that the discharge contravenes any public policy.

Accordingly, as the complaint 'reveals the absence of fact sufficient to make a good claim,' we affirm the trial court's dismissal of plaintiff's claim for relief against all defendants for wrongful discharge.

III

Interference with Contractual Relations

[4] The elements of a tortious interference with employee contract claim are: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). The interference is "without justification" if the defendants' motives for procuring termination of the employment contract were "not reasonably related to the protection of a legitimate business interest" of the defendant. *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 292 (1976); *Sides*, 74 N.C. App. at 347, 328 S.E.2d at 829. This claim for relief also exists on behalf of employees at will. *Smith*, 289 N.C. at 85, 221 S.E.2d at 291.

The complaint alleged that Janowsky was the director of the University's "Center for Alcohol Studies" and that Resvani was the assistant director of the Center's "Lab." These allegations show that both Janowsky and Resvani had an interest in insuring proper work procedures at the Center and, as such, had a legitimate professional interest in the plaintiff's performance of his duties. Therefore, Privette's complaint on its face admits that Janowsky and Resvani had a proper motive for their actions. *See Sides*,

74 N.C. App. at 346, 328 S.E.2d at 829 (complaint must admit of no other motive for interference other than malice).

Accordingly, Privette's complaint 'reveals the absence of fact sufficient to make a good claim' for interference with employment contract and the trial court was correct in dismissing this claim.

IV

Intentional Infliction of Emotional Distress

Privette assigned as error dismissal of this claim for relief, but has failed to cite authority in his brief in support of the assignment. We deem it abandoned. North Carolina Rules of App. Procedure, Rule 28(b)(5); *State v. Sanders*, 95 N.C. App. 56, 381 S.E.2d 827, 832 (1989).

V

Deprivation of Civil Rights

Plaintiff next alleged that the defendants, in their individual and official capacities, violated Privette's civil rights and sought relief under 42 U.S.C. § 1983 (1979). § 1983, a federal statute, "creates no substantive rights; it only provides for access to the courts to vindicate those rights already guaranteed by the Constitution or other federal statutes." *Harwood v. Johnson*, 92 N.C. App. 306, 311, 374 S.E.2d 401, 405 (1988). State courts, along with the federal courts, "exercise concurrent subject matter jurisdiction over claims arising under [§] 1983." *Id.*

A. Substantive Due Process

A plaintiff states a cause of action under § 1983 when he alleges that his conduct was protected by the constitution and that the constitutionally-protected conduct was a "motivating factor" in his discharge. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484 (1977). An employment discharge violates substantive due process rights if it is based upon constitutionally impermissible grounds, regardless of whether the employee had a property interest in continued employment. *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L.Ed.2d 570, 577 (1972).

[5] Plaintiff first alleged that his association with Myers led to defendants' harassment of Privette. Privette argues that any harassment from the defendants as a result of his relationship with Myers is a violation of his "freedom of association" and gives rise to

§ 1983 claim. We agree with the plaintiff that freedom of association can be a liberty interest entitled to "protection as a fundamental element of personal liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 82 L.Ed.2d 462, 471 (1984). The United States Supreme Court has enunciated two types of association: the "freedom of intimate association" and the "freedom of expressive association." *Id.*

The 'freedom of intimate association' grows out of the bill of rights and protects "the formation and preservation of certain kinds of highly personal relationships . . . from unjustified interference by the State." *Id.* Determining the limits which can be made on a public employee "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.*, 468 U.S. at 620, 82 L.Ed.2d at 473. The only association between Myers and Privette alleged in the complaint is an employment relationship. There is no allegation of any 'intimate' association or 'personal attachment.'

'Freedom of expressive association' includes:

> [a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances [that] could not be vigorously protected from interference by the State unless a correlative freedom to engage in *group effort* toward those ends were not also guaranteed. . . . According protection to *collective effort* on behalf of *shared goals* is especially important in preserving *political and cultural diversity* and in *shielding dissident expression* from suppression by the majority.

Roberts, 468 U.S. at 622, 82 L.Ed.2d at 474 (emphasis added) (citations omitted). Plaintiff's complaint includes no allegations that defendants' actions in any manner interfered with a 'collective effort' of Privette and Myers to assert 'shared goals.' The allegation that Privette was harassed for his association with Myers is insufficient to allege a 'freedom of expressive association.' The mere "accident of overlapping location at some point in space and time" is not sufficient "to invoke the preferred freedom of association." Tribe, Laurence H., *American Constitutional Law*, 2d Ed. (1988) §§ 15-17.

Accordingly, the complaint 'reveals the absence of fact sufficient to make a good claim;' we determine the trial court did not err in dismissing plaintiff's claims for violations of substantive due process based on 'freedom of association.'

B. Procedural Due Process

The plaintiff is denied procedural due process "only to the degree that plaintiff's complaint reveals a colorable claim that a 'property' or 'liberty' interest was violated by the procedures attendant to plaintiff's discharge." *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979).

1

[6] Plaintiff first claimed a property interest "in continued employment" and that this interest was violated when he was denied a hearing before being discharged from his employment. We disagree. At-will employees have no property interests in their employment cognizable under the due process clause. *See Pittman v. Wilson County*, 839 F.2d 225, 229-30 (4th Cir. 1988). The necessity of a hearing *before* discharge arises only if plaintiff has a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 33 L.Ed.2d 548, 556 (1972) (hereafter "*Roth*").

2

[7] Privette next alleged his "right to seek and be considered for admission into the University's Medical School" was a property interest and that the procedures attendant to his dismissal denied him of this interest. To have a property interest claim, a plaintiff "must have more than an abstract need or desire. . . . He must have more than a unilateral expectation. . . . He must, instead, have a legitimate claim of *entitlement*. . ." *Roth*, 408 U.S. at 577, 33 L.Ed.2d at 561 (emphasis added). Privette alleged only his desire to attend UNC medical school. He did not allege that he was qualified to attend medical school, that he had applied and was rejected by the medical school or that he was entitled to admission to any medical school. " 'The admission to a professional school is a privilege and not, standing alone, a constitutional or property right. . . .' " *Phelps v. Washburn University*, 632 F.Supp. 455, 458 (D. Kan. 1986) (citation omitted). Privette's allegations are no more than speculation suggesting the defendants might interfere with his application were he to apply. These allegations do not rise to a property interest.

3

[8] Privette next alleged that the defendants interfered with his liberty interest in seeking future employment by threatening to disseminate false information.

Dismissal from employment does not itself offend the liberty interest one has to seek future employment. However, "dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee" does affect a constitutional liberty interest. *Arnett v. Kennedy*, 416 U.S. 134, 157, 40 L.Ed.2d 15, 35 (1974). In such an instance, the employee is to be accorded pursuant to the due process clause, "an opportunity to refute the charge before University officials." *Roth*, 408 U.S. at 573, 33 L.Ed.2d at 558. The purpose of the hearing in such a case is to provide the person " 'an opportunity to clear his name.' " *Arnett*, 416 U.S. at 157, 40 L.Ed.2d at 35 (citation omitted).

Assuming Privette has sufficiently alleged that the defendants dismissed him 'upon an unsupported charge which could wrongfully injure the reputation' of Privette and entitle him to a hearing after his dismissal, Privette also alleged that UNC's administrative hearing procedures were inadequate in that:

> [UNC's] Grievance Procedure would not provide adequate redress for Privette's claims and requested remedies, and would not provide an orderly procedure for appeal to the Superior Court for review of the final administrative action. Thus, Privette has no adequate remedy under state law which provides due process.

These conclusory allegations are insufficient as a matter of law to "demonstrate the adequacy, or lack thereof, of legal administrative remedies." *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979). "[W]hen an *effective* administrative remedy exists, that remedy is exclusive. . . . Our inquiry must therefore be, taking plaintiff['s] factual allegations as true, whether the [grievance] procedure is an effective administrative remedy for the wrongs of which [he] complain[s]." *Id.* 296 N.C. at 428, 251 S.E.2d at 852. However, the failure of the complaint to allege the provisions of UNC's Grievance Procedure renders impossible our determination of the adequacy in fact of the hearing procedures provided to Privette. In order for Privette to avoid dismissal under Rule 12, the complaint must allege facts sufficient to satisfy the substantive elements of the claim; plaintiff's conclusory pleadings are insufficient. *Jackson*, 318 N.C. at 175, 347 S.E.2d at 745 (conclusions of law are not accepted as true when considering Rule 12 motion to dismiss). Accordingly, the complaint 'reveals the absence of fact sufficient to make a good claim' for violation of his procedural

due process rights and the trial court did not err in dismissing this claim.

VI

Conspiracy

[9] The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme. *Jones v. City of Greensboro*, 51 N.C. App. 571, 583, 277 S.E.2d 562, 571 (1981) (citations omitted).

As we have determined that plaintiff has not successfully alleged the doing of any 'unlawful' act and does not argue that defendants' acts were lawful, but done in an 'unlawful way,' plaintiff's conspiracy claim fails. The complaint 'reveals the absence of fact sufficient to make a good claim,' and the trial court properly dismissed this claim.

VII

Punitive Damages

[10] Punitive damages can be recovered "only for tortuous [sic] conduct and then only on proof that the defendant acted to cause plaintiff's injury wilfully, with malice, or with a reckless disregard for plaintiff's rights." *Sides*, 74 N.C. App. at 348, 328 S.E.2d at 830. We have determined that plaintiff's claims for the underlying causes of actions are not enforceable claims as alleged and plaintiff's plea for the award of punitive damages likewise was properly dismissed.

VIII

Having determined that the trial court committed no error in dismissing Privette's complaint under Rule 12, we find it unnecessary to address any of the alternate bases for the trial court's dismissal.

Affirmed.

Judges JOHNSON and COZORT concur.

TRIANGLE LEASING COMPANY, INC. v. ROBERT F. McMAHON, MARILYNNE M. McMAHON, JOSEPH G. PRIEST, AND WILMINGTON AUTO RENTAL, INC.

No. 8810SC1351

(Filed 7 November 1989)

1. **Appeal and Error § 6.2 (NCI3d)— preliminary injunction— covenant not to compete—appealable**

An appeal lay from an interlocutory preliminary injunction restraining defendants from violating a covenant not to compete where defendants would lose a substantial right, that of practicing their livelihood in North Carolina, prior to final determination on the merits.

Am Jur 2d, Appeal and Error §§ 50 et seq., 387.

2. **Master and Servant § 11.1 (NCI3d)— covenant not to compete— territorial limitation—unenforceable**

A covenant not to compete was unenforceable because its territory was unnecessarily broad where defendant Robert McMahon had executed an employment agreement with plaintiff which prohibited defendant from competing with the company throughout North Carolina, but the record showed that defendant Robert McMahon's access was limited to Wilmington customers and business confidences related to the Wilmington market. The burden of persuasion rests on the employer to show necessity for protection which would extend outside the area in which the employee worked, but the company showed no facts to support its contention that McMahon's attempts to compete affected the company's business in its other two locations or in the whole of North Carolina outside the Wilmington area.

Am Jur 2d, Master and Servant § 106; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 543, 544, 566-568, 572, 576.

3. **Master and Servant § 11.1 (NCI3d)— covenant not to compete— time limitation—unenforceable due to overbroad territorial limitations**

Time restriction of two years in a covenant not to compete was unenforceable in light of an overbroad territorial restraint. Time and area are not independent and unrelated aspects of

the restraint, and each must be considered in determining the reasonableness of the other.

Am Jur 2d, Master and Servant § 106; Monopolies, Restraints of Trade, and Unfair Trade Practices § 569.

Judge JOHNSON concurring.

Judge COZORT dissents.

APPEAL by defendants from *Allen (J. B.), Judge.* Order entered 31 October 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 8 June 1989.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by John R. Wallace, Peter J. Sarda and Cheryl M. Swart, for plaintiff-appellee.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellants.

GREENE, Judge.

Plaintiff (hereafter "Company" or "plaintiff") and defendant Robert F. McMahon (hereafter "Employee") were parties to a non-competition agreement. Plaintiff requested and was granted a preliminary injunction by the trial court, restraining defendants Robert F. McMahon and Company employee Marilynne M. McMahon from violating the agreement. Defendants Robert F. McMahon and Marilynne M. McMahon appeal.

The evidence presented to the trial court at the preliminary injunction hearing tended to show that the Company and Employee executed an "employment agreement" (hereafter "Agreement") on 9 September 1986. The Agreement provided in pertinent part:

> 4. Accounts of the Company. Employee expressly covenants and agrees that any and all current business and accounts of the Company, or business and accounts procured by the Employee or Company while employed hereunder, are and shall be the permanent and exclusive property of the Company and for its exclusive benefit; that the records, use and control of all such business and accounts shall be and remain the absolute and exclusive property of the Company.

5. Covenant Not to Compete; Disclosure of Information. Employee recognizes and acknowledges that the lists and names of the Company's customers and accounts are a valuable and unique asset of the Company and that the Company has devoted and continues to devote consideration [sic] time and expense in developing business relationships with its customers. Employee further recognizes the substantial investment made by the Company in training him and his fellow employees and the value to him of that training. Acknowledging these circumstances and in consideration of his employment and the payment of salary, the undersigned Employee agrees to the following:

(a) *Upon termination of employment* hereunder for any reason whatsoever, *Employee will not, for a period of two (2) years from the date of termination of this Agreement* (excluding, however, any period of violation or any periods of time required by litigation to enforce said covenants), *and within the State of North Carolina or any other state or territory in which the Company conducts business, directly or indirectly, solicit or attempt to procure the customers, accounts, or business of Company, or directly or indirectly make or attempt to make car of* [sic] *truck-van rental sales to the customers of Company.* For purposes of this Agreement, "soliciting or attempting to procure the business of Car Truck-Van Rental or Leasing" of the Company shall include but not be limited to any business or individual customer of Company for any other employer for the purpose of selling or otherwise dealing in Car Van-Truck Rental or Leasing; Employee further agrees not to divulge the names, addresses, or other information concerning the customers and accounts of the Company or any other confidential information acquired during employment by the Company to any person, firm, corporation, association or other entity for any purpose whatsoever. (Emphasis added.)

Pursuant to the Agreement, Employee became manager of the Company's Wilmington office on or about 9 September 1986. The Company was in the business of leasing vans, trucks and automobiles with offices at the Raleigh-Durham Airport, the Greensboro-High Point Airport and in Wilmington. In November 1986, the Company also employed Employee's wife, Marilynne M. McMahon, to work in the Wilmington office. Employee's wife did not sign an employment contract or noncompetition agreement. Employee received

from the Company about ten days of training relating to "procedural policies on how [the Company] wanted the books handled and how [the Employee] was going to send the paper work from Wilmington to Raleigh." Employee was not given any "training or suggestions to how [he was] to approach customers in the Wilmington area to develop the business of [the Company]." Prior to beginning his work with the Company, Employee had approximately thirteen years of experience in the rental car business in Alabama, Georgia and North Carolina. Employee's "job assignment" with the Company included, among other things, "calling on certain accounts." As part of Employee's job, Employee "had knowledge of prices charged" with respect to all Wilmington customer accounts. Employee knew the Company's "bottom line" price for rentals and what it "would do and what [the Company] would not do [about deviating from the 'bottom line']." Employee knew how "far [the Company] would go to set a rate for a customer." The Company maintained a "rate book," which was available to Employee, identifying Wilmington customers by name and by "class of customer." The Company maintained a "retail rate structure" which was published and generally available to the public. The general public did not have access to the "rate structure with respect to specific regular customers" in Wilmington, but Employee did have access to this information. Employee also had access to the "decision makers" or "key persons" within the structure of the Company's list of Wilmington customers.

On 30 September 1988, Employee and his wife left the employment of the Company and on 1 October 1988 began work with defendant Wilmington Auto Rental, Inc., a corporation owned by Joseph G. Priest and Marilynne McMahon. Wilmington Auto Rental, Inc. owned the Thrifty Car Rental franchise and was in the business of leasing vehicles to the public. After 1 October 1988, defendant Wilmington Auto Rental, Inc., leased several vehicles to former customers of the Company.

The Company's complaint alleges that Employee, his wife, and defendant Priest, in conspiracy with each other, embarked on an unlawful plan and scheme "to divert [the Company's] business to themselves" and "unlawfully [used the Company's] competitively sensitive proprietary information and [breached] the fiduciary duties owed by Defendants to [the Company] and [breached] Defendant Robert F. McMahon's employment agreement." On 11 October 1988, the trial court entered a temporary restraining order which was

converted into a preliminary injunction after a hearing on 7 November 1988. In its 7 November 1988 order the trial judge entered the following pertinent findings of fact, conclusions and order:

FINDINGS OF FACT

14. The covenant not to compete was entered into in order to protect the business interests of the Plaintiff.

15. The territorial restriction of the State of North Carolina contained in the covenant not to compete is necessary to protect the business and good will of the Plaintiff.

16. The time limitation of two years contained in the covenant not to compete is reasonably designed to protect the legitimate business interests of the Plaintiff.

. . . .

19. Defendants Robert and Marilynne McMahon, as employees of Plaintiff, had access to competitively sensitive, proprietary information of Plaintiff including Plaintiff's pricing list, customer list, customer contacts, marketing information, inventory information, and information concerning the rental car needs of Plaintiff's customers.

. . . .

29. The Defendants McMahon and McMahon have intentionally and willfully solicited or attempted to procure the customers and accounts of Plaintiff.

CONCLUSIONS OF LAW

36. The covenant not to compete protected the legitimate business interests of the Plaintiff, its customer list, pricing list, marketing information, inventory information, and information concerning the rental car needs of Plaintiff's customers.

37. The territorial restriction of the State of North Carolina contained in the covenant not to compete is necessary to protect the business and good will of the Plaintiff.

38. The time limitation of two years contained in the covenant not to compete is reasonably designed to protect the legitimate business interests of the Plaintiff.

. . . .

43. Plaintiff has shown a reasonable likelihood that it will prevail on the merits at trial on its claims against Defendants McMahon and McMahon for violating the employment agreement and, through a civil conspiracy among and between the Defendants, Robert and Marilynne McMahon, to violate the employment agreement. . . .

44. Plaintiff has shown that a preliminary injunction against Defendants Robert and Marilynne McMahon is reasonably necessary for the protection of its rights during the course of litigation because Plaintiff's covenant not to compete will expire on September 30, 1990, and it does not appear that Plaintiff has an adequate remedy at law.

. . . .

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants Robert and Marilynne McMahon, their officers, agents, servants and employees and other people in active concert or participation with the Defendants Robert and Marilynne McMahon be and hereby are enjoined and restrained by order of this court from committing or continuing to commit any of the following acts:

1. The retention, use, or disclosure of any records, customer lists, or price lists of Plaintiff or copies thereof.

2. Directly or indirectly soliciting or attempting to procure the customers, accounts, or business of Plaintiff within the State . . . for a period of two years from September 30, 1988. . . .

4. Becoming employed with, consulting with, or participating in the management of the Defendant Wilmington Auto Rental, Inc. and further from being employed by or consulting with the Defendant Joseph G. Priest in the automobile, van and truck rental and sales business in North Carolina for a period of two years from September 30, 1988.

IT IS FURTHER ORDERED that the secured bond of $5,000.00 previously posted by the plaintiff shall remain in effect throughout the duration of this preliminary injunction.

The issue presented in this case is: whether the Company can bar Employee from competing with the Company's business throughout North Carolina for two years, when Employee's con-

fidential information and customer contacts derive from only one city in the state. The answer to this issue resolves the ultimate issue of whether the trial court properly granted a preliminary injunction against Employee.

[1] No appeal lies from a trial court's grant of an interlocutory preliminary injunction unless the defendant would be deprived of a substantial right which he would lose absent a review prior to final determination. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). We determine that defendants would lose a substantial right, that of practicing their livelihood within North Carolina, prior to final determination of the contract on its merits. As of the time of this opinion, defendants have been prevented from practicing their livelihood anywhere in North Carolina for a period of approximately one year, although they opened a business to do so shortly before the Company filed this suit. *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *petition denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

[2] A preliminary injunction is an equitable remedy, and will issue only if the movant is able to show at the hearing the " '*likelihood* of success on the merits of his case.' " *A.E.P.*, at 401, 302 S.E.2d at 759 (emphasis in original) (citations omitted). This 'likelihood of success' results from the movant's prima facie showing of prerequisites to the enforceability of a covenant: its reasonableness as to both time and territory. *A.E.P.*, at 402-03, 302 S.E.2d at 761. It is only after the movant establishes its likelihood of success that the trial court considers whether plaintiff is likely to suffer irreparable harm, or needs the injunction to protect its rights prior to trial on the merits. *Robins & Weill*, 70 N.C. App. at 540-41, 320 S.E.2d at 696. The trial court exercises its sound discretion in deciding whether to grant the relief requested. *Huskins v. Yancey Hospital, Inc.*, 238 N.C. 357, 360, 78 S.E.2d 116, 120 (1953).

Our de novo review of the trial court's grant of the preliminary injunction is based on the "facts and circumstances of each particular case." *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605, *disc. rev. denied*, 290 N.C. 659, 228 S.E.2d 451 (1976). We determine from the testimony presented at the hearing of this matter that the covenant is unenforceable because its territory is unnecessarily broad to protect the company.

" '[T]he territory [the covenant] embraces . . . shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.' " *A.E.P.*, 308 N.C. at 408, 302 S.E.2d at 763 (citation omitted). The reasonableness of the restraint is a matter for the court and the contract "must stand or fall integrally." *Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947). If the territory is broader than is reasonably necessary to protect the employer's business, the contract is invalid. *Delmar Studios v. Kinsey*, 233 S.C. 313, 324, 104 S.E.2d 338, 344 (1958) (applying North Carolina law).

This is not a case in which the parties have made divisions of territory, so that a court of equity can take notice of the divisions the parties have made, enforcing only the reasonable territorial restrictions. *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (holding that a provision for a city-wide restriction was reasonable, but that a provision restricting any city or town in the United States where employer does or intends to do business was not).

The pertinent provisions of the contract at issue are Parts 4 and 5: "Accounts of the Company" and "Covenant Not to Compete; Disclosure of Information," respectively. Clearly, the Company's intent in these provisions was to prevent Employee from taking unfair advantage of his contacts with Company customers and confidential business information '*acquired during employment.*' The record shows that during his employment, Employee's access was limited to *Wilmington* customers and business confidences, and that the Wilmington office started operations with Employee as its first employee.

In reviewing the 'necessity' of protection for an employer's business in a wide territory, we take particular notice of the employee's "personal association with customers" because of his status as manager for his employer, and the employee's acquisition of "intimate knowledge" about the employer's business. *Manpower of Guilford Co., Inc. v. Hedgecock and Tempco, Inc.*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979). The former activities are known commonly as "customer contact," and the latter as "confidential information." *See United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 651, 657, 370 S.E.2d 375, 381, 384 (1988). However, when such contact and information derives from employee's employment which is limited to a portion of employer's total business area, the em-

ployer must "correlate the protection sought [over the total business area] with [a] need of his business." *Noe*, 228 N.C. at 245, 45 S.E.2d at 123. "Furthermore, in determining the reasonableness of territorial restrictions, when the primary concern is the employee's knowledge of customers, the territory should only be limited to the areas in which the employee made contacts during the period of his employment." *Manpower*, 42 N.C. App. at 522, 257 S.E.2d at 114-15. "A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* [its] customers." *Id.*, at 523, 247 S.E.2d at 115 (emphasis added).

When we review the evidence presented at the hearing, the burden of persuasion rests on the employer to show necessity for protection which would extend outside the area in which the employee worked. *Delmar*, 233 S.C. at 319, 104 S.E.2d at 341. Facts which would be persuasive on this point would include the Company's showing the Employee "became acquainted with those [customers] in other parts of the territory mentioned in the contract or that it was contemplated that he would later work therein." *Id.*, at 320, 104 S.E.2d at 341. Or, the employer could show that it furnished its employee with confidential business information on customers outside the area in which he worked, such as the names of customers, and the "history of the solicitation" of other customers. *Id.*

From the information which Company introduced at the preliminary injunction hearing, we find no indication that Employee had customer lists from Company locations other than the Wilmington location. The Company introduced evidence that its Wilmington customer base included "categories" of "regular customers in Wilmington," such as rental cars and body shops, "bread and butter" customers such as a film company, and "the general public calling up for rental cars." However, all of the Company's evidence introduced at the hearing focused on its regular customers and 'bread and butter' customers in the Wilmington area.

As to confidential information of business outside Wilmington, the record shows only that the Company gave Employee "price information at the then Western Boulevard [Raleigh] location" approximately two years prior to Employee's resignation while Employee was in training. However, the Company does not show whether the price information was for Wilmington or Raleigh.

The Company also admitted that it priced its products "to the individual customer, consumer," and "the prices will fluctuate [according to] what the market is presently [sic] doing." All of Company evidence highlighting Employee's acquisition of confidential information related to Employee's intimate knowledge of the *Wilmington* market, and how Company conducted business in the *Wilmington* market. The Company has shown no facts to support its contention the Employee's attempts to compete affected the Company's business in its two other locations or in the whole of North Carolina, outside the Wilmington area. *Cf. Schultz and Assoc. v. Ingram*, 38 N.C. App. 422, 429, 248 S.E.2d 345, 350 (1978) (Employer showed facts supporting its contention that Employee competed with it in Employer's entire area of business).

The Company seeks to bar Employee from competing with it for its customers anywhere in North Carolina, despite the Company's failure to show Employee's knowledge of Company's current customers and accounts outside Wilmington, or Employee's knowledge of the Company's records of customer buying habits, pricing formula, vehicle inventory, or market factors outside Wilmington, for the period of two years.

[3] Without determining what period of time would be acceptable, we determine that the covenant's time restriction of two years is also unenforceable in light of the extensive territorial restraint.

> Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other. Furthermore, neither is conclusive of the validity of the covenant, but both are important factors in settling that question. . . . In situations such as the one we now consider, a longer period of time is justified where the area in which competition is prohibited is relatively small.

Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 665, 158 S.E.2d 840, 844 (1968) (citation omitted).

In sum, the practical effect of the territorial provision is to stifle normal competition for vehicle rentals and leasing throughout the State of North Carolina. A contract whose provision has such an effect "is as much offensive to public policy as it ever was in promoting monopoly at the public expense and is bad." *Kadis*

v. Britt, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944). The Company has failed to carry its burden of showing a likelihood of success on the merits as to the reasonable necessity of its territorial restriction.

Reversed.

Judge JOHNSON concurs.

Judge COZORT dissents.

Judge JOHNSON concurring.

I concur with the reasoning and holding of the opinion that the covenant is unenforceable as to territory and that the order of the trial court should be reversed. However, inasmuch as the covenant is unenforceable because the territory the covenant embraces is greater than is reasonably necessary to secure the protection of the business or good will of the plaintiff, I find it unnecessary to pass upon the question of whether the covenant's time restriction of two years is also unenforceable.

Judge COZORT dissenting.

I disagree with the majority's conclusion that the employment agreement executed by defendant Robert F. McMahon is unreasonable in respect to time and territory. In my opinion, the trial court did not err in entering the preliminary injunction, and I vote to affirm.

In *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E.2d 602 (1976), this Court considered the reasonableness of a restrictive covenant in an employment contract of a sales representative. The representative was assigned a 10-county territory in North Carolina. His employment contract provided he would not compete with his employer in North Carolina, South Carolina, and parts of Virginia and Tennessee for a period of two years. This Court held those facts were insufficient to permit a determination that the covenant was unreasonable as to territory. *Id.* at 684, 225 S.E.2d at 605. I find that reasoning applicable to the facts below, where the defendant was employed to develop the plaintiff's business in the Wilmington area (although the executed contract did *not* restrict defendant's working area to Wilmington) and the non-competition clause applied to North Carolina.

I also find nothing unreasonable about the two-year time restriction. My review of the applicable case law indicates that two-year restrictions are generally found reasonable. *See, e.g., Keith v. Day*, 81 N.C. App. 185, 343 S.E.2d 562 (1986). Further, I find nothing in the record to support the majority's conclusion that the practical effect of the restriction is to stifle competition. To the contrary, defendant testified to at least six other auto leasing companies in Wilmington, including Hertz, Avis, National, Budget, Snappy, and Claudia's, with the last two presumably local operations as opposed to national chains.

I vote to affirm the trial court.

SEAN P. SMITH, PLAINTIFF v. SELCO PRODUCTS, INC., DEFENDANT

No. 8926SC79

(Filed 7 November 1989)

1. Sales § 22.2 (NCI3d)— product liability—failure to obey cautionary warning—latent defects—no contributory negligence as matter of law

In an action to recover for injuries received by plaintiff while operating a cardboard box riding gate baler designed and manufactured by defendant, plaintiff was not contributorily negligent as a matter of law under N.C.G.S. § 99B-4(1) in failing to obey a warning attached to the baler to keep his hands clear of the machine while it was in operation so as to entitle defendant to summary judgment because the evidence raised an issue as to the existence of latent defects in the baler which rendered the warning inadequate where plaintiff presented evidence tending to show: a tapeswitch safety sensor on the baler frequently broke because of its design and location; the baler did not include a mechanism to warn baler operators when the sensor was not functioning; at the time of the accident, defendant knew that its riding-gate baler violated OSHA and industry standards requiring a gate that must be pulled down before the machine will operate; and although defendant developed a package to replace the riding gates on its older models with pull-down gates, defendant made no systematic effort to replace the riding gates on the balers it sold to plaintiff's employer.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 28; Products Liability §§ 334, 335, 339, 344-352, 367-369, 400, 931 et seq.; Summary Judgment § 27.

2. **Sales § 22.2 (NCI3d)— product liability—placing hand in cardboard box baler—no contributory negligence as matter of law**

In an action to recover for injuries received by plaintiff while operating a cardboard box baler designed and manufactured by defendant, the evidence on motion for summary judgment did not show that plaintiff failed to exercise reasonable care under the circumstances in violation of N.C.G.S. § 99B-4(3) as a matter of law when he reached into the baler to retrieve a knife while the platen was descending where plaintiff presented evidence that it was a regular practice for baler operators to place their hands in the bale chamber during operation to prevent cardboard boxes from falling out and to remove objects inappropriate for baling; plaintiff's employer was aware of this practice by its workers; baler operators relied on a tapeswitch safety sensor to protect them but the sensor was not functioning at the time of plaintiff's accident; and plaintiff had never known the sensor to fail and was unaware of its poor maintenance history.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 28; Products Liability §§ 334, 335, 339, 344-352, 367-369, 400, 931 et seq.; Summary Judgment § 27.

APPEAL by plaintiff from *Snepp, Jr., Judge*. Order entered 6 September 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 September 1989.

In this products liability action plaintiff seeks damages from defendant for injuries received while operating a cardboard box baler designed and manufactured by the defendant, Selco Products, Inc. (Selco). Upon completion of discovery, defendant moved pursuant to Rule 56(c) of the N.C. Rules of Civil Procedure for summary judgment in its favor. After an examination of the discovery materials and other evidence, and having heard the arguments of counsel for both sides, an order was entered granting defendant's motion. Plaintiff appealed, and it was stipulated and agreed by counsel for both parties that the sole basis for the Summary Judgment Order and the sole issue for this appeal is the correctness of the court's ruling that plaintiff was contributorily negligent as a matter

of law. Plaintiff's complaint contains the following allegations of fact:

Defendant is a corporation organized under the laws of the state of Georgia, and at the relevant times was doing business in North Carolina. Plaintiff, Sean P. Smith, worked as a part-time stocker and bagger at Food Lion Store #111 in Matthews, North Carolina. The accident occurred on the evening of 3 June 1986 while Smith was at work. His left arm became caught in a cardboard box baler and was torn off above the elbow.

It is important to understand how this baler works. The baler is an industrial trash compactor, about the size of a dumpster, designed for the specific purpose of crushing cardboard boxes into 60-inch wide bundles. The baler on which the plaintiff was injured was classified as a "riding gate" baler, designed so that the bale chamber at the front of the machine remains open as the baler's ram, or platen, begins to cycle downward to crush the boxes. The platen is a hydraulic press, like a large piston, which moves from the top to the bottom of the baler. The safety riding gate is attached to the side of the platen facing the front where the bale operator stands. During the loading phase of the process, the platen is retracted at the ceiling of the baler creating an opening below the riding gate. The operator loads cardboard boxes into the baler's bale chamber much as one would put a bag of trash into a dumpster. The boxes are placed into the chamber through the rectangular opening that is created between the bottom of the riding gate and the top of the bale cabinet door, which forms the front of the machine below waist level and through which the cardboard bales are removed after crushing. A red and white cautionary decal was attached to the front of the baler at the top of the bale gate. It read: CAUTION—KEEP HANDS CLEAR OF MACHINE WHILE IN OPERATION. However, the caution decal had been placed on the baler only a week or so before Smith's accident to replace an identical, but older decal that had become torn, illegible, and marred with graffiti.

The baler's control box was on the right side, set back several inches from the front face of the machine. It contained buttons marked "up," "down," and "emergency stop," as well as a "full bale" indicator light. The baler was activated by pressing the "down" button. After the machine was activated, the platen began to descend. The riding gate moved down with the platen, closing

the rectangular opening that led into the bale chamber until the gate met the top of the bale cabinet door. The platen continued to descend below the top of the cabinet door into the bottom of the bale chamber. At the end of the cycle, the platen returned to the start position at the ceiling of the baler.

As a safety precaution, a "tapeswitch" pressure-sensitive strip was fastened to the bottom of the riding gate, running the length of the gate. If the tapeswitch strip came into contact with an object during the riding gate's descent, the tapeswitch was triggered, halting the ram's descent and causing it to retract to its upward position, much as an elevator door retracts upon contact with part of a person's body.

At the time of this accident, Smith had placed several boxes into the bale chamber and activated the baler by pressing the down button. After the compression cycle had begun, Smith noticed that a case cutter, a razor-sharp knife used by employees to open boxes, had been mislaid inside the baler. Smith reached into the baler with his left hand and attempted to remove the case cutter, but the platen and riding gate struck his arm. On this occasion, however, the safety tapeswitch apparently failed to operate properly. The ram continued on its downward cycle, trapped Smith's arm, and ripped it off just above the elbow.

Cannon & Blair, by Bentford E. Martin and Paul A. Reichs, for plaintiff appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Frederick C. Meekins; and Rodney A. Dean, for defendant appellee.

Blanchard, Twiggs, Abrams & Strickland, by Douglas B. Abrams, for North Carolina Academy of Trial Lawyers, Amicus Curiae.

ARNOLD, Judge.

The only issue we will review is whether the basis of the summary judgment order for defendant, that the plaintiff was contributorily negligent, is supported by the records, briefs, and other arguments. Selco argues that plaintiff was guilty of negligence under two separate sub-parts of N.C.G.S. § 99B-4: that his failure to obey a cautionary decal affixed to the baler constituted contributory negligence under N.C.G.S. § 99B-4(1); and that by reaching into the baler while the platen was descending, plaintiff failed to

exercise reasonable care under the circumstances, in violation of N.C.G.S. § 99B-4(3).

N.C.G.S. § 99B-4 reads in pertinent part:

> Injured parties' knowledge or reasonable care.
>
> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warning delivered with, appearing on, or attached to the product or on its original container or wrapping . . .
>
> * * * *
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

We are asked here to review the application of these two sections of the statute as they apply to a motion for summary judgment. Rule 56 of N.C. Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56. A moving party may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim (citations omitted). Generally, this means that the moving party is entitled to judgment as a matter of law where on the "undisputed aspects of the opposing evidential forecasts," there is no genuine issue of fact. 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Supp. 1970).

Nevertheless, it is widely acknowledged that certain claims or defenses are not well suited to summary judgment. For example, summary judgment is rarely appropriate in a negligence case. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). This is because the determination of essential elements of these claims or defenses to these claims are within the peculiar expertise of the fact finders. *Moore v. Fieldcrest Mills, Inc.*, 296

N.C. 467, 251 S.E.2d 419 (1979); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2729 (2d ed. 1973). Similarly, contributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible. *City of Thomasville*, 300 N.C. at 658, 268 S.E.2d at 195-196; *Cowan v. Laughridge Const. Co.*, 57 N.C. App. 321, 326, 291 S.E.2d 287, 290 (1982). "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." W. Prosser, Handbook of the Law of Torts § 45, at 290 (4th ed. 1971); *see Williams v. Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979).

In the present action, reasonable men could differ as to whether plaintiff exercised prudence in his operation of the baler. Because the evidence will support a finding that defendant's negligence was the proximate cause of plaintiff's injuries, the court erred in granting summary judgment in the defendant's favor.

[1] Contributory negligence was not established in this case as a matter of law because Smith violated a warning attached to the baler. A manufacturer must properly inform users of a product's hazards, uses, and misuses or be liable for injuries resulting therefrom under some circumstances. *Milikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 320 S.E.2d 909 (1984), *cert. denied*, 312 N.C. 798, 325 S.E.2d 631 (1985). An issue arises here as to whether or not latent hazards existed in this baler, which rendered the attached warning inadequate.

Evidence indicates that Selco may not have used reasonable care in designing its riding gate baler. In *Corprew v. Geigy Chemical Co.*, 271 N.C. 485, 492, 157 S.E.2d 98, 103 (1967), the North Carolina Supreme Court stated:

> As a general rule a manufacturer is under a duty to make an article carefully where its nature is such that it is reasonably certain to place life and limb in peril where negligently made, and he is liable to a third person for an injury resulting from a failure to perform this duty.

At the time Selco designed its riding-gate baler, the company, although under a duty to do so, did not inform itself about what safety designs and methods were available in the industry. *See Jenkins v. Helgren*, 26 N.C. App. 653, 217 S.E.2d 201 (1975). Also an issue arises here concerning the adequacy of Selco's testing of

its product. A manufacturer is under a duty to make reasonable tests to discover any latent hazards. *See Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E.2d 651, *disc. rev. denied,* 300 N.C. 195, 269 S.E.2d 622 (1980).

According to evidence provided in the record, normal operation of the Selco's riding-gate baler frequently led to malfunctions of the safety tapeswitch. Paul Levering, a Food Lion maintenance mechanic, stated in his deposition that tapeswitches on the Selco balers frequently broke because of the way they were designed, located, and installed by Selco. He had replaced several defective tapeswitches, including tapeswitches on the baler that injured plaintiff. Levering found the tapeswitch wires to be too short, which caused them to break or pull out of the tapeswitch. Jim Tonseth, Food Lion's former manager of maintenance, stated, "there were numerous instances where the tapeswitch wires, as designed and located by Selco, either broke or otherwise failed to function. . . . [T]he failures appeared to be caused by either the shortness of the tapeswitch wires, or their location along the outside of the baler."

Compounding this problem, the baler's design did not include a mechanism to warn bale operators when the tapeswitch sensor was not functioning. In his deposition, Forrest Wildes, president of Selco Products, recognized that there was no way for an operator to know that the tapeswitch was not working without operating the machine. Yet, no warning concerning this extremely dangerous aspect of the baler appeared on the machine. In addition, "fail safe" technology, which would automatically shut the baler off and not allow its operation at all if the tapeswitch sensor circuit was broken, was available in the industry and in use before Selco manufactured its first riding-gate baler. The manufacturer of a product has the duty to provide adequate safety devices on its products. If a product is inherently dangerous due to its design, then at the least the safety precaution of an adequate warning that is reasonably commensurate with the dangers involved must be provided. *See Corprew v. Geigy Chemical Co.*, 271 N.C. 485, 157 S.E.2d 98.

The record also shows that at the time of the accident the Selco riding-gate baler violated both OSHA and industry standards. Michael T. Peak, an OSHA investigator, stated in an affidavit concerning his report on Smith's accident:

> [I]t was my finding that the Selco baler on which Mr. Smith was injured did not comply with North Carolina or Federal

> OSHA regulations. Specifically, I found the baler to be in violation of OSHA Section 1910.212(a)(3)(ii), which requires that the baler, as operated in the employer's workplace, be designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle. Because the subject Selco baler was designed so that the gate to the bale chamber rides down with the ram, the baler could be operated without the gate in a closed position. Since the baler remained in this condition as operated at the Food Lion store, it was in violation of the applicable OSHA standard.

Selco apparently knew several years before the Smith accident that their riding-gate baler violated these standards. In 1982, industry standards changed, requiring that all balers be equipped with a door on the front that must be pulled down, sealing off the bale chamber from access by the operator before the machine would operate. As a result, Selco abandoned its riding-gate design, but did not recall those balers already in the market. When the industry standard changed, Selco developed a "retro-fit" package to replace the riding gates on its older models with "pull down" gates, but the company made no systematic effort to retrofit the riding-gate balers it had sold Food Lion. After Smith's accident, Food Lion hired an independent contractor to remove the safety gates from all of its riding-gate balers and replace them with pull down gates.

A manufacturer does not completely discharge its duty to warn simply by providing some warnings of some dangerous propensity of its product at the time of sale. A continuing duty exists to provide post-sale warnings of any deficiencies it learns exists in the product to users. A manufacturer may be held liable for negligence if he "sells a dangerous article likely to cause injury in its ordinary use and the manufacturer fails to guard against hidden defects and fails to give notice of the concealed danger." *Davis v. Siloo Inc.*, 47 N.C. App. 237, 244, 267 S.E.2d 354, 359, *disc. rev. denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

It would be improper for us to ignore this type of evidence concerning the deficient design and warnings of the Selco baler and hold the plaintiff contributorily negligent at the summary judgment stage of this proceeding for failure to heed the attached decal. *See Fieldcrest Mills*, 296 N.C. 467, 251 S.E.2d 419; *City of Thomasville*, 300 N.C. at 651, 251 S.E.2d 419.

[2] We now turn to defendant's second contention that Smith did not act as a reasonably prudent person under the circumstances. Again, we disagree with defendant that plaintiff was contributorily negligent as a matter of law. Specifically, a question arises whether this riding-gate baler could be efficiently and effectively operated without the operators at times placing their hands in the bale chamber. Six Food Lion employees, who frequently operated the baler before Smith's injury, signed affidavits stating that it was regular practice for workers to place their hands in the bale chamber during operation, and that doing so was necessary to prevent cardboard boxes from falling out during its operation. Three other employees had reached into the chamber while the baler was operating to pull out foreign objects prior to Smith's injury.

Despite defendant's numerous contentions, it appears clear that Smith and the other bale operators relied on the tapeswitch safety sensor as an additional stop button during the operation of the baler. The actual stop button was located on the side of the baler, out of reach for operators standing at the front left of the baler. In his deposition, Smith testified he had witnessed other bale operators reaching into the bale chamber, and that he had never known the tapeswitch to fail nor was he aware of its poor maintenance history.

As N.C.G.S. § 99B-4(3) of the Products Liability statute indicates, the claimant's behavior "under the circumstances" must be considered in determining contributory negligence. Reaching into the bale chamber to push in boxes and grab objects inappropriate for baling was clearly the custom among the Food Lion workers. Food Lion management was aware of this practice by its workers. In North Carolina, a servant's conduct "which otherwise might be pronounced contributory negligence as a matter of law is deprived of its character as such if done at the direction or order of defendant [employer]." *Cook v. Tobacco Co.*, 50 N.C. App. 89, 96, 272 S.E.2d 883, 888, *disc. rev. denied*, 302 N.C. 396, 279 S.E.2d 350 (1981). "[I]f a rule has been habitually violated to the employer's knowledge, or violated so frequently and openly for such a length of time that in the exercise of ordinary care he should have ascertained its nonobservance, the rule is waived or abrogated." *Swaney* at 543, 131 S.E.2d at 610. It must be noted another sticker was attached to the front of the baler. It read: "YOUR STORE LOSES MONEY ON FREIGHT IF EACH BALE IS NOT PACKED

AS SOLIDLY AS POSSIBLE," reminding Food Lion workers they should prevent foreign objects from becoming packed into the bales.

While the employer is not the defendant in this case, the logic behind waiving the rule when a servant sues a master is also applicable when determining whether contributory negligence occurred under the "circumstances" here. All of Smith's co-workers reached into the bale chamber to keep the machine running efficiently, and in doing so, these workers relied on the tapeswitch sensor to protect them. In part, the provocation for this workplace practice can be traced to the design of the Selco baler.

These factors: questions about the design of the baler and its violation of OSHA and industry standards, and the workplace practice this design provoked create questions of whether the warning sticker was adequate and whether Smith's action was contributory negligence. Other reasonable inferences may be drawn from the circumstances of this accident. When such inferences are possible, summary judgment based on plaintiff's contributory negligence is not correct. *Dalrymple v. Sinkoe*, 230 N.C. 453, 53 S.E.2d 437 (1949); *Graham v. R.R.*, 240 N.C. 338, 82 S.E.2d 346 (1954).

The order of the trial court is reversed and the case is remanded.

Reversed and remanded.

Judges BECTON and COZORT concur.

ELECTRICAL SOUTH, INC. v. J. GREGORY LEWIS

No. 8918SC19

(Filed 7 November 1989)

1. Appeal and Error § 6.2 (NCI3d) — covenant not to compete — denial of preliminary injunction — appealable

The Court of Appeals elected to address whether a covenant not to compete was enforceable in an appeal from the denial of a preliminary injunction where plaintiff would lose a substantial right prior to final determination on the merits and the case presented an important question affecting the

rights of employers and employees who choose to execute agreements involving covenants not to compete.

Am Jur 2d, Appeal and Error § 388.

2. Master and Servant § 11.1 (NCI3d) — covenant not to compete — not enforceable

A covenant not to compete was not enforceable where the covenant stated that the employee could not own, manage, operate, be employed by, participate in, or be connected in any manner with the ownership, management, operation or control of any concern which manufactures or designs industrial solid state electronic equipment or which repairs or services industrial solid state electronic equipment or which competes directly or indirectly with the company in such endeavors within a radius of two hundred miles of Greensboro. The focus of the restraint was not on the employee's competition for the company's customers in a 200-mile circle, but on employee's association with another company, wherever located, which may be linked with plaintiff company's competitors within the 200-mile circle by any slender thread.

Am Jur 2d, Master and Servant § 106; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 543, 544, 566-568.

APPEAL by plaintiff from *Long (James M.), Judge*. Order entered 6 October 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 August 1989.

Adams Kleemeier Hagan Hannah & Fouts, by Joseph W. Moss, for plaintiff-appellant.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for defendant-appellee.

GREENE, Judge.

Plaintiff (hereafter "Company" or "plaintiff") and defendant J. Gregory Lewis (hereafter "Employee") were parties to a non-competition agreement. Plaintiff requested and was granted a preliminary injunction by the trial court, restraining defendant from disclosing trade secrets and confidential information. The trial court denied the Company's request for a preliminary injunction

restraining defendant from competing with the Company. Plaintiff Company appeals.

The evidence presented to the trial court at the preliminary injunction hearing tended to show that the Company and Employee executed an "Employment Contract" (Contract) on or about 24 July 1984. The Contract provided in pertinent part:

> 9. Non-disclosure of Trade Secrets and Confidential Information. The employee agrees that during the term of his employment hereunder and thereafter, he will not disclose, other than to an employee of the company, any confidential information or trade secrets of the company that were made known to him by the company, its officers or employees, or learned by him while in the company's employ, without the prior written consent of the company, and that upon termination of his employment for any reason, he will promptly return to the company any and all properties, records, figures, calculations, letters, papers, drawings, blue prints or copies thereof or other confidential information of any type or description. It is understood that the term "Trade Secrets" as used in this agreement is deemed to include lists of the companies [sic] customers, information relating to the industrial practices, know how [sic], processes, inventions, decisions and formulas [sic] of the company and any other information of whatever nature which gives to the company an opportunity to obtain an advantage over its competitors who do not have access to such information, but it is understood that said term does not include knowledge, skills or information which is common to the trade or profession of the employee.
>
> . . . .
>
> 11. Covenant Not to Compete. The employee covenants and agrees that for a period of twenty-four (24) months after the termination of his employment with the company, regardless of whether such termination is voluntary or involuntary, and whether with or without cause, the employee will not directly or indirectly own, manage, operate, be employed by, participate in, or *be connected in any manner with* the ownership, management, operation or control of any concern which manufactures or designs industrial solid state electronic equipment or which repairs or services industrial solid state electronic equipment, *or which competes directly or indirectly, with the company*

in such endeavors, within a radius of two hundred (200) miles of the company's branch office to which the employee is assigned at the time of such termination. . . . (Emphasis added.)

Pursuant to the Contract, Employee worked with the Greensboro office of Company in its business of repairing industrial electronic equipment. Employee resigned his employment with the Company in late February 1988, and on or about 1 March 1988, Employee began working for an electronics company in Pickens, South Carolina.

The Company's complaint alleges that Employee is now directly competing with the Company's business in performing repairs on industrial electronic equipment. The Company also alleges that Employee's new employer is located within a two-hundred-mile radius of Greensboro, North Carolina, and that Employee has solicited the Company's customers within a two-hundred-mile radius of Greensboro.

The trial court preliminarily enjoined Employee from disclosing the Company's trade secrets and confidential information. The trial court denied the Company's request for a preliminary injunction for the Covenant Not To Compete, entering in its order the following pertinent findings of fact and conclusions of law:

Findings of Fact

6. The covenant not to compete contained in the employment contract between plaintiff and defendant prohibits the defendant from working for any employer, *wherever located*, if that employer competes, directly or indirectly, with the plaintiff within a 200-mile radius of the plaintiff's office in the City of Greensboro, North Carolina. [Emphasis added.]

[Conclusions of Law]

2. The covenant not to compete provision contained in Paragraph 11 of the employment contract is overly broad with relation to territory or area encompassed in the prohibition in that it prohibits defendant from working for any employer wherever located which competes, directly or indirectly, with the plaintiff within a 200-mile radius of plaintiff's office in the City of Greensboro, North Carolina.

NOW, THEREFORE, IT IS ORDERED:

1. Plaintiff's motion pursuant to Rule 65 of the North Carolina Rules of Civil Procedure for an order preliminarily enjoining defendant from competing with plaintiff within a 200-mile radius of plaintiff's office in the City of Greensboro, North Carolina, is denied.

2. Plaintiff's motion for an order preliminarily enjoining defendant from divulging trade secrets or other confidential business information under Paragraph 9 of the employment contract is hereby granted; and defendant is hereby preliminarily enjoined from disclosing any confidential information or trade secrets of the plaintiff that were made known to him by Electrical South, Inc., its officers or employees, while in the company's employ, including lists of the Company's customers, processes, inventions, and formulas [sic] which are unique in nature and which give plaintiff an opportunity to obtain an advantage over its competitors who do not have access to such information; provided, that such trade secrets and confidential information do not include knowledge, skills, or information which is common to the trade or profession of the defendant.

3. Defendant shall immediately return to the company any and all property, records, figures, calculations, letters, papers, drawings, blue prints or copies thereof of any confidential information of any type or description of the plaintiff Electrical South, Inc.[,] which the defendant presently has in his possession.

The issue presented in this case is whether the Company's restrictive covenant can bar Employee from employment with a competitor located anywhere in the world who does business within 200 miles of the Company's branch office in Greensboro, North Carolina. The answer to this question resolves the ultimate issue of whether the trial judge properly denied the Company's request for a preliminary injunction.

[1] No appeal lies from a trial court's denial of an interlocutory preliminary injunction unless the appellant would be deprived of a substantial right which he would lose absent a review prior to final determination. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). This court *must* consider

whether plaintiff has a right of appeal "even though the question of appealability has not been raised by the parties themselves." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) (emphasis added). Plaintiff has offered no argument, contention or evidence that it would be deprived of a substantial right if we do not hear this case. However, we determine that plaintiff would lose a substantial right prior to final determination of the covenant on its merits in that plaintiff has "essentially lost its case because the [two-year] time limitation" under the covenant expires in March 1990. *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759. Although "the appellate process is not the procedural mechanism best suited for resolving the dispute . . . [n]evertheless, because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues." *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759.

[2] A preliminary injunction is an equitable remedy, and will issue only if the movant is able to show at the hearing the " 'likelihood of success on the merits of his case.' " *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759 (emphasis omitted) (citations omitted). This 'likelihood of success' results from the movant's prima facie showing of prerequisites to the enforceability of a covenant: its reasonableness as to time and territory. *A.E.P.*, 308 N.C. at 402-03, 302 S.E.2d at 761. "Since the determinative question is one of public policy, the reasonableness and validity of the contract is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven facts. . . ." *Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944).

Because grant of an injunction is an equitable matter, the trial court in its sound discretion considers the "question of undue hardship imposed on the defendant." *Kadis*, 224 N.C. at 164, 29 S.E.2d at 549. The public's interest in preserving an individual's ability to earn a living outweighs the employer's protection from competition "[w]hen the contract is defective . . . because its practical effect is merely to stifle normal competition. . ." *Id.*, 224 N.C. at 159, 29 S.E.2d at 546. *See also Starkings Court Reporting Ser., Inc. v. Collins*, 67 N.C. App. 540, 313 S.E.2d 614 (1984). The "equitable balance between conflicting interests of employer and employee" takes into account "the right of the employer to protect, by reasonable contract with [its] employee, the unique assets of [its] business, a knowledge of which is acquired during the employment

and by reason of it. . . ." *Kadis*, 224 N.C. at 159, 29 S.E.2d at 546. These 'unique assets' have been defined as "customer contacts" and "confidential information" by our courts. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 653, 657, 370 S.E.2d 375, 381, 384 (1988). "To this [employer's right] must be added the condition that [the contract does] not impose unreasonable hardship on the [employee]. . . ." *Kadis*, 224 N.C. at 161, 29 S.E.2d at 547. As a general rule, courts will enforce employer-drawn restrictions on an employee's use of 'customer contacts' and 'confidential information,' " 'providing the covenant does not offend against the rule that as to time . . . or as to territory it embraces it shall be no greater than is reasonably necessary to secure the protection. . . .' " *A.E.P.*, 308 N.C. at 408, 302 S.E.2d at 763 (citation omitted).

Here, the trial court preliminarily enjoined Employee from disclosing confidential information about the Company's business that Employee acquired during employment with the Company. This information encompassed customer lists, "industrial practices, know how [sic], processes, inventions, decisions and formulas [sic] . . . which gives to the company an opportunity to obtain an advantage over its competitors who do not have access to such information." The trial court then found as a fact that "[t]he covenant not to compete contained in the employment contract between plaintiff and defendant prohibits the defendant from working for any employer, wherever located, if that employer competes, directly or indirectly, with the plaintiff within a 200-mile radius of the plaintiff's office in the City of Greensboro, North Carolina[,]" and concluded that the restriction was "overly broad."

Our de novo review of the trial court's grant or denial of a preliminary injunction is based on the "facts and circumstances of the particular case." *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605, *disc. rev. denied*, 290 N.C. 659, 228 S.E.2d 451 (1976). When we review the evidence presented at the hearing, " 'there is a presumption that the [trial court's decision was] correct, and the burden is upon appellant to show [that the trial court erred in ruling].' " *Western Conference v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (citation omitted).

The pertinent provision of the contract at issue is Section 11, Covenants Not to Compete. It states that Employee cannot "own, manage, operate, be employed by, participate in, or *be con-*

nected in any manner with the ownership, management, *operation* or control of any concern which manufactures or designs industrial solid state electronic equipment or which repairs or services industrial solid state electronic equipment *or* which *competes directly or indirectly*, with the company in such endeavors within a radius of [200] miles of [Greensboro.]" (Emphases added.)

We note that the language of the contract, above, is ambiguous, because of the word "or": "*or* which competes directly or indirectly with the company in such endeavors . . ." (Emphasis added.) Grammatically, 'or' in this covenant can be read to mean "or" or "and." It can indicate either two types of business 'concerns' or one business 'concern' with several characteristics. If one reads the covenant so that "or" is used in its disjunctive sense ("either/or"), the contract language seems to enumerate two types of "[business] concerns" that Employee cannot "be connected in any manner with" [sic]: the first 'which manufactures,' 'designs' or 'repairs' industrial solid state electronic equipment within 200 miles of Greensboro, *or* the second 'which competes directly or indirectly with the Company' within 200 miles of Greensboro. If, however, we read the "or" in its conjunctive ("and") sense, the covenant describes only one type of business 'concern' having two prohibited attributes: one that 'manufactures or designs,' 'repairs or services,' *and* 'which competes directly or indirectly with the Company' within 200 miles of Greensboro. When the language in a contract is ambiguous, we view the practical result of the restriction by "construing the restriction strictly against its draftsman. . ." *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 522, 257 S.E.2d 109, 115 (1979). Construing the contract according to this tenet, we interpret the word 'or' in its conjunctive sense and do not determine whether the contract has a divisible provision which may be enforceable. A court can "enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961); *Schultz and Assoc. of the Southeast, Inc. v. Ingram*, 38 N.C. App. 422, 429, 248 S.E.2d 345, 351 (1978) (divisible "areas of activity").

Additionally, the Company argues that the language of the contract requires that we read 'or' in the covenant to mean 'and.' Consistent with contract interpretation rules and the Company's argument, the covenant is not divisible and the Company has no right to enforcement of the indivisible contract as it is written.

The Company contends that even if the covenant refers to only one business 'concern,' it is not overly restrictive because the covenant only bars Employee from *competing for or soliciting the Company's customers inside* the 200-mile radius. Presuming this point, the Company introduced and directed all of its evidence at the preliminary injunction hearing to illustrate its need to protect its existing customers from Employee's competition inside the 200-mile radius. However, the Company misperceives the plain language of the covenant, which addresses Employee's *association with Company's competitors* 'wherever located.' The focus of the restraint was not on *Employee's competition* for the Company's customers in the 200-mile circle around Greensboro, but on Employee's *association* with another company, wherever located, which may be linked with the Company's competitors within the 200-mile circle by *any* slender thread; for instance, a company which creates advertising for a Company competitor.

The restriction prohibits Employee's association with an employer anywhere in the world if the new employer indirectly competes with the Company in the Greensboro locale. Its practical effect is to limit Employee's employment within the solid state electronic equipment industry only to companies that do not compete with the Greensboro branch office and surrounds in any manner, regardless of how far away Employee moves to obtain work, regardless of the position Employee accepts and regardless of the current protection of the Company's interests by the trial court's injunction on Employee prohibiting disclosure of information acquired while he worked with the Company. Furthermore, the prohibition against Employee's "connect[ion] in any manner with" the 'concerns' could arguably result in a breach of the covenant if any of Employee's *family* worked with a Company competitor. The "shotgun" approach to drafting this provision produces oppressive results, which violate both the public's and Employee's interest in his earning a living.

We conclude that the Company has failed to carry its burden of showing a likelihood of success on the merits as to the compliance of the Covenant Not to Compete with public policy or the reasonableness of its territorial restriction.

The trial judge correctly denied the Company's request for a preliminary injunction enforcing the noncompetition clause of this Contract.

Affirmed.

Judges JOHNSON and ORR concur.

GARLAND H. MURRAY AND BROADWAY MOTOR COMPANY, INC. v. A. A. JUSTICE

No. 8929SC8

(Filed 7 November 1989)

1. Malicious Prosecution § 13 (NCI3d)— DMV investigation of automobile dealer—no malice—no special damages

Summary judgment was properly granted for defendant in a malicious prosecution action where defendant was an inspector with the North Carolina Division of Motor Vehicles investigating alleged violations of licensing laws relating to motor vehicle dealers and others; plaintiffs' license to operate as an automobile dealer had been suspended pursuant to a consent order; defendant was informed that plaintiffs sold two vehicles during the suspension period pursuant to a power of attorney for another dealer; defendant informed his superior who told him to investigate and prepare a report; defendant determined that in his opinion plaintiffs' conduct violated the consent order; defendant's supervisor ordered an additional one-year suspension; an administrative hearing officer subsequently decided that plaintiffs' conduct did not violate the consent order; defendant later investigated plaintiffs for odometer rollbacks; DMV's standard procedure after discoveries of this type was to investigate all sales transactions between involved dealers to determine if there were other alterations; upon learning that all of the records pertaining to automobiles handled by plaintiffs at another dealership were under investigation, the individual plaintiff went to defendant to complain; defendant then informed plaintiff that plaintiff was no longer under investigation; and defendant alleged that he knew of no contract between plaintiffs and the other dealership and had no intention of interfering with any of plaintiffs' contracts. Plaintiffs failed to show special damages in that neither plaintiffs nor their property suffered any substantial interference by the extension of the suspension and the administrative hear-

ing does not amount to a substantial interference with the plaintiffs' property or person as contemplated by the special damages requirement. Plaintiffs also failed to show malice, even though the further suspension was reversed at the administrative hearing, because defendant's actions were done in good faith in an effort to carry out his job duties.

Am Jur 2d, Malicious Prosecution §§ 45-49, 68, 192, 193; Public Officers and Employees §§ 364, 382.

2. **Contracts § 34 (NCI3d)— malicious interference with contract— DMV inspector—summary judgment for defendant proper**

Summary judgment was appropriate for defendant in an action for malicious interference with a contract where defendant was a DMV inspector and plaintiff an automobile dealer, defendant first investigated plaintiff for selling cars while on suspension, and defendant then investigated all of plaintiff's records with another dealer as a part of an odometer rollback investigation. There is no evidence on the record that defendant's actions were malicious in the legal sense and all of defendant's actions were pursuant to DMV's standard procedure.

Am Jur 2d, Interference §§ 3, 27, 28, 37, 38.

3. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—DMV inspector—summary judgment for defendant proper**

Summary judgment was properly granted for defendant in an action for intentional infliction of emotional distress arising from defendant DMV inspector's investigation of plaintiff automobile dealer where defendant's conduct was within the scope of his employment and was under the direction of his supervisor.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4-7; Public Officers and Employees § 379.

4. **Public Officers § 9 (NCI3d)— DMV inspector—actions neither negligent nor malicious—immune**

An inspector for DMV whose investigation of plaintiffs was neither negligent nor malicious was afforded absolute immunity.

Am Jur 2d, Public Officers and Employees §§ 358 et seq.

APPEAL by plaintiffs from *Owens, Judge*. Order entered 21 October 1988 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 25 August 1989.

The plaintiffs sued defendant for malicious prosecution, malicious interference with contracts, and intentional infliction of emotional distress and sought punitive damages. The plaintiffs are engaged in the retail and wholesale automobile sales business. The defendant is an inspector employed by the Enforcement Section of the North Carolina Division of Motor Vehicles. The defendant's job duties include investigating alleged violations of licensing laws relating to motor vehicle dealers, manufacturers and salesmen, motor vehicle odometer alterations and other violations of Chapter 20 of the General Statutes.

Plaintiffs' license to operate as an automobile dealer had been suspended for nine months pursuant to a consent order dated 19 October 1984. During this suspension period, plaintiffs sold two motor vehicles pursuant to a power of attorney for James Motors, Inc. After being informed about this activity, the defendant reported it to his supervisor who instructed him to investigate the sales and prepare a report. The defendant discovered that the vehicles were purchased with the plaintiff Murray's money and that James Motor Company did not share in the profits or losses. The defendant then determined that in his opinion the plaintiffs' conduct violated the consent order. Defendant reported this to his supervisor. As a result, the defendant's supervisor ordered an additional one year suspension effective 25 January 1985. At a subsequent administrative hearing challenging this additional suspension, the administrative hearing officer decided that the plaintiffs' conduct did not violate the consent order because the terms of the order did not bar the plaintiffs from selling vehicles while acting as agents for another dealer.

Later, in September 1986 defendant investigated plaintiffs for alleged odometer rollbacks after it became apparent that two North Carolina vehicle titles reflected altered odometer readings. The vehicles for which the titles were issued were traded to the Smith-Huckabee dealership, sold to plaintiff Broadway Motor Company, and subsequently sold to a South Carolina dealer. DMV's standard procedure after discoveries of this type was to investigate all sales transactions between the involved dealers to determine if there were other alterations. Upon learning that all of the records per-

taining to the automobiles handled by them at the Smith-Huckabee dealership had been investigated, Murray went to defendant to complain. At that time, defendant informed him that he was no longer under investigation. The defendant alleges that he knew of no contract between the plaintiffs and the Smith-Huckabee dealership and had no intention of interfering with any of the plaintiffs' contracts.

The plaintiffs brought this action against the defendant complaining that the defendant initiated the hearing on 21 March 1985 pursuant to an order dated 22 January 1985 maliciously with the intent to harass the plaintiffs. As a result, plaintiffs allege they have suffered great damages and have incurred expenses. The plaintiffs also allege that the record inspection at the Smith-Huckabee dealership was initiated by the defendant with the intent to harass and intimidate the plaintiffs. The plaintiffs claim that they were subjected to severe emotional distress and mental anxiety resulting in anxiety tension reactions, sleeplessness, and increased blood pressure.

In an affidavit, the defendant answered that he only knew the plaintiffs in a professional capacity and that all of his actions were conducted within the course and scope of his employment and were customary for his position. The defendant alleged that he had no ill will or malice and that all of his actions were based on reasonable suspicion.

The defendant moved for summary judgment and to dismiss the plaintiffs' action pursuant to Rule 12(b)(1), (6), and (7) and contended that he possessed absolute or at least qualified immunity and was not liable to plaintiffs as a matter of law. The trial judge granted defendant's motion after determining that there was no genuine issue as to a material fact to submit to the jury. The plaintiffs appeal.

Robert W. Wolf for plaintiff-appellants.

Attorney General Thornburg, by Assistant Attorney General William B. Ray, for defendant-appellee.

EAGLES, Judge.

In reviewing an order of summary judgment, we must determine whether there is no genuine issue of material fact and whether judgment was appropriate as a matter of law. *Waste Mngt. of*

Carolinas, Inc. v. Peerless Ins. Co., 72 N.C. App. 80, 84, 323 S.E.2d 726, 729, *rev. allowed*, 313 N.C. 612, 330 S.E.2d 616, *reversed*, 315 N.C. 688, 340 S.E.2d 374, *rehearing denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). In reviewing the grant of summary judgment, we examine the entire record. *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). After careful review of the record here, we conclude that there is no genuine issue of material fact as to any of the plaintiffs' claims and that the defendant is entitled to judgment as a matter of law. Accordingly, we affirm.

I. Malicious Prosecution

[1] In order to recover for malicious prosecution the plaintiffs "must show that the defendant initiated the earlier proceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in plaintiffs' favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). Malice, as required in malicious prosecution actions, may be inferred from a lack of probable cause when instituting the underlying action. *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966). If the underlying action was a civil action, the plaintiff must also prove special damages. 297 N.C. 181, 254 S.E.2d 611 (1979).

Here plaintiffs have failed to show any special damages. The court in *Stanback* has defined special damages as a "substantial interference either with the plaintiff's person or his property." 297 N.C. at 203, 254 S.E.2d at 625. Since the consent order of 25 January 1985 only extended the original suspension and was done prior to the expiration of the original suspension, neither the plaintiffs nor their property suffered any substantial interference. Plaintiffs allege that the administrative hearing, which they requested as a result of the order, caused them to suffer great injury to their reputation, business, and credit. This type of injury does not amount to a substantial interference with plaintiffs' property or person as contemplated by the special damage requirement. *Id.* at 204, 254 S.E.2d at 626. "Embarrassment, expense, inconvenience, lost time from work or pleasure, stress, strain and worry are experienced by all litigants to one degree or another, and by themselves do not justify additional litigation" in the form of a malicious prosecution claim. *Brown v. Averette*, 68 N.C. App. 67, 70, 313 S.E.2d 865, 867 (1984).

Further, plaintiffs have failed to show that the defendant acted maliciously. The defendant reported his suspicions to his superior

who told him to investigate the plaintiffs' activity. While under the restriction of the consent order, the plaintiffs had in fact sold two cars. Since the defendant believed that the consent order prohibited that activity and this was a reasonable interpretation of the order, defendant's actions were done in good faith in an effort to carry out his job duties. Although the decision to further suspend the plaintiffs' license was reversed at the hearing, we have held that "mere termination of a lawsuit in favor of an adverse party does not mean that there was a want of probable cause to believe on a set of stated facts that a cause of action did exist." *Petrou v. Hale*, 43 N.C. App. 655, 658, 260 S.E.2d 130, 133 (1979), *cert. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980).

Here, because the plaintiffs have failed to forecast evidence of both special damages and malice, the defendant is entitled to summary judgment on the malicious prosecution claim.

II. Malicious Interference With Contracts

[2] " 'The overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party.' " *Smith v. Ford Motor Co.*, 289 N.C. 71, 84, 221 S.E.2d 282, 290 (1976), *quoting Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954). There are five essential elements to this tort: (1) that a valid contract existed between plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person; (2) that the outsider had knowledge of plaintiff's contract with the other party; (3) that the outsider intentionally induced the other party not to perform his contract with plaintiff; (4) that in so doing the outsider acted without justification; and (5) that the outsider's act caused plaintiff actual damages. *Childress* at 674, 84 S.E.2d at 181-82. In order to establish a *prima facie* case of malicious interference with contract, "a plaintiff must establish that the defendant's actions were malicious in the legal sense." *Murphy v. McIntyre*, 69 N.C. App. 323, 328, 317 S.E.2d 397, 401 (1984). Malice for these purposes "denotes the intentional doing of a harmful act without legal justification." 240 N.C. at 675, 84 S.E.2d at 182. Proof of actual malice is not sufficient. *Childress v. Abeles, supra.*

> Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability

> for so doing, no matter how malicious in actuality his conduct may be. A "malicious motive makes a bad act worse but it cannot make that wrong which, in its own essence, is lawful."

Id. at 675, 84 S.E.2d at 182, *quoting Bruton v. Smith*, 225 N.C. 584, 586, 36 S.E.2d 9, 10 (1945).

Plaintiffs allege that defendant's investigation of their records at the Smith-Huckabee dealership caused the termination of their relationship. Plaintiffs contend that the investigation was done with the intent to harass and intimidate. However, on this record there is no evidence that the defendant's actions were malicious in the legal sense. It is not disputed that plaintiffs had engaged in the activity that gave rise to the defendant's original suspicions, i.e., selling cars while under the consent order's restrictions. Moreover, the records at the Smith-Huckabee dealership were inspected due to suspicions of odometer rollbacks or alterations. The defendant was appointed to a task force to inspect sales records and this investigation was totally unrelated to the investigation concerning a violation of the initial consent order. All of the defendant's actions were done pursuant to DMV's standard procedure. The plaintiffs were later told that they were no longer suspects for odometer alterations. Defendant's actions were part of his job and under the circumstances were justified. Because plaintiffs have failed to forecast evidence to establish malice, the cause of action for malicious interference with contracts must fail. Accordingly, the trial judge's entry of summary judgment was correct.

III. Intentional Infliction of Emotional Distress

[3] The essential elements of a claim for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct; (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The "extreme and outrageous conduct" necessary for recovery is defined as conduct which "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. at 196, 254 S.E.2d at 622. The determination of what is extreme and outrageous conduct is a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). We conclude that the defendant's conduct was within the scope of

his employment and was under the directions of his superior. In our judgment, it could not reasonably be regarded as extreme and outrageous conduct sufficient to satisfy a claim for intentional infliction of emotional distress. Summary judgment for the defendant was also proper on this claim.

IV. Immunity

[4] While recognizing that the trial judge did not address the defendant's immunity argument in his summary judgment order, we note that the defendant's contention has merit.

"Our Supreme Court has established that when an action is brought against individual state officers or employees in their official capacities, the action is one against the State for purposes of applying the doctrine of sovereign immunity." *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988), *disc. rev. granted*, 324 N.C. 247, 377 S.E.2d 754 (1989), *citing Insurance Co. v. Unemployment Compensation Comm.*, 217 N.C. 495, 8 S.E.2d 619 (1940). Under the doctrine of sovereign immunity, a state cannot be sued without its consent. *See Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971); *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949). For purposes of determining liability for negligent acts, our courts have distinguished between public employees and public officers and officials. "[A] 'public official' is immune from liability for 'mere negligence' in the performance of [his] duties, but he is not shielded from liability if his alleged actions were 'corrupt or malicious' [or] if 'he acted outside of and beyond the scope of his duties.' " *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404, *quoting Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985). On the other hand, " '[a]n employee of a governmental agency . . . is personally liable for his negligence in the performance of his duties proximately causing injury to another.' " *Harwood* at 309-10, 374 S.E.2d at 404, *quoting Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E.2d 530, 534-35 (1968). Finally, this court has held that an inspector of the DMV exercises some portion of sovereign power of the State and thus is a public officer and is immune from negligence. *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 471, 361 S.E.2d 418, 421, *disc. rev. denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

The Division of Motor Vehicles is a duly authorized state agency that is administered by the Commissioner of Motor Vehicles under the authorization of the Secretary of the Department of Transportation. G.S. 20-2 (1983 and Supp. 1988). The powers of the Commissioner include promoting the interests of retail buyers and preventing unfair methods of competition and unfair or deceptive acts or practices. The Commissioner may make rules and regulations that are necessary or proper for the effective administration and regulation of motor vehicle licensing laws. G.S. 20-302 (1983). The Commissioner is also authorized to appoint agents, field deputies and clerks necessary to administer and enforce motor vehicle licensing laws. G.S. 20-39 (1983 and Supp. 1988).

The plaintiffs recognize that *Thompson* establishes that an inspector is a public official who is immune from liability for negligent acts, but argue that no such immunity exists for the defendant because his acts were malicious. The defendant is an inspector employed by the Enforcement Division of DMV. His investigation of the plaintiff was not negligent or malicious. Accordingly, he is afforded absolute immunity.

Finally, the plaintiffs cite *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L. Ed. 2d 396 (1982) to refute the defendant's contention that his action should at least be afforded qualified immunity as a quasi-judicial function if he was not given absolute immunity. In *Harlow*, two aides and advisers of the President of the United States were entitled to qualified immunity from civil damages for their conduct in seeking the discharge of a civilian employee of the Department of Air Force. The United States Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738, 73 L. Ed. 2d at 410.

Since the defendant's actions were totally within the purview of his ministerial functions, he is absolutely immune from liability and there is no need to address the applicability of *Harlow* to this case.

For the reasons stated, the decision of the trial court to grant the defendant's motion for summary judgment is affirmed.

Affirmed.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. ADOLPH CHRISTIE

No. 8926SC303

(Filed 7 November 1989)

1. **Criminal Law § 146.5 (NCI3d)— guilty plea—notice of appeal—timely**

The State's motion to dismiss as untimely defendant's appeal from a guilty plea to possession of marijuana with intent to sell or deliver was denied where the transcript clearly states that defendant gave verbal notice of appeal to the district attorney in open court and filed a notice of appeal on the same date.

Am Jur 2d, Appeal and Error §§ 316, 317; Criminal Law § 490.

2. **Searches and Seizures §§ 3, 14 (NCI3d)— narcotics—search of bus passenger—no seizure—valid consent**

Defendant was not seized within the meaning of the Fourth Amendment when officers boarded a bus on which he was a passenger or when they began questioning defendant and, furthermore, marijuana found in defendant's baggage was collected pursuant to a valid search with defendant's consent where defendant was a passenger on a Greyhound bus which he had boarded in Houston, Texas; the Charlotte Police Department employed the source city concept in its drug enforcement efforts, which identifies major coastal cities associated with drug smuggling, including Houston; officers boarded the bus, making no announcements to the passengers; they wore police jackets but no uniforms and displayed no weapons; they began questioning passengers at the rear of the bus, talking in a non-threatening manner and positioning themselves so that the person to whom they were speaking and others not yet questioned were not barred from leaving; an officer noticed that defendant appeared to exhibit some characteristics asso-

ciated with the drug courier profile; the officer showed defendant his credentials and asked to talk with defendant; defendant replied "sure" and pointed out his bags and a jacket; defendant was visibly nervous; the officer told defendant he was not in custody or under arrest and requested permission to search defendant and his luggage; defendant responded, "sure, go ahead"; marijuana was found in defendant's bag and defendant replied affirmatively when asked if he had marijuana in his bag; and defendant was then placed under arrest. Defendant was not seized in a Fourth Amendment context until he was arrested and his consent for the search of his bags could not have been more freely given.

Am Jur 2d, Searches and Seizures §§ 16, 48, 100, 101.

APPEAL by defendant from *Snepp (Frank W.), Judge*. Judgment entered 21 October 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1989.

Defendant was charged with possession with intent to sell marijuana under G.S. 90-95 on 27 April 1988. On 14 July 1988, defendant moved to suppress evidence of approximately 25 pounds of marijuana found in his suitcase. The suppression hearing was held before Judge Frank W. Snepp on 18 August 1988, and defendant's motion to suppress was denied.

Defendant entered notice of appeal of the denial of his motion on 21 October 1988 prior to entry of his guilty plea. On the same date, defendant pled guilty to possession of marijuana with intent to sell or deliver before Judge Chase B. Saunders. Defendant received an active sentence of two years' imprisonment.

From the order denying his motion to suppress the evidence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant.

ORR, Judge.

[1] The State moved to dismiss defendant's appeal before this Court on 17 April 1989, alleging that it did not receive timely

notice of appeal prior to defendant entering his guilty plea. Defendant responded and provided a transcript of the beginning of defendant's plea on 21 October 1988. This transcript clearly states that defendant gave verbal notice of appeal to the district attorney in open court and filed a notice of appeal on the same date. We find this sufficient to meet the requirements of G.S. 15A-979(b) and *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed.2d 795, 100 S.Ct. 2164 (1980), and therefore deny the State's motion to dismiss this appeal.

[2] The State's evidence at the hearing on 18 October 1988 tended to show that on 27 April 1988 defendant was a passenger on Greyhound bus 1371 which he boarded in Houston, Texas. The bus made several scheduled stops including one in Charlotte, North Carolina.

For approximately eight months prior to 27 April 1988, the Charlotte Police Department had employed the "source city concept" in its drug enforcement efforts. This concept identifies major coastal cities which have been associated with a high incidence of drug smuggling, including Houston, Texas and New Orleans, Louisiana. In conjunction with city identification, the police investigate the transportation of illegal drugs on buses passing through Charlotte. The investigation consists of police officers boarding certain buses from source cities with permission of the driver and station manager and talking to the passengers. Officers board the bus close to the scheduled departure time to identify passengers with their luggage.

The two officers boarding the bus make no announcements to the passengers. They do not wear uniforms (except for police jackets, commonly known as riot jackets) and display no weapons. When questioning passengers, they begin at the rear of the bus, talk in a non-threatening manner, and position themselves such that the person to whom they are speaking and others they have not yet questioned would not be barred from leaving. If a passenger chooses to leave the bus, he or she will not be followed.

On 27 April 1988, narcotics investigator Gerald P. Sennett and S.B.I. agents Becker and Akers received permission from the station manager and bus driver to board bus 1371 to conduct the above described "source city" investigation. Prior to 27 April 1988, drug arrests had been made involving passengers on the same bus route. None of the law enforcement officials had a search

warrant because there was no probable cause to believe illegal drugs were on board.

Officer Sennett and Agent Becker boarded the bus approximately ten minutes prior to the expected departure time while Agent Akers remained outside with the bus driver. The door to the bus remained open. As Officer Sennett proceeded to the rear of the bus to begin questioning passengers, he observed defendant and noted that defendant exhibited some characteristics associated with the drug courier profile. During his questioning of other passengers, Officer Sennett noted that defendant turned around and looked back at the officers four or five times. Although other passengers also turned around, none did so as often as defendant.

Officer Sennett reached defendant in approximately four minutes. Defendant sat in an aisle seat with one bag and a jacket on the seat next to him. The aisle between defendant and the door was clear. Officer Sennett showed defendant his credentials and asked to talk with him. Defendant answered, "Sure." Defendant told Officer Sennett that he was returning to Washington, D.C., from a three-week vacation in Houston, Texas. He identified his bag and jacket in the seat next to him and a matching bag overhead.

When defendant produced his identification, he was visibly nervous. He was sweating, his hands were shaking, and his breathing was heavy and irregular. Defendant's behavior and the fact that defendant was traveling from a source city raised Officer Sennett's suspicion that defendant may have been carrying drugs. Officer Sennett testified that he was also concerned about concealed weapons because of the lack of security checks of bus passengers and because weapons are frequently found on or near persons carrying drugs.

Officer Sennett explained to defendant that he was a narcotics officer looking for illegal drugs and requested permission to search defendant and his luggage. Officer Sennett told defendant that he was not in custody or under arrest. Defendant responded, "Sure, go ahead," and started to pick up the bag and jacket on the seat next to him. At the same time, defendant started to put his hands up, although he had been told that he was not under arrest. Officer Sennett told defendant that he was not under arrest and that he (Officer Sennett) did not want to embarrass him.

Agent Becker then joined Officer Sennett and reached across defendant to search the small bag or defendant. Officer Sennett

retrieved defendant's bag from the overhead shelf and noticed that it was heavy. When he unzipped the bag, he observed white powder, three trash bags and fabric softener sheets. He noticed that there was an odor of marijuana.

Officer Sennett then asked defendant if he (defendant) had marijuana in his bag, and defendant responded affirmatively. Officer Sennett placed defendant under arrest. Agent Akers then boarded the bus, handcuffed defendant and took him off the bus. The police officers displayed no weapons at any time, and no one touched defendant prior to his arrest. The substance in defendant's bag was approximately 25 pounds of marijuana.

After defendant's arrest, Officer Sennett and Agent Becker completed questioning the remaining passengers. The entire procedure from the time the officers first boarded the bus took approximately ten minutes, and the bus was not late departing the station.

The trial court found the following facts and denied defendant's motion to suppress.

> First, law enforcement agents did not 'seize,' within the meaning of the fourth amendment, a commercial passenger bus carrying Christie when, during a brief rest stop at a bus terminal, two of them went aboard the bus, with the bus driver's permission, for the purpose of questioning the passengers. Second, the agents did not seize Christie when they approached him on the bus, asked him questions, and obtained his consent to searches of both his person and of two bags located near him. Third, Defendant Christie was seized when Sennett arrested him after discovering the marijuana in his bag. Fourth, the evidence gathered is admissible since it was collected pursuant to a valid search. For these reasons Defendant's Motion to Suppress should be denied.

(Exceptions omitted.)

Defendant argues that the trial court erred in not suppressing evidence of marijuana seized from defendant's luggage because the police officers had no reasonable and articulable suspicion that anyone on the bus was engaged in criminal activity. Further, defendant maintains that he was illegally "seized" because a reasonable person would not feel free to leave the bus and that his consent to search his luggage was not freely given.

The Fourth Amendment allows reasonable searches and seizures based upon probable cause. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, not every contact between a police officer and a citizen rises to the level of a "seizure" or is one which requires objective justification. *Sibron v. New York*, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968). There is no seizure of an individual until a police officer demonstrably restricts an individual's liberty. *Id.* at 63, 20 L.Ed.2d at 935, 88 S.Ct. at 1889.

In *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870, *reh'g denied*, 448 U.S. 908, 65 L.Ed.2d 1138, 100 S.Ct. 3051 (1980), the United States Supreme Court refined the above principles and stated:

> We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
>
> . . .
>
> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 553-54, 64 L.Ed.2d at 509-10, 100 S.Ct. at 1877 (citations and footnote omitted). *Accord, Michigan v. Chesternut*, 486 U.S. 567, 100 L.Ed.2d 565, 108 S.Ct. 1975 (1988).

Defendant argues that he was illegally "seized" when the officers first boarded the bus, when the officers positioned themselves and began questioning him, and that the "seizure" was more intrusive than necessary to effectuate the investigative purpose. We disagree.

Applying the above rules of law to the case before us, we affirm the trial court's finding that defendant was not "seized" in a Fourth Amendment context until he was arrested. First, he was not seized when the officers boarded the bus. Only two officers boarded the bus; they did not display any weapons; they did not use threatening language or a compelling tone of voice; and they did not block or inhibit defendant in any way from refusing to answer their questions or leave the bus. While defendant may have felt restrained from leaving the bus by the officers' presence, he had no reason to feel such restraint.

The *Mendenhall* standard of whether a reasonable person would have believed that he was not free to leave is an objective standard, not subjective. In these circumstances, we believe that a reasonable person would have believed that he was free to leave the bus and free to refuse to answer questions. The officers did not create by their actions or appearances either physical or psychological barriers to any passenger who wanted to leave the bus. *See United States v. Rembert*, 694 F.Supp. 163 (W.D.N.C. 1988).

We further note that no seizure was found under these exact circumstances in *United States v. Rembert*, 694 F.Supp. 163 (W.D.N.C. 1988). Like our defendant, Rembert argued that he was seized at the bus terminal when officers boarded a bus upon which he was a passenger. The court found that the boarding was entirely consensual, *citing INS v. Delgado*, 466 U.S. 210, 80 L.Ed.2d 247, 104 S.Ct. 1758 (1984). The officers "did not enhance in any way the restricting characteristics of the bus interior by their mere presence on the bus." *Rembert*, at 174. *See also United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *cert. denied*, --- U.S. ---, 102 L.Ed.2d 566, 109 S.Ct. 534 (1988) (AMTRAK police did not seize defendant on train when they first entered his roomette with consent).

Second, defendant was not seized when the officers began questioning him. The evidence tended to show that the aisle was not blocked by anyone at any time prior to the actual search. The officers were entirely non-threatening in their appearance and conduct. Applying the reasonable person standard of *Mendenhall*, a reasonable person in defendant's position would not have felt that he was compelled to stay in his seat and answer the questions. *See Rembert* at 175.

Third, a seizure did not occur because the officers' boarding the bus was not more intrusive than necessary. In *United States v. Sokolow*, 490 U.S. ---, 104 L.Ed.2d 1, 109 S.Ct. 1581 (1989), the United States Supreme Court held that "[t]he reasonableness of an officer's decision . . . does not turn on the availability of less intrusive investigatory techniques." *Id.* at ---, 104 L.Ed.2d at 12, 109 S.Ct. at 1587. Moreover, we find in the case *sub judice* that the officers' actions were not more intrusive than necessary. Officer Sennett testified that they wanted to question the passengers on the bus to identify them with their luggage. There was no other way to make such identification when the bus was not either loading or unloading all of the passengers and their luggage.

Defendant further maintains that his consent to search his luggage was not freely given. We disagree. Officer Sennett specifically told defendant that he was not under arrest. When Officer Sennett then requested to search defendant's bags and person, defendant responded, "Sure, go ahead." Such consent could not be more freely given.

Although defendant was not informed of his right to refuse to consent to a search, it does not make his consent inherently involuntary. *State v. Long*, 293 N.C. 286, 293, 237 S.E.2d 728, 732 (1977), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973).

For the reasons set forth above, we hold that defendant was not "seized" within the meaning of the Fourth Amendment when law enforcement officers boarded the bus or when they began questioning defendant. Further, we hold that the marijuana found in defendant's bags was collected pursuant to a valid search with defendant's consent.

No error.

Judges WELLS and JOHNSON concur.

GROVER CHARLES MATHEWS, TROY EVERETTE McHONE, ROBERT EUGENE SIMMONS, PLAINTIFFS, AND JAY HILL BREEDLOVE, INTERVENOR v. BOARD OF TRUSTEES OF THE ASHEVILLE POLICEMEN'S PENSION AND DISABILITY FUND, THE CITY OF ASHEVILLE, DEFENDANTS, AND JOHN E. PIPITONE, INTERVENOR

No. 8828SC892

(Filed 7 November 1989)

Retirement Systems § 2 (NCI3d)— municipal system funds transferred to State system—transfer sanctioned by statute—plaintiffs' complaint against State Retirement System

In an action for an injunction to prevent the transfer of assets of the Asheville Policemen's Pension and Disability Fund into the State Retirement System, plaintiffs' argument that the terms of a pension plan may not be amended when its members are voluntary participants therein was not germane to the real issue before the court, since that argument would apply to the dissolution in 1986 of the Law Enforcement Officers' Benefit and Retirement Fund to which plaintiffs made voluntary contributions, but plaintiffs did not contest the transfer of their LEO contributions into the State Retirement System; defendant city's decision to terminate the Asheville Policemen's Pension and Disability Fund in favor of participation in the State System was an action clearly sanctioned by statute, N.C.G.S. § 128-25; and if plaintiffs' right to receive two pensions was erased by the merger, plaintiffs' complaint was properly with the State Retirement System and not with defendants.

Am Jur 2d, Pensions and Retirement Funds §§ 1001 et seq.

APPEAL by plaintiffs from judgment entered 8 April 1988 in BUNCOMBE County Superior Court by *Judge Robert D. Lewis*. Heard in the Court of Appeals 16 March 1989.

Roberts, Stevens & Cogburn, P.A., by Max O. Cogburn and Glenn S. Gentry, for plaintiff-appellants.

William F. Slawter and Sarah Patterson Brison for defendant-appellees.

BECTON, Judge.

This is an action in which plaintiffs seek an injunction preventing defendant Board of Trustees of the Asheville Policemen's Pension and Disability Fund from transferring assets of the Fund into a State-administered pension system. Plaintiffs further seek a declaration of their rights with respect to this transfer. On 31 December 1986, the judge issued a temporary restraining order forbidding the Trustees from merging the Fund with the State System. On 8 January 1987, John E. Pipitone intervened as a party defendant. On 9 January 1987, defendant City of Asheville consented to an order making it a party defendant. That same day, the judge denied plaintiffs' motion for a preliminary injunction and dissolved the restraining order. Jay Hill Breedlove intervened as a plaintiff in this action on 24 February 1987. On 8 April 1988, the judge entered summary judgment in favor of defendants. Plaintiffs appeal, and we affirm.

I

Plaintiffs are members of the Asheville Police Department. By virtue of their employment, each automatically participated in the Asheville Policemen's Pension and Disability Fund ("the Asheville Fund"), a fund created by Chapter 242 of the Public-Local Laws of 1939. Five percent of each plaintiff's monthly salary was deducted from his paycheck and put into this Fund. Each of these plaintiffs, in addition, voluntarily participated in the Law Enforcement Officers' Benefit and Retirement Fund ("LEO"), a separate pension system providing coverage in the event of death, disability, or retirement. Another six percent of each plaintiff's monthly salary was deducted and forwarded to LEO by defendant City of Asheville.

In January 1986, the legislature, enacting N.C. Gen. Stat. Sec. 143-166.70, directed that all funds previously contributed to LEO be transferred to the North Carolina Governmental Employees' Retirement System ("the State Retirement System"), a pension fund administered by the State. Plaintiffs' funds in LEO were thus transferred into the State Retirement System. Plaintiffs continued

to contribute to the Asheville Fund and thus continued to participate in two separate pension systems.

On 3 December 1986, more than 60% of the Asheville police officers eligible to vote elected to participate in the State Retirement System. Plaintiffs voted against participating. The affirmative vote authorized the merging of the Asheville Fund with the State Retirement System and the placement of Fund participants under the jurisdiction of the State System. Prior to the vote, defendant Asheville City Council guaranteed to Fund members who had previously contributed to LEO "payments in the amount of their accrued benefits under LEO . . . ."

On 9 December 1986 the City Council adopted a resolution expressing its desire to "assure the members of the Asheville [Fund] that no such member shall ever receive a benefit upon retirement or disability under [the State Retirement System] in an amount less than that which they would have been entitled to under the Asheville [Fund]." The Council resolved that Asheville Fund members be paid any supplemental amounts necessary to compensate them for any difference between the amount of monthly benefits to which the State Retirement System would entitle them versus the amounts they would have received from the Asheville Fund. The Council further resolved to make to the former LEO members payments representing the present value of their accrued LEO/State Retirement System benefits. Finally, the Council resolved to participate in the State Retirement System and to transfer the assets and liabilities of the Asheville Fund to that System.

Plaintiffs instituted this action seeking an injunction to prevent the merger of the Asheville Fund with the State Retirement System. On 9 January 1987, a temporary restraining order was lifted, and the Board of Trustees transferred the Asheville Fund into the State System. The trial judge, finding that "there is no genuine issue of material fact at this time," subsequently awarded summary judgment to defendants, and plaintiffs appealed.

II

Plaintiffs contend that the trial judge erred by failing to grant their motion for summary judgment and by entering judgment for defendants. Prior to the transfer of the Asheville Fund into the State Retirement System, plaintiffs maintain that they were entitled to receive two pensions—one from the Asheville Fund

and the other from the State System. Plaintiffs assert that the City, through its resolutions, has guaranteed them only that they will not receive an amount under the Retirement System that is less than the benefits they would have received from the Asheville Fund. This guarantee, plaintiffs argue, does not mean that they will receive the same amounts they would have recovered had they continued to participate in *both* the Retirement System and the Asheville Fund.

Plaintiffs assert that the City's resolution to pay to them the present value of the benefits they accrued under LEO does not protect their interests in that "[t]he 'buy out' figures are based on unreasonable and arbitrary assumptions with regard to the future salaries of Plaintiffs, interest and inflation rate . . . . [and] . . . also ignore the immediate tax consequences to each Plaintiff." Had plaintiffs voluntarily withdrawn from LEO, they argue, any amounts they would have received would have been exempted from State or municipal tax under N.C. Gen. Stat. Sec. 143-166(q) (1974 Replacement). The payments from the City, however, are explicitly to be treated "as compensation from the City for tax purposes."

Plaintiffs also contend that they have been placed in a position that is inferior to those police officers who declined to participate in LEO in the first place and, instead, placed six percent of their salaries in other investments. Plaintiff Grover Mathews asserts, for example, that had he invested six percent of his salary at the legal interest rate of eight percent, *see* N.C. Gen. Stat. Sec. 24-1 (1986), his return after eleven years of contributions would have been $14,520.83. (Mr. Mathews asserts that this figure, in reality, would have been higher because the average rate of return during the relevant time period exceeded eight percent; in addition, the interest income could have been compounded.) The City of Asheville, conversely, has offered him $13,644.00, all of it treated as taxable income.

Finally, plaintiffs allege that the City's attempt to pay them the value of their accrued LEO benefits ignores the death and disability components of plaintiffs' previously vested LEO/Retirement System rights. They contend the City's plan presumes that all plaintiffs will continue to work until retirement age. However, the City has made no effort to provide any guarantees to plaintiffs in the event of death or disability, thus eliminating a significant

component of plaintiffs' rights without compensation or consideration for the destruction of those rights.

Plaintiffs' argument, essentially, is that the terms of a pension plan may not be amended when its members are *voluntary* participants therein. They contend that every jurisdiction which has addressed the distinction between mandatory and voluntary participation has agreed that "benefits provided for employees under a voluntary pension or retirement plan created by an act of the legislature may not be modified or reduced by subsequent amendatory legislation for the reason that those electing to participate in such voluntary plans acquire vested rights of contract to the benefits provided therein upon acceptance of the plan, which rights may not be impaired by subsequent amendments to the act." *State v. City of Jacksonville Beach*, 142 So.2d 349, 353 (Fla. Dist. Ct. App. 1962); *see also Smith v. City of Dothan*, 188 So.2d 532 (Ala. 1966); *Bardens v. Bd. of Trustees*, 22 Ill. 2d 56, 174 N.E.2d 168 (1961); *Clarke v. Ireland*, 199 P.2d 965 (Mont. 1948); *Ball v. Bd. of Trustees*, 71 N.J.L. 64, 58 A. 111 (1904).

The logic of the Florida court seems sound, and, indeed, we are not indifferent to plaintiffs' claims that the merger of the Asheville Fund with the Retirement System may damage plaintiffs' interests. Ultimately, however, we are in agreement with defendants that any impairment of plaintiffs' contractual rights is not the consequence of defendants' actions. If plaintiffs' right to receive two pensions has been erased by the merger, plaintiffs' complaint is properly with the State Retirement System and not with defendants. We ground our holding on the clear statutory authorization for the kind of merger that occurred in this case.

The General Assembly has permitted the dissolution of "any retirement pension or annuity fund or system of any county, city, or town" whenever 60% of the local fund's members elect to join the State System. N.C. Gen. Stat. Sec. 128-25 (1986). This provision has been in effect since the creation of the State System. *See* North Carolina Code of 1939 (Michie), Sec. 3212(5)(2). The record before us indicates, and the parties agree, that more than 60% of the members of the Asheville Fund voted to join the State Retirement System. The City Council's subsequent resolution to participate in the State System, and to dissolve the Asheville Fund thereby, accorded with the procedure prescribed by our statutes. In short, the City's decision to terminate the Fund in favor of

participation in the State System was an action clearly sanctioned by the General Assembly.

We have not turned a deaf ear to plaintiffs' assertions that the City has failed to adequately compensate them for their accrued benefits in LEO. The briefs of both parties and the record offer exhaustive analysis on the question whether plaintiffs have or have not been damaged by the Asheville Fund-Retirement System merger. Defendants apparently concede that the State Retirement System, although it has received contributions for two different pensions—LEO and the Asheville Fund—will provide these plaintiffs with only one pension. In the final analysis, however, we have concluded that this question is inapposite to the real question before us.

Plaintiffs voluntarily participated in LEO; their participation in the Asheville Fund was mandatory. *See* Act of Mar. 25, 1955, ch. 322, Sec. 1(a), N.C. Sess. Laws 273. Plaintiffs' argument, summarized above, that the terms of a voluntary pension plan may not be modified by later amendment is thus not germane to their compulsory participation in the Asheville Fund. LEO, the fund in which plaintiffs did become voluntary members, ceased to exist in 1986 after the legislature repealed N.C. Gen. Stat. Sec. 143-166 and enacted N.C. Gen. Stat. Sec. 143-166.70. Plaintiffs did not contest the transfer of their LEO contributions into the State Retirement System at that time, presumably because they continued to contribute to two pension systems (the Asheville Fund and the State System). It is at the present time, following the merger of the Asheville Fund with the State System, that plaintiffs complain their right to receive two pensions has been destroyed by the City of Asheville. If, however, it is true that the State System will provide only a single pension to plaintiffs, then it is the State System, and not defendants, who have arguably impaired plaintiffs' contractual rights.

We express no opinion as to whether the City's offer of compensation is adequate recompense for plaintiffs' rights under LEO. If, *arguendo*, it is not, we believe that plaintiffs' recourse is against the State Retirement System and not defendants.

III

Plaintiffs next argue that the trial judge erred by dismissing their action when he had jurisdiction to issue a declaratory judgment concerning the rights of the parties. If this action were ripe

for declaratory judgment, however, the order of the trial judge lifting the temporary restraining order and allowing the transfer of the Asheville Fund into the State Retirement System is tantamount to a declaration in favor of defendants' position. We agree with defendants that "[h]ad the trial court determined that the [plaintiffs] had the right to prevent the transfer [of the Asheville Fund assets] to the [State System], the temporary restraining order would not have been dissolved, and the injunctive relief would have been maintained." For this reason, we overrule this assignment of error.

IV

For the foregoing reasons, the judgment in favor of defendants is

Affirmed.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. ERIC WAYNE OUTLAW

No. 896SC203

(Filed 7 November 1989)

1. **Narcotics § 1.3 (NCI3d)— transportation of narcotics—use of public street not required**

An offense of felonious transportation of controlled substances is not limited to a conveyance on a public street or highway.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 40 et seq.

2. **Narcotics § 4 (NCI3d)— transportation of cocaine—backing in driveway—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of felonious transportation of more than 28 grams of cocaine where it tended to show that defendant was backing his truck containing the cocaine out of his driveway when officers stopped him.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 40 et seq.

3. Narcotics § 4 (NCI3d)— manufacture of cocaine—proximity of packaging materials

The State's evidence was sufficient to support defendant's conviction of felonious manufacture of cocaine where packaged cocaine was found in a toolbox in a truck defendant was backing out of his driveway, and packaging materials were found in defendant's residence which he had just left and in defendant's garage.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 40 et seq.

APPEAL by defendant from *Friday, Judge.* Judgment entered 23 June 1988 in Superior Court, HERTFORD County. Heard in the Court of Appeals 1 September 1989.

Defendant was tried and convicted for possession of marijuana with intent to sell, felonious transportation of more than 28 grams of cocaine, felonious manufacture of more than 28 grams of cocaine and felonious possession of more than 28 grams of cocaine. These charges arose after the defendant's estranged wife, Sandra Outlaw, contacted Special Agent David J. Wooten of the State Bureau of Investigation (SBI).

At trial, Agent Wooten testified that on 26 January 1988 at approximately 5:00 a.m., he was called by Mrs. Outlaw who informed him that she had fought with her husband on the night before and that she thought her husband was going to kill her when he returned. Mrs. Outlaw had previously spoken to Agent Wooten several times between May 1986 and July 1987 concerning her husband and her suspicions about him.

Agent Wooten testified that during his conversation with Mrs. Outlaw she agreed to testify in court. After this, Mrs. Outlaw called Agent Wooten and told him that she had seen cocaine in their house and that it was kept in a locked red tool box to which only the defendant had a key. After this phone call, Agent Wooten called his assistant supervisor in Greenville.

Approximately fifteen minutes later, Mrs. Outlaw called Agent Wooten and urged him to come immediately. Agent Wooten then called Agent Ransome and Deputy Sheriff Twine and asked them to meet him at the Outlaw residence.

As Agent Wooten approached defendant's residence, he saw defendant's truck backing out of the driveway. He concluded that the defendant was backing out because he saw "the white lights, the reverse lights" on before seeing the defendant's brake lights come on. At that time, Agent Wooten put on his blue lights and defendant pulled his truck back up towards the house. Defendant got out of the truck and Agent Wooten introduced himself and the other officers. Defendant was then searched and patted down. Agent Wooten did not find any weapons.

Agent Wooten testified that at that time, Mrs. Outlaw came out of the house. She exchanged words with defendant and told the officers that the red tool box was in the truck. Agent Wooten said he then questioned defendant about the contents of the red tool box. He said that defendant replied, "[w]hat red box." Agent Wooten responded "[t]he red box that's on the truck seat," and then defendant replied, "[d]ope." Defendant then explained that his wife was selling the dope and that he was taking it away from the house. Agent Wooten testified that Mrs. Outlaw denied that allegation and said she could not even get in the box. When questioned, defendant denied having a key and would not tell what kind of dope was in the box. Agent Wooten secured the red tool box and put it in his car.

After another officer arrived, Agent Wooten then took defendant into custody and searched him. Agent Wooten then went to the house to use the telephone and apprise Mrs. Outlaw of defendant's arrest. Mrs. Outlaw invited Agent Wooten into the house and told him about built-in hidden compartments within the house and a hidden safe. While using the telephone in the kitchen, Agent Wooten noticed on the table a plastic bag of "brownish green plant material that appeared to be marijuana." Agent Wooten seized the plastic bag and its contents and left the premises leaving Officers Ransome and Twine behind.

Agent Wooten obtained a search warrant to search defendant's residence, truck, red tool box, and garage as well as an arrest warrant for defendant based on possession of the bag of marijuana. Accompanied by Agent Ransome, he served the search warrant on defendant.

Using one of the keys seized from Mr. Outlaw, Agent Wooten opened the red tool box and found seven plastic bags which contained white powder and one empty plastic bag. Some of the bags

were labeled by weight. He also found a card with the combination to the safe. Agent Wooten then searched defendant's residence and found some inositol, smoking screens, a plastic film container, two plastic bag corners, electronic scales and three straws that had been cut, some of which had white residue on them. In the master bedroom, Agent Wooten found triple beam and postal scales, a small pipe, and three bags of marijuana in an ice bucket. In the safe, the officers found money and a plastic bag containing white powder. The officers finally searched the garage where they found plastic bags, inositol, a pipe, and a plastic grinder in a desk drawer that had been nailed shut. In a file cabinet and in plastic bags in a garbage can, the officers found what appeared to be marijuana. Based on the contraband found and seized from the red tool box and the home, defendant was indicted.

Attorney General Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

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

EAGLES, Judge.

Defendant assigns as error the trial judge's denial of his motion for directed verdict based on the insufficiency of the evidence to show that defendant transported cocaine. Defendant contends that the evidence at trial did not show that he transported cocaine because his truck never left his property. The defendant argues that at most the evidence showed that he attempted to transport cocaine.

"Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State as well as that introduced by defendant." *State v. Perry*, 316 N.C. 87, 95, 340 S.E.2d 450, 456 (1986), citing G.S. 15-173 (1983), G.S. 15A-1227 (1983). "Thus the question presented is whether upon consideration of all the evidence, whether competent or incompetent, in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and the defendant was a perpetrator of that crime." *Id.* at 95, 340 S.E.2d at 456, citing *State v. Riddle*, 300 N.C. 744, 268 S.E.2d 80 (1980); *State v. Scott*, 289 N.C. 712, 224 S.E.2d 185 (1976).

Initially, we note that G.S. 90-95(h)(3) (Supp. 1988) provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine. . . .'" The defendant argues that the evidence was insufficient to show that he transported cocaine.

The word "transports" has not been defined in the North Carolina Controlled Substances Act, G.S. 90-86 *et seq.*, or in any case discussing whether controlled substances were in fact transported. However, we note that the meaning of the word "transportation" has been discussed within the context of alcoholic beverages and common carrier cases.

In *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950), a case involving transporting intoxicating liquor in a vehicle, our Supreme Court stated that "[t]he word 'transport' means to carry or convey from one place to another." *Id.* at 81, 59 S.E.2d at 202, citing *Alexander v. R.R.*, 144 N.C. 93, 56 S.E. 697; *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 43 S.Ct. 504, 67 L. Ed. 894 (1922). "Hence, a person transports liquor when he carries or conveys it from one place to another on his person, or in some vehicle under his control, or in any other manner." *Id.*, 59 S.E.2d at 202-3.

On the other hand, *Alexander v. R.R.*, 144 N.C. 93, 56 S.E. 693 (1907) involved the transportation of goods by a common carrier within a specified time period. In *Alexander*, the court stated that transportation "did not mean simply to remove from one place, but includes also the idea of carrying to another place." *Id.* at 96, 56 S.E. at 698.

The United States Supreme Court in *Cunard Steamship Company v. Mellon*, 262 U.S. 100, 43 S.Ct. 504, 67 L. Ed. 894 (1922), determined that "transportation comprehends any real carrying about or from one place to another." *Id.* at 122, 43 S.Ct. at 506, 67 L. Ed. at 901. *Cunard* involved suits brought by steamship companies who operated passenger ships between this country and foreign ports. The companies sought exemption from certain provisions of the National Prohibition Act. In order to determine the rights of the parties under the 18th Amendment, the court addressed the meaning of the word "transportation." In defining transportation, the court said that "[i]t is not essential that the carrying be for hire, or by one for another; nor that it be incidental

to a transfer of the possession or title. If one carries in his own conveyance, for his own purposes, it is transportation no less than when a public carrier, at the instance of a consignor, carries and delivers to a consignee for a stipulated charge." *Id.*, 43 S.Ct. at 506-7, 67 L. Ed. at 901.

[1] Defendant has cited *State v. Wells*, 259 N.C. 173, 130 S.E.2d 299 (1963), and The Beverage Control Act of 1933 for the proposition that under alcoholic beverage laws transportation means to convey on a public street or highway. He states that this same limited definition should be applied to transportation of controlled substances.

We note that neither *Wells* nor The Beverage Control Act of 1933 establishes that movement into the public sphere is a prerequisite to charging someone for unlawful transportation. First, *Wells* only mentions public streets or highways in the wording of the warrant. In *Wells*, our Supreme Court never articulated a definition for transportation and did not imply that transportation could only occur if conveyed within the public sphere. Finally, unlike the broad prohibitions against transporting controlled substances contained in the North Carolina Controlled Substances Act (Article 5, Chapter 90), The Beverage Control Act of 1933, 1933 S.L. Ch. 319, by its own terms merely deals with the regulation of alcohol if it is transported over the public highways.

[2] Here, we believe that it is correct to view transportation as "any real carrying about or movement from one place to another." 262 U.S. at 122, 43 S.Ct. at 506, 67 L. Ed. at 901. Agent Wooten testified that defendant was in his truck and the truck's white "backup" lights were illuminated indicating that the defendant was in the process of backing out of his driveway. The defendant would have completed backing out of his driveway but for Agent Wooten's arrival with his blue light flashing. Moreover, defendant admits in his brief that he was in fact backing out of his driveway before Agent Wooten stopped him. He admits in his brief that he was taking the red tool box which contained "dope" from the house to the truck and in the truck to the end of the driveway. This is an admission of transportation of controlled substances. Accordingly the evidence of defendant's acts was sufficient to sustain a charge of felonious transportation of cocaine.

[3] Next, the defendant assigns as error the trial judge's denial of his motion for directed verdict on the grounds that there was sufficient evidence to show that the defendant manufactured cocaine.

Defendant contends that the State failed to show that he manufactured the cocaine that was seized. "When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, quoting *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1967).

The defendant recognizes that "this Court has held that there was sufficient evidence of manufacturing where the instruments of manufacture are found together with cocaine which was apparently manufactured." *See State v. Muncy*, 79 N.C. App. 356, 339 S.E.2d 466, *disc. rev. denied*, 316 N.C. 736, 345 S.E.2d 396 (1986); *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987); *State v. Brown*, 64 N.C. App. 637, 308 S.E.2d 346 (1983), *aff'd*, 310 N.C. 563, 313 S.E.2d 585 (1984). However, the defendant contends that the "packaging materials were not found in sufficient proximity to the cocaine to support an inference that the defendant manufactured *that* cocaine."

In *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), the defendant also argued that there was insufficient evidence to sustain a charge of trafficking in heroin by manufacturing. *Id.* at 98, 340 S.E.2d at 457. In *Perry*, police officers observed the defendant leaving an apartment carrying a shiny, silver package, which was later found in some bushes and held 390 glassine envelopes, each containing a small amount of heroin and mannitol. After the defendant's arrest, he said that the apartment he was observed leaving belonged to his girlfriend, that he had a key and that he left a small amount of heroin under the bed. The police officers later discovered a light bill and phone bill in defendant's name with the address to the apartment that supposedly belonged to defendant's girlfriend. The officers searched the apartment and found several items that are used in packaging and repackaging heroin including mannitol, rubber gloves, boxes with empty bindles or envelopes, a strainer, album covers, aluminum foil, scotch tape, rubber bands, measuring spoons and other items. *Id.* at 92, 340 S.E.2d at 454. Our Supreme Court held that this was "ample evidence to give rise to a reasonable inference that the defendant did manu-

facture heroin by packaging the controlled substance." *Id.* at 99, 340 S.E.2d at 458.

Like the defendant in *Perry*, Outlaw had just come out of the residence where the cocaine packaging materials were found. The materials were found in the defendant's home. Since the red tool box found in defendant's possession in the truck in the driveway contained packaged cocaine and packaging materials were found in the house and garage, the evidence taken together was sufficient to support a reasonable inference on the manufacturing charge. The trial judge properly submitted the issue to the jury.

For the reasons stated, we find no error.

No error.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. ROBERT CHARLES BARNETTE

No. 8927SC200

(Filed 7 November 1989)

1. **Burglary and Unlawful Breakings § 5.1 (NCI3d)— felonious breaking or entering of house—defendant's presence near scene—fingerprints on window frame—sufficiency of evidence**

In a prosecution for felonious breaking or entering, evidence was sufficient to be submitted to the jury where it tended to show that defendant was observed on the victim's front porch just hours before the crime was discovered, and defendant's fingerprints were found on the frame of the victim's broken kitchen window.

Am Jur 2d, Burglary § 45.

2. **Burglary and Unlawful Breakings § 4 (NCI3d)— felonious breaking or entering of house—victim's opinion as to who committed crime—evidence not prejudicial**

In a prosecution for felonious breaking or entering there was no merit to defendant's contention that the trial court improperly permitted the victim of the break-in to give his

opinion as to who committed the crime, since the victim was asked to repeat only what he previously had told a police officer investigating the matter, and the victim had already testified that he saw defendant on his front porch and that was the basis for his belief that defendant committed the crime.

Am Jur 2d, Burglary §§ 44, 50.

Judge BECTON dissenting.

APPEAL by defendant from *Owens, Judge.* Judgment entered 27 October 1988 in Superior Court, GASTON County. Heard in the Court of Appeals 20 September 1989.

Defendant was charged in a proper bill of indictment with felonious breaking or entering in violation of G.S. 14-54(a). Evidence presented at trial tends to show the following: On 25 May 1988 at approximately 4:30 p.m., Mr. Benjamin Nichols left his house at 722 South Weldon Street in Gastonia, North Carolina. As he was leaving, Nichols saw defendant standing on his (Nichols') front porch. Nichols refused a request by defendant to stop and talk and did not let defendant into the house. When Nichols left, there was no one else at home. Upon returning, he discovered that his kitchen window had been smashed with a brick and that a television converter box was missing from the house. A subsequent police investigation revealed defendant's fingerprints on the frame of the broken kitchen window.

A jury found defendant guilty of felonious breaking or entering. From a judgment imposing a prison sentence of eight years, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Elaine A. Dawkins, for the State.

Assistant Public Defender Joseph F. Lyles for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns as error the trial court's denial of his motion to dismiss at the close of all evidence. He contends the evidence of defendant's guilt offered by the State was insufficient for submission to the jury. We disagree.

A motion of nonsuit in a criminal case requires the trial judge to consider all evidence "in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. Bass*, 303 N.C. 267, 270, 278 S.E.2d 209, 212 (1981). Where the State relies on fingerprint evidence at the scene of the crime, a motion for nonsuit must be denied if there is "substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed." *Id.* at 272, 278 S.E.2d at 212. What constitutes "substantial" evidence is a question of law for the trial court. *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975).

In an earlier breaking and entering case, the Supreme Court held the presence of the defendant's fingerprints at the crime scene, when coupled with testimony by the owner/attendant of the premises that she had never seen defendant before the date of the crime, was sufficient to send the issue of the defendant's guilt to the jury. *State v. Tew*, 234 N.C. 612, 68 S.E.2d 291 (1951). In the present case, defendant's fingerprints were found on the frame of the window broken by the alleged perpetrator. Furthermore, he was spotted at the crime scene shortly before the break-in occurred. Upon examination of the record on appeal and in light of the facts and result reached in *Tew*, we conclude the denial of defendant's motion to dismiss was proper. The testimony placing defendant at the crime scene shortly before the break-in was evidence of defendant's opportunity to commit the offense in question. As such, it was "substantial" enough to warrant submitting the issue of defendant's guilt to the jury.

In support of his claim that circumstantial evidence of guilt was not "substantial" in this case, defendant cites *State v. Bass*, *supra*. In *Bass*, the defendant was convicted of burglary and larceny when his fingerprints were found on a screen outside the victimized house, and the prosecuting witness testified she could not identify him and did not know him. The Supreme Court, however, overturned the conviction holding the evidence presented did not reasonably eliminate the possibility that the fingerprints had been impressed at some other time. To support its holding, the Court relied on the defendant's admission that he broke into the house on a prior occasion, and his story was corroborated by police testimony confirming a break-in three to four weeks earlier. Moreover, the Supreme Court pointed out that the State pro-

duced no additional evidence to connect the defendant with the offense in question.

The present case is clearly distinguishable from *Bass*. Not only did the State produce additional evidence connecting defendant with the crime (his presence at the scene just hours before the incident), but also defendant failed to present any alternative explanation, like that offered in *Bass*, for the presence of defendant's fingerprints on the kitchen window frame. While defendant did indicate he had been to the house on prior occasions, he failed to provide any convincing reason why his fingerprints were found on the frame of the kitchen window. These critical factual differences make it clear that the holding in *Bass* is not controlling.

Defendant also contends the trial court erred by denying his request to instruct the jury on the lesser included offense of misdemeanor breaking or entering. Instruction on a lesser included offense is proper only where there is evidence that would permit a jury rationally to find a 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 possibility that a jury might partially accept or reject the State's evidence against a defendant is not sufficient to require instruction on the lesser included offense. *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954).

[2] Finally, defendant claims the trial court improperly permitted Benjamin Nichols, the victim of the break-in, to give his opinion as to who committed the crime. This testimony, however, is not opinion testimony. Nichols was only asked to repeat what he previously told a police officer investigating the matter. Furthermore, assuming *arguendo* that this testimony was improperly admitted, defendant was not prejudiced thereby. Nichols testified he thought defendant committed the crime only because defendant had been at Nichols' house a few hours earlier. Moreover, the fact that Nichols saw defendant on his front porch was already in evidence when Nichols testified. Upon consideration of defendant's argument and evidence presented at trial, we find no unfair prejudice against defendant by admission of the testimony in question.

Defendant had a fair trial free from prejudicial error.

No error.

Judge ARNOLD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that defendant's motion to dismiss should have been granted, I dissent. In my view, the majority passes over critical factual distinctions between this case and *State v. Tew*. In *Tew*, the prosecuting witness testified she had never seen the defendant on the premises prior to the day of the burglary, and no other evidence tended to show that defendant had been there before. 234 N.C. at 617-18, 68 S.E.2d at 295; *see also State v. Scott*, 296 N.C. 519, 525-26, 251 S.E.2d 414, 418 (1979). Here, as the majority notes, evidence suggests that defendant had been to the victimized house on earlier occasions. Even Mr. Nichols admitted that defendant had visited Mr. Nichols' brother at the house "not more than three times" and that defendant could have been at the sink where the window is located. This evidence is highly significant since the State's conviction rests largely on the basis of fingerprints found at the crime scene.

To survive a motion for nonsuit, the State must present "substantial evidence of circumstances from which the jury can find that the fingerprints *could only* have been impressed at the time the crime was committed. . . ." *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) (emphasis added). Disturbingly, the majority in this case concludes that the State presented such evidence by minimizing the importance of defendant's having been to the house previously and by imposing upon him, instead, the burden of furnishing a "convincing reason" to explain the presence of his fingerprints on the window. Defendant's failure to satisfy the majority on this point, coupled with his purposeful presence on the porch before the crime, is, to the majority, "substantial evidence" that the fingerprints could have been left at no time other than when the crime occurred. "The burden," however, "is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt." *Scott*, 296 N.C. at 526, 251 S.E.2d at 419. *Accord Bass*, 303 N.C. at 273, 278 S.E.2d at 213.

In light of the evidence that defendant had been to the house prior to the day of the crime, there is no necessary connection between his presence at the house on that day and the fact that his fingerprints were found on the window. Furthermore, I do not attach the same probative value to defendant's presence on

the porch as does the majority. Defendant was not a stranger to Mr. Nichols. Defendant told Mr. Nichols he wished to speak with him, and Mr. Nichols, who did not have time to converse, was content to leave his premises even though defendant was still standing on the porch.

In short, defendant's presence at the house on the date of the crime was of no concern to the owner, and it is just as reasonable to infer from the evidence that defendant touched the window at some time prior to the day of the burglary. I am not at all satisfied that the State presented "substantial evidence" tending to show when defendant impressed his fingerprints on the window, and accordingly, I dissent.

JOSEPH HENRY LANDER BOSTON, PETITIONER-APPELLEE v. N.C. PRIVATE PROTECTIVE SERVICES BOARD, RESPONDENT-APPELLANT

No. 892SC66

(Filed 7 November 1989)

Administrative Law § 4 (NCI3d)— denial of private investigator's license—decision affected by error of law and in excess of statutory authority

The trial court properly found that respondent's decision to deny petitioner a private investigator's license was affected by an error of law and was in excess of respondent's statutory authority where respondent erroneously determined that experience as a bail bondsman's runner did not qualify as investigative work, and where respondent, by refusing to consider petitioner's runner experience, disregarded the mandate of N.C.G.S. § 74C-3(a)(8) to consider all investigative work in determining whether to issue a license.

Am Jur 2d, Licenses and Permits §§ 6, 47, 130.

APPEAL by respondent from *Strickland, Judge*. Order entered 24 October 1988 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 1 September 1989.

This is an appeal from the superior court's reversal of respondent Board's denial of petitioner's application for a private investigator's license.

The North Carolina Protective Services Board (hereinafter Board) licenses and regulates private protective services businesses within this State pursuant to G.S. 74C *et seq.* In April 1987, Joseph Boston, petitioner-appellee, applied to respondent to obtain a private investigator's license submitting evidence of his experience as a detective sergeant with the Washington, North Carolina Police Department, as an investigator for attorneys and as a bail bondsman's runner (hereinafter runner). Petitioner also submitted evidence that he had obtained an Associate's Degree in Police Science. The Board denied petitioner's application on the grounds that he lacked the requisite experience. At petitioner's request a hearing to review the decision was held on 9 September 1987 before an administrative law judge (ALJ). In his proposal for decision, the ALJ found that an applicant must have had three years experience within the past five years in private investigative work as set out in G.S. 74C-8(d)(3). He also found that petitioner had fifteen months experience as a detective sergeant with the Washington, N.C. Police Department from April 1982 through June 1983 and that petitioner worked as bail bondsman from July 1984 through March 1987. Judge Reilly concluded that "[p]etitioner's work as a bail bondsman which involved the obtaining of information with reference to the whereabouts of persons qualifies as private investigative experience under G.S. 74C-8(d)(3) and G.S. 74C-3(8)." In his proposed decision, Judge Reilly stated that petitioner should provide to the Board documentation of the actual hours spent investigating the whereabouts of people so the Board could determine if petitioner had met the experience requirement of G.S. 74C-8(d)(3).

Despite the ALJ's proposal for decision, the Board in its final agency decision affirmed its previous decision to deny the petitioner's request for a license concluding that his work as a bail bondsman did not meet the experience requirement of G.S. 74C-8(d)(3). The petitioner sought judicial review of the Final Agency Decision in the Superior Court of Beaufort County alleging that the decision "erroneously and improperly excluded his work as a bail bondsman" and that the decision failed to consider his educational experience and investigative work performed for attorneys. The trial court entered an order reversing the Board's decision after review of the "whole record." The trial court concluded that the agency de-

cision exceeded its statutory authority in refusing to consider petitioner's experience as a bail bond runner and remanded the case for further consideration of petitioner's application for license as a private investigator. Respondent appeals.

Jeffrey L. Miller for petitioner-appellee.

Attorney General Thornburg, by Assistant Attorney General Teresa L. White, for respondent-appellant.

EAGLES, Judge.

When reviewing a final administrative decision, the trial judge's conclusion must "rest on whether there was substantial evidence in view of the entire record submitted." *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 237-8, 293 S.E.2d 171, 176 (1982). We note parenthetically that *Lackey* interpreted G.S. 150A-51(5) which has been recodified intact as G.S. 150B-51(5). This standard of judicial review is known as the "whole record" test. *Id.* at 238, 293 S.E.2d at 176, citing *Thompson v. Wake Cty. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 237, 293 S.E.2d at 176, quoting *Comm. of Ins. v. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

Respondent first assigns as error the trial judge's determination that the Board's "Final Agency Decision is 'affected by error of law.'" Respondent argues that G.S. 74C-8(d)(3) provides that "a person must have at least three years experience within the past five years in private investigative work." The respondent further argues that G.S. 74C-3(a)(8) sets out that private investigative work is work done by an individual who is "in the business or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to: . . . ." The respondent states that a runner locates a person for his own use and not someone else so he is "not in the business of" as contemplated by G.S. 74C-3(a)(8). We disagree.

We note initially that G.S. 85C-1(9) defines a runner as "a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or to assist in apprehension and surrender of defendant to the court or keeping defendant under necessary surveil-

lance. . . ." A runner is employed by the bail bondsman and investigates the whereabouts of a particular defendant for his employer. Accordingly, the nature of a runner's work is investigative and the Board erred in not considering it.

Secondly, the respondent assigns as error the trial court's determination that respondent exceeded its statutory authority by refusing to consider petitioner's experience as a runner. The respondent contends that it did not exceed its statutory power since G.S. 74C-5(2)(5) and (6) empowers it to do the following: "(2) . . . determine minimum qualifications, . . . and establish minimum education, experience, and training standards for applicants . . . (5) approve individual applicants to be licensed . . . (6) deny . . . any license . . . to be issued . . . to any applicant or licensee who fails to satisfy the requirements of this Chapter. . . ." Thus, the respondent contends that it was within its power to determine whether the petitioner had the experience required by G.S. 74C-8(d)(3). The respondent also contends that it was the proper body to determine if the petitioner was qualified and the reviewing court's duty was not "to inject its opinion in place of that of the agency who because of its [the agency's] particular expertise had been entrusted with decision making power."

We note that "[a]n administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority." *In re Williams*, 58 N.C. App. 273, 279, 293 S.E.2d 680, 685, quoting *In re Broad and Gales Creek Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980).

While the Board does have the statutory power to grant or deny licenses, it must still act within the scope of its statutory powers. The statutes direct the Board to consider all evidence of experience that is investigative in nature to determine if the applicant had the necessary experience. The Board did in fact recognize that the petitioner worked as a runner but refused to consider that work in satisfaction of the investigative experience requirement. By refusing to consider the runner experience, the Board erroneously disregarded the mandate of G.S. 74C-3(a)(8) to consider all private investigative work. Accordingly, this assignment is overruled.

Next, the respondent argues that the trial court's determination that the Board must consider petitioner's experience as a

runner for credit as private investigative work was not supported by competent evidence. The Board argues that it had considered the experience when it found that petitioner worked as a runner from July 1984 through March 1987 and found it to be inadequate. We note, however, that in its reply brief the Board stated that the petitioner's experience as a runner did not qualify as private investigative experience. It is clear that the trial court was correct when it found that the Board did not consider petitioner's experience.

In his proposal for decision, the ALJ relied on *King v. Board*, 82 N.C. App. 409, 346 S.E.2d 300 (1986), in interpreting G.S. 74C-3(a)(8). In *King*, applicants were denied a license by the North Carolina State Board of Sanitation Examiners because applicants were not "engaged in a broad range of environmental health functions indicative of a sanitarian." *Id.* at 412, 346 S.E.2d at 302. However, the statute required only that the applicant be engaged in "one or more of the many diverse elements comprising the field of environmental health." *Id.*, 346 S.E.2d at 302. Our court held that this was erroneous and affirmed the trial court's order of remand. Here, we agree that G.S. 74C-8(d)(3) merely contemplated some form of private investigative activities and did not necessarily require experience in a broad range of those activities. Since as a runner petitioner often had to determine the whereabouts of defendants, those activities constituted private investigative work.

Finally, the respondent assigns as error the trial court's reversal of its decision and remand of the matter back to the Board. The Board contends that the "Superior Court cannot substitute its judgment for that of the agency unless the action is so clearly unreasonable as to amount to oppressive and manifest abuse." *State Highway Commission v. Greensboro City Board of Education*, 265 N.C. 35, 48, 43 S.E.2d 87, 97 (1965).

G.S. 150B-51(b)(2) and (4) provide that "a reviewing court may reverse the decision of an agency if the substantial rights of petitioners may have been prejudiced because the agency's findings, inferences, conclusions or decisions are: (2) [i]n excess of statutory authority or jurisdiction of the agency; (4) affected by other error of law."

Since the Board's decision was both in excess of its statutory authority and affected by an error of law, the trial court acted properly when it reversed the decision and remanded this matter for further consideration.

In summary, the trial court correctly ruled that the Board acted improperly and erroneously when it refused to consider the petitioner's experience as a runner. Accordingly, we affirm and remand this matter to the superior court for remand to the respondent Board for reconsideration of petitioner's application consistent with this opinion.

Affirmed.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. JOHN ALVIN HAIRE

No. 8926SC266

(Filed 7 November 1989)

Larceny § 7.2 (NCI3d)— felonious larceny of tools—evidence of value sufficient

The trial court in a felonious larceny prosecution did not err in failing to submit to the jury the lesser included offense of misdemeanor larceny where the owner of the stolen tools, after being instructed as to the meaning of fair market value, gave unequivocal testimony that his tools were valued between $885 and $1,030, and the basis for his testimony was not the purchase price or replacement cost of the stolen items, but was instead his knowledge of prices paid for used tools in the construction industry.

Am Jur 2d, Larceny §§ 45, 46.

APPEAL by defendant from *Lamm (Charles C., Jr.), Judge.* Judgment entered at the 12 September 1988 session of Criminal Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 October 1989.

On 15 September 1988, a jury returned verdicts of guilty against the defendant for breaking and entering a motor vehicle and felonious larceny. The Honorable Charles C. Lamm, Superior Court Judge presiding, imposed a sentence of ten years imprisonment on the charge of felonious larceny and a consecutive three year sentence

on the charge of breaking and entering a motor vehicle. Defendant entered notice of appeal only as to the larceny conviction on 20 September 1988.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant.

LEWIS, Judge.

Defendant first argues that the trial court erred in failing to submit to the jury the lesser included offense of misdemeanor larceny. He asserts that the jury should have been allowed to consider whether the items stolen had a fair market value of $400.00 or less. Larceny of goods with a value of more than 400 dollars is a felony while larceny of goods where the value is 400 dollars or less is a misdemeanor. G.S. 14-72(a). The term "value" in this section means fair market value and not the replacement cost of the goods. *State v. Morris*, 318 N.C. 643, 645, 350 S.E.2d 91, 93 (1986). The appropriate measure of value is "the price which the subject of the larceny would bring in the open market—its 'market value' or its 'reasonable selling price' at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny. . . ." *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972).

In the present case, the subject property included a miter box, two circular saws, a jigsaw, two portable drills, battery drills, a half-inch reversible drill, and a large hammer drill. At trial, the owner of these tools was asked to express his opinion as to the fair market value of each of the stolen items. The following exchange occurred:

> Q. When you came back to your vehicle and after you talked to Ms. McManimen, what things did you observe at that time that were missing from the vehicle that had been there when you parked it?
>
> A. Well, the first thing I noticed was my miter box.
>
> Q. Would you tell us what the fair market value of that particular instrument was at that time and in that condition?

A. I'd say about Two Fifty, something like that, for sure.

Q. Two Hundred and Fifty Dollars?

A. Yes.

Q. What else did you notice at that point in time that was missing from the vehicle from the time you parked it until you came back?

A. Well, I noticed my circular saw was gone, regular saw. Run about a Hundred and Sixty dollars.

Q. Fair market value would be about a Hundred and Sixty Dollars?

A. Well, that's wht [sic] it would cost to buy them.

Mr. Towler:—OBJECTION and I MOVE TO STRIKE that.

A. I don't know—

THE COURT:—well, SUSTAINED. Members of the Jury, you're not to consider that. He asked you what the fair market value was at the time in its condition, if you have an opinion.

A. In the condition it was in? I don't really know. I don't have no opinion, because I don't know. I don't know. . . .

Q. I want to go back to the items that you noticed initially. The jigsaw, could you give us a fair market value on that particular item at that time?

A. No, I cannot. I don't know—I just know what I paid for 'em. I don't know what the market value is if I tried to sell 'em. Never tried to sell no tools.

Q. Do you have any idea of the fair market value of the two circular saws?

A. No, I don't.

Q. All of these items that you listed, did they have some value, were they usable in the construction trade?

A. Right. That's what I used them for.

Q. But you have no idea of the individual fair market value.

A. I'm—no, sir. I'm a layperson as far as selling tools. It's hard for me to get the tools; so, I never try to sell no tools. I try to keep all I can get.

Shortly after hearing this testimony, the court called a brief recess in which the witness conversed with the prosecutor. After the recess the witness returned to the stand and was prepared to testify as to the fair market value of the tools. Defense counsel objected, and the court questioned the witness as to the basis of his conversation with the prosecutor:

THE COURT:—During the break what conversation did you have with Mr. Driver or with anybody concerning the fair market value?

A. I just asked him, I told him I didn't know what that was, what does he mean by that?

THE COURT:—Did he explain what he meant by it?

A. Yeah. He just said, just whatever you thought that they were worth in the condition that they're in, and what somebody would pay for 'em, what you would pay for 'em, this type of thing. It works hand in hand. I said well, I know how much I paid for them, and I know—

THE COURT:—do you understand that fair market value is what a person who is willing to buy, or desires to buy, though is not compelled to do so, would sell it for, or what somebody would pay for it.

A. Now, just like this is where we get screwed up, 'cause if you say it like that, I don't know what you're talking about. The only thing I know is, if a person in business, been in business like I am, and they are another contractor, I would know just about what they would pay for it, you know.

THE COURT:—If they were wanting to buy the tools?

A. Right.

THE COURT:—But did not have to buy them from you.

A. Oh, right. Right. Yeah.

THE COURT:—And if you were willing to sell the tools, but didn't have to sell them.

A. Right, right.

THE COURT:—Is that what you're saying?

A. Right, yeah. Nobody had to.

THE COURT:—The objection is OVERRULED. Bring the Jury back, please, sir.

Back before the jury, the witness testified that he had been in the contracting area for about 21 years, that he had purchased all his tools himself, that he was familiar with some of the prices paid for used tools, and that he had opinions on the fair market value of the tools. He then proceeded to testify as to his opinion as to the fair market value of each of the tools individually; the aggregate value was between $885 and $1,030.

On cross-examination he stated that he was familiar with new tool prices and the prices of rebuilt tools from shops as well as what other people talk about paying for tools. When defense counsel suggested that the basis for his testimony was really the purchase price or replacement cost of the stolen items, the witness replied, "No, it cost more than that to replace 'em. Cost way more than that to replace 'em. That's why I didn't understand what the fair market value meant. Can't buy another car, you know, in 1989 for what you paid in 1987. Still need a car." The defendant argues that this testimony is "equivocal and susceptible of diverse inferences," citing *State v. Jones*, 275 N.C. 432, 438, 168 S.E.2d 380, 384 (1969). We disagree. Once the State explained to the witness what the term "fair market value" meant, he was able to give testimony as to the value of the tools at the time they were stolen. The questions from the bench expeditiously clarified the basis and meaning of the witness' testimony. He confirmed his understanding when he was further questioned on redirect examination about a tool in which he had expressed his opinion as to its fair market value before that term was explained to him:

Q. Previously, when I asked you about the miter box, before you testified that you understood the concept of fair market value, you said Two Hundred and Fifty on the miter box? Now, with additional understanding, do you have an opinion as to the fair market value of that particular item?

A. I'd say in the condition, about a Hundred Seventy-Five to Two Hundred Dollars.

Based upon this exchange it is clear that the witness' testimony as to the fair market value was not "equivocal" once he understood the meaning of the term.

We distinguish *State v. Morris*, 318 N.C. 643, 350 S.E.2d 91 (1986), relied upon in defendant's brief. In that case, the owner of the property testified that the approximate value of the edger and mower taken was $500.00. On cross-examination it was revealed that this figure represented the replacement cost of the items. The Supreme Court held that the jury could have inferred from the evidence that the fair market value of the tools was less than the replacement cost testified to and that it was less than $400.00. Holding it was error under these circumstances for the trial court to refuse to instruct on misdemeanor larceny, the court reversed and remanded for a new trial. Here, by contrast, the witness did not testify as to the replacement cost of the stolen tools. In fact, he denied that that was the basis of his valuation. When asked on cross-examination if he was really stating how much it would cost to replace the tools, he replied, "No, it cost more than that to replace 'em. Cost way more than that to replace 'em." We find that once the witness understood the meaning of the term he was able to give clear, cogent testimony as to the "fair market value" of his tools at the time they were taken.

Defendant also contends that his motion to dismiss the charge of felonious larceny should have been granted because the owner's testimony regarding the value of the stolen tools was not credible. Allowing the State every reasonable inference to be drawn from the evidence, *State v. Johnson*, 310 N.C. 574, 577, 313 S.E.2d 560, 563 (1984), we find that the trial court did not err in denying the defendant's motion. The total fair market value of the stolen tools was over twice the statutory monetary threshold for felonious larceny. The evidence was sufficient to go to the jury and accordingly we find

No error.

Judges PHILLIPS and COZORT concur.

DARYL PRESTON SMITH v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, A CORPORATION

No. 8925SC146

(Filed 7 November 1989)

Damages § 12.1 (NCI3d) — failure to settle insurance claim promptly — punitive damages adequately alleged

Plaintiff's complaint was sufficient to state a claim for punitive damages based on aggravated and oppressive tortious conduct in defendant insurer's failure promptly to settle a claim for damages to plaintiff's mobile home. N.C.G.S. § 58-54.4(11).

Am Jur 2d, Damages §§ 731 et seq.; Insurance §§ 1771-1773.

APPEAL by plaintiff from *Griffin, Kenneth A., Judge*. Order entered 15 November 1988 in CATAWBA County Superior Court. Heard in the Court of Appeals 14 September 1989.

Plaintiff sought compensatory and punitive damages for defendant's failure to timely and fairly settle plaintiff's claim for damages to his mobile home covered by a mobile homeowner's policy issued by defendant. Defendant moved to dismiss plaintiff's claim for punitive damages for failure to state a claim upon which relief could be granted. The trial court granted defendant's motion. Plaintiff appeals from that order.

Randy D. Duncan for plaintiff-appellant.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant-appellee.

WELLS, Judge.

As a preliminary matter we note that the trial court's order was incorrectly titled "Order for Partial Summary Judgment." Defendant has acknowledged responsibility for this error in his brief. It is not disputed that the trial court's order was for dismissal of plaintiff's claim for punitive damages pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. Ordinarily, an interlocutory order such as this is not immediately appealable. In this case the trial court's order provides that there is no just

reason for delay. The order is therefore immediately appealable. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1983 & Supp. 1988).

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. The question of law for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB National Bank of N.C.*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). "In analyzing the sufficiency of the complaint, the complaint must be liberally construed." *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). A complaint is sufficient to withstand a Rule 12(b)(6) motion when it provides sufficient notice of the events and circumstances from which the claim arises and alleges the substantive elements of at least some recognized claim. *Stewart v. Allison*, 86 N.C. App. 68, 356 S.E.2d 109 (1987). A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is not legally entitled to relief under any statement of facts which could be proved in support of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

When determining whether a claim for punitive damages for breach of contract is sufficient to withstand a Rule 12(b)(6) motion the law in North Carolina is as follows:

> [Generally,] punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. But when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. [However], allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. . . . Even where sufficient facts are alleged to make out an identifiable tort, . . . the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed.

(Citations omitted), *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). This type of aggravated conduct includes fraud, malice, oppression, insult, rudeness, caprice, and willfulness. *Dailey v. Integon Insurance Corp.*, 57 N.C. App. 346, 291 S.E.2d 331 (1982). Punitive damages are also recoverable when the wrong is done in a manner which evinces a ruthless and wanton disregard of the plaintiff's rights. *Hornby v. Penn. Nat'l Mut. Casualty Ins.*

Co., 77 N.C. App. 475, 335 S.E.2d 335 (1985), *disc. rev. denied*, 316 N.C. 193, 341 S.E.2d 570 (1986).

Plaintiff's first claim based on breach of contract was not dismissed. It is incorporated by reference into his second claim for punitive damages. In order to determine whether claim two establishes a claim for which relief can be granted we summarize claim one and set out in detail claim two.

CLAIM ONE

In addition to identifying the parties and the insurance policy, this claim details plaintiff's efforts to obtain settlement of his claim. The basic allegations are: On 23 July 1986 plaintiff's mobile home and property were extensively damaged when the mobile home fell from its concrete block foundation. An adjuster from defendant's company inspected the mobile home on the same day it was damaged and indicated to plaintiff that he would engage a mobile home repair company to estimate the damage. This estimate was never performed and when plaintiff contacted the adjuster several weeks later, the adjuster suggested that plaintiff contact the mobile home's manufacturer. The manufacturer was unwilling to make repairs and after three more weeks had passed without any contact with the adjuster despite plaintiff's repeated attempts to telephone him, the plaintiff contacted the adjuster's supervisor. The next day a representative from a mobile home repair company contacted plaintiff, at defendant's request, informing him that he would not repair the damage but that he would submit an estimate to defendant. This estimate given 3 November 1986 was for $1,016.80. Another month passed without further action by defendant. In December 1986 plaintiff obtained an estimate from another mobile home company for $5,466.95. Plaintiff next contacted the North Carolina Department of Insurance concerning defendant's failure to settle the claim. Defendant advised the State Insurance Specialist that a claims payment check had been mailed to plaintiff. Plaintiff later received and rejected defendant's 29 December 1986 claim settlement check for $1,421.13. For the next nine months plaintiff attempted unsuccessfully to negotiate a settlement of his claim with defendant. Plaintiff then obtained counsel who contacted defendant 2 October 1987 and enclosed a third damage estimate in the amount of $5,950.00. Defendant objected to this estimate, suggested an estimate by a fourth repair company, and questioned which repairs were caused by the 23 July 1986 accident.

CLAIM TWO

I.-IX. That Paragraphs I-IX of Claim Number 1 are adopted and realleged by reference.

X. That the actions of defendant are aggravated and oppressive conduct which constitute a wrongful and tortious failure to settle a claim in good faith, for which plaintiff is, upon information and belief, entitled to recover punitive damages.

XI. That, upon information and belief, defendant's actions were aggravated in:

(a) Not attempting in good faith to effectuate prompt, fair and equitable settlement of this claim in which liability has become reasonably clear, as prohibited by G.S. 58-54.4(11)f; and

(b) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled, as prohibited by G.S. 58-54.4(11)h; and

(c) Failing to promptly settle this claim where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlement under other portions of the insurance policy coverage, as prohibited by G.S. 58-54.4(11)m.

Similar claims for relief were held sufficient to withstand a Rule 12(b)(6) motion in *Dailey, supra* and *Payne v. N.C. Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 313 S.E.2d 912 (1984). In *Dailey* plaintiff sought punitive damages after his insurer refused to negotiate concerning plaintiff's fire losses. Defendant's alleged bad faith refusal to settle the claim constituted the tort as well as the breach of contract. Plaintiff further alleged that the defendant's actions were "willful [sic], oppressive, and malicious" in that defendant intended to stall negotiations so that financial pressures on the plaintiff would force him to accept a low settlement, were "outrageous" in the misuse of its power and authority, and constituted "reckless and wanton disregard" for plaintiff's rights under the policy. The decision in *Payne* relied on *Dailey* to the extent that it also held that plaintiff's claim for punitive damages based on an insurance company's bad faith refusal to provide coverage was wrongly dismissed on the pleadings when he had alleged bad faith and supported his claim with two specific acts of bad faith that conceivably could rise to the level of aggravated conduct. These acts included a statement by an adjuster from defendant

company to one of the insureds to the effect that although such claims were covered by the policy, the company discouraged payment of such claims and numerous excuses offered by the defendant company as to why it was refusing to compensate plaintiff.

In this case plaintiff also bases his claim for punitive damages on allegations that defendant has failed to settle a claim in good faith. Plaintiff specifically alleges that the actions of defendant are "aggravated and oppressive" and attempts to enumerate the aggravating conduct in paragraph XI, subparagraphs (a)-(c) of his second claim. Additional facts which support this claim include the 5-month passage of time between when the adjuster from defendant company first observed the damages to plaintiff's mobile home and when a claim check was issued; the extended period of negotiations with little progress toward reaching a resolution; and the substantial disparity between both of plaintiff's estimates and the estimate relied upon by defendant.

Plaintiff's allegations that defendant has violated G.S. § 58-54.4(11) do not alone determine the validity of the claim. *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985). The *facts* pleaded in the complaint determine whether the complaint states a claim upon which relief can be granted. *Id.* (Emphasis added.) A claim should not be dismissed pursuant to Rule 12(b)(6) when the facts alleged give rise to a claim for relief on any theory. *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 349 S.E.2d 82 (1986), *disc. rev. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). We hold that plaintiff's complaint states a claim for punitive damages based on aggravated and oppressive tortious conduct. We, therefore, hold that the trial court erred in dismissing plaintiff's second cause of action.

Defendant makes much of the fact that plaintiff has already amended his complaint once in an attempt to perfect his claim for punitive damages. In light of the liberal approach to amendments encouraged by G.S. § 1A-1, Rule 15(a), this concern is misplaced. Discretionary amendments are to be freely granted unless the opposing party would be prejudiced. *Roper v. Thomas*, 60 N.C. App. 64, 298 S.E.2d 424 (1982), *disc. rev. denied*, 308 N.C. 191, 302 S.E.2d 244 (1983). Amending pleadings to more accurately state the legal theory supported by the factual allegations already present in the complaint would not result in unfair surprise to defendant.

Defendant also asserts that even if plaintiff's complaint sets forth a claim for punitive damages, the alleged facts do not rise to the level of aggravated conduct necessary to support such a claim. That is a question for the trier of fact to determine.

Reversed.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED SEPTEMBER 1, 1987 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED WORKERS' COMPENSATION INSURANCE RATES

No. 8810INS599

(Filed 7 November 1989)

Master and Servant § 80 (NCI3d)— workers' compensation—rates

In setting the rates for workers' compensation insurance the Commissioner erred in relying on the Commission's expert witness who failed to recognize that a reasonable margin for deviations and dividends must be calculated into the underwriting profit provision and erred in failing to explain the steps by which he arrived at the figure for underwriting profit; however, the Commissioner did not use an arbitrary or capricious method in selecting a 13% target return, was not required to take into account the volatility of unearned premium, loss, and loss expense reserve funds, and did not rely on market data from Virginia or South Carolina in arriving at a negative underwriting provision. Moreover, this proceeding must be remanded for the Commissioner to clarify the evidence upon which he relied to reach a 19.5% provision for production costs and general expenses, and to the extent that the ordered provision was based on countrywide data where North Carolina data was available, it must be reconsidered.

Am Jur 2d, Workmen's Compensation §§ 79-81.

APPEAL by defendant North Carolina Rate Bureau from the Commissioner of Insurance entered 22 December 1987. Heard in the Court of Appeals on 11 January 1989.

On 1 September 1987, the North Carolina Rate Bureau filed for a rate level change for workers' compensation insurance. The filing requested a + 16.8% rate level change in the overall premium level, based on an expense provision for production costs and general expenses of + 22.5% and a provision for profit and contingencies of 2.5%. The Commissioner ordered an overall rate change of + 4.4% based on a combined provision for production costs and general expenses of 19.5% and a provision for underwriting profit and contingencies of - 2.5%.

The Rate Bureau appeals pursuant to G.S. 58-9.4.

Hunter & Wharton, by John V. Hunter III, and Parker, Sink, Powers, Sink, Potter & Nelson, by E. Daniels Nelson, for appellee.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr. and R. Michael Strickland, for appellant.

LEWIS, Judge.

The standard for appellate review of orders of the Insurance Commissioner is set forth in G.S. 150B-51 and G.S. 58-9.6. While it is the task of this Court to determine whether the Commissioner's conclusions are supported by "material and substantial evidence in view of the entire record as submitted," G.S. 58-9.6(a)(5), it is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). It is for the administrative agency "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). However,

> [i]f the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.
>
> G.S. 150B-51(a).

I

The Rate Bureau contends that the Insurance Commissioner did not comply with G.S. 58-124.19. This statute requires the Insurance Commissioner, in determining insurance rates, to consider certain factors. It must give due consideration to a reasonable margin for underwriting profit and contingencies as well as to dividends. The Rate Bureau contends that the Commissioner erred in (A) relying on the Commission's expert witness, who failed to recognize that a reasonable margin for deviations and dividends must be calculated into the underwriting profit provision, (B) arriving at the figure for underwriting profit by using surplus rather than net worth as a base figure, (C) using an arbitrary "target" of 13% to calculate the provision for underwriting profit, and (D) being unduly influenced by the fact that South Carolina and Virginia have made negative provisions for underwriting profit and not taking into account the differences between these markets and the North Carolina market.

(A)

The Rate Bureau contends that the Commissioner relied on testimony which failed to recognize that the profit contingencies of rate deviations and dividends are factors to be considered in determining the underwriting profit provision. Upon cross-examination, Mr. Wilson appears to suggest that such profit contingencies are external to the factors to be considered in calculating the underwriting profit provision. The record indicates that the Insurance Commissioner's chief witness, John Wilson, failed to recognize that the "profit contingencies" of rate deviations and dividends are factors to be considered in determining the rate. Wilson recommended a figure of -4.3% for underwriting profits. The Commissioner ordered a -2.5% provision for underwriting profit. The Commissioner's figure was closer to Wilson's than to the recommendation of any other expert witness, and the record suggests the Commissioner relied on Wilson's testimony in arriving at the ordered -2.5% provision for underwriting profit. To the extent that the Commissioner relied on Mr. Wilson's calculation, he has perpetuated Wilson's error of failing to take rate deviation and dividend "contingencies" into account and failed to comply with the explicit statutory requirements of G.S. 58-124.19. The Commissioner does not state in his order the factors which guided his derivation of -2.5% for underwriting profit. We vacate the ordered -2.5% provision

for underwriting profit and remand the issue to the Commissioner to state the reasons for and explain his calculation of this figure.

(B)

The Commissioner's chief witness calculated a target of 13% return based on net worth. The Rate Bureau contends the witness then mistakenly applied this figure to surplus rather than net worth, resulting in an unduly small provision for underwriting profit. Net worth is greater than surplus because surplus excludes certain "non-admitted assets." The record shows that the Rate Bureau and the Commissioner have different definitions of the technical usage of "surplus" in the insurance industry. Neither the applicable statutes nor the case law compel the Commissioner to consider overall net worth as the basis upon which to apply the recommended return. However, the Commissioner's derived figure for underwriting profit would not be based on "substantial evidence," G.S. 150B-51b(5), if it relied on mathematically inconsistent testimony. The Commissioner's order does not provide sufficient explanation for us to determine to what extent he relied on the 13% rate of return recommended by Wilson in deriving his final figure for underwriting profit. On remand, the Commissioner should explain the steps by which he arrived at the −2.5% provision for underwriting profit. G.S. 15B-51(a). If the Commissioner did rely on Wilson's misapplication of the target return figure, the calculations should be revised accordingly. The order should indicate whether he is applying the 13% return to surplus or net worth.

(C)

The Rate Bureau contends that the Commissioner's selection of a 13% target return is "arbitrary or capricious" in violation of G.S. 58-9.6b(6). The Bureau contends that each of the three methods Wilson used to arrive at the 13% target—a market to book ratio analysis, a discounted cash flow analysis, and a comparable earnings analysis—is either flawed or misapplied. Although the extent to which the Commissioner relied on Wilson's methods of analysis is unclear, we do not find bias or error in these methods. As we do not find error in the Commissioner's judgment we cannot replace our judgment for his. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. at 410, 233 S.E.2d at 541. The Commissioner's reliance on these methods of analysis of the profit to which the insurance companies are entitled lies entirely within his discretion. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,*

300 N.C. 381, 407, 269 S.E.2d 547, 565-66, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

(D)

The Rate Bureau also contends that the Commissioner erred in concluding that investment income on unearned premium loss and loss expense reserves was too large to justify the Rate Bureau's recommended 2.5% provision for underwriting profit. The Rate Bureau contends that the Commissioner (i) did not take into account the volatility of those reserves and (ii) relied on the fact that Virginia and South Carolina apply negative underwriting provisions without taking into account the differences between those markets and the North Carolina market. G.S. 58-124.19(2) requires the Commissioner to take into account unearned premium, loss and loss expense reserve funds and to estimate these factors based on North Carolina data when available. We do not believe that the Commissioner must, in addition, take into account the volatility of the market. This consideration lies entirely within the discretion of the Commissioner. *Id.* Furthermore, we conclude that there is no indication in the Commissioner's order that he relied on market data from Virginia or South Carolina in arriving at the negative provisions for underwriting profit. The finding that South Carolina and Virginia implement negative provisions is superfluous and not prejudicial.

II

The Rate Bureau also contests the Commissioner's findings that the recommended provisions for production costs and general expenses should be reduced from the filed 22.5% to 19.5%. The Rate Bureau contends (i) that the Commissioner's rejection of data exclusively from stock companies does not justify his reduction of the recommended figure for this provision, (ii) that the Commissioner relied on Mr. Schwartz's use of countrywide premium discount data when North Carolina data was available.

The Commissioner concluded that Schwartz's use of data exclusively for stock companies was inappropriate and then reduced the Rate Bureau's 22.5% recommended provision for production costs and general expenses to 19.5%. The Rate Bureau contends that the Commissioner's objection to the Schwartz data does not justify the reduction. The burden of proof in a Rate Bureau filing lies with the Rate Bureau. *State ex rel. Comm'r of Ins. v. North*

Carolina Rate Bureau, 300 N.C. 485, 489, 269 S.E.2d 602, 605 (1980). If the Commissioner determines the Rate Bureau has not carried that burden and there is no "substantial and material evidence" to the contrary, we do not substitute our judgment for that of the Commissioner. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. at 406, 269 S.E.2d at 565. The record indicates that the actual production costs and general expenses incurred by North Carolina insurance companies during the last three years is in fact closer to the provision ordered by the Commissioner than to the requested filing of the Rate Bureau. However, G.S. 58-124.19(2) does explicitly state that North Carolina data must be used where available. To the extent that the Commissioner relied on Mr. Schwartz's use of countrywide premium discount data where North Carolina data was available, his decision is not in compliance with the statute. Therefore, we remand this issue to the Commissioner to clarify the evidence upon which he relied to reach a 19.5% provision for production costs and general expenses. To the extent that the ordered provision was based on countrywide data where North Carolina data was available, it must be reconsidered.

Affirmed in part, vacated in part, and remanded.

Judges EAGLES and PARKER concur.

PYA/MONARCH, INC., A CORPORATION, PLAINTIFF v. RAY LACKEY ENTERPRISES, INC., VILLAGE INN PIZZA PARLORS, INC., AND W. RAY LACKEY, INDIVIDUALLY, DEFENDANTS

No. 8926DC10

(Filed 7 November 1989)

Rules of Civil Procedure § 60.2 (NCI3d)— summary judgment for plaintiff—failure of defendants' attorney to appear at summary judgment hearing—no prejudice to defendants—no meritorious defense shown

The trial court did not err in refusing to set aside a previous order granting summary judgment for plaintiff where the record clearly supported a basis for granting plaintiff's summary judgment motion; defendants were not prejudiced

by their attorney's failure to appear at the summary judgment hearing; and defendants' mere denial that they were indebted to plaintiff failed to establish a meritorious defense.

Am Jur 2d, Summary Judgment §§ 16, 24, 25.

APPEAL by defendants from *Cantrell, Daphene L., Judge.* Judgment entered 7 November 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 25 August 1989.

Harkey, Fletcher, Lambeth and Nystrom, by Francis M. Fletcher, Jr., for plaintiff-appellee.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for defendant-appellants.

JOHNSON, Judge.

This is a civil action in which plaintiff, PYA/Monarch, Inc., a North Carolina corporation dealing in the business of selling food supplies, seeks to recover money allegedly owed on an account by defendants, Ray Lackey Enterprises, Inc., Village Inn Pizza Parlors, Inc., and W. Ray Lackey, individually.

The pertinent facts are as follows: On 23 May 1986, plaintiff filed this action alleging it had sold certain food supplies to defendant, Village Inn Pizza Parlors, Inc. (hereinafter VIPPI), for use at VIPPI's locations in Athens, Georgia and Hopewell, Virginia. Plaintiff further alleged that Ray Lackey Enterprises, Inc. (hereinafter RLE), was liable on the accounts since its president, W. Ray Lackey, had executed an Application for Credit in which he, Lackey, directed that all bills for purchases by the defendant, VIPPI, were to be paid from the defendant, RLE of Statesville, North Carolina. In addition, plaintiff's complaint alleged that W. Ray Lackey, individually, was liable to the extent of $5,000 on the VIPPI account. This allegation was premised upon the fact that prior to the time credit was extended, W. Ray Lackey executed an Unconditional Guaranty of Account for $5,000.

On 6 July 1987 defendants, RLE and W. Ray Lackey, filed a motion for summary judgment pursuant to G.S. sec. 1A-1, Rule 56. Defendants offered the affidavit of W. Ray Lackey to support their motion.

On 11 August 1987 plaintiff filed a cross motion for summary judgment against defendants. Such motion was supported by several affidavits from PYA/Monarch representatives. The affidavit of Robert J. Skalicky, Credit Manager for PYA/Monarch, states that defendant, W. Ray Lackey, acknowledged that "the billing (for the Village Inn Pizza Parlor in Athens, Georgia) was to be made by Ray Lackey Enterprises, Inc. pursuant to credit terms previously established by Lackey in both its corporate and individual capacities"; and that "there existed an unpaid balance in excess of $6,000 for supplies sent to the Athens, Georgia store."

Both motions were calendared for hearing on 14 September 1987 before the Honorable L. Stanley Brown, Judge presiding in the General Court of Justice for Mecklenburg County. Neither W. Ray Lackey nor his attorney of record were present.

Following consideration of all documentary evidence submitted by the parties, summary judgment was entered for plaintiff on 16 September 1987. On 23 September 1987 defendants filed a motion to set aside judgment, pursuant to G.S. sec. 1A-1, Rule 60. Defendants' motion was subsequently denied. From an entry of summary judgment for plaintiff and denial of a motion to set aside judgment, defendants appeal.

The issue before this Court is whether the trial court erred in refusing to set aside a previous order granting summary judgment for plaintiff. We find no error.

G.S. sec. 1A-1, Rule 60(b)(1) provides that a party may be relieved of a final judgment by reason of mistake, inadvertence, surprise, or excusable neglect. This Court has previously held that "[f]or a judgment to be set aside, the moving party must show both excusable neglect and a meritorious defense." *Chapparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985). "Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered." *Norton v. Sawyer*, 30 N.C. App. 420, 424, 227 S.E.2d 148, 152, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). A determination of whether the movant's neglect is excusable is made by examining the relevant facts that gave rise to the neglect. *Chapparral Supply, supra*, at 121, 331 S.E.2d at 737. A meritorious defense by definition is a real or substantial defense on the merits. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 704, 179 S.E.2d 890, 891 (1971). In determining whether a meritorious defense exists, the trial

court, without hearing the facts, merely determines whether the movant has pled, in good faith, a meritorious defense. *Carolina Bank, Inc. v. Northeastern Ins. Finance Co., Inc.*, 25 N.C. App. 211, 212, 212 S.E.2d 552, 553 (1975).

Defendants assert "excusable neglect" by virtue of the fact that their attorney, Mr. Eisele, failed to attend the summary judgment hearing. We disagree.

After hearing arguments and reviewing the pleadings, the trial court judge found and concluded, as a matter of law, that the record clearly supported a basis for granting plaintiff's summary judgment motion. It was further concluded that: (1) defendants were not prejudiced by Mr. Eisele's failure to appear at the summary judgment hearing; and (2) a justifiable basis for setting aside the summary judgment had not been established.

"Findings of fact by the trial court on a motion to set aside a judgment on the grounds of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact." *Chapparral Supply, supra*, at 121, 331 S.E.2d at 737.

Here, defendants' exception to the trial court's refusal to set aside the summary judgment constitutes an exception to the trial court's findings of fact. *Id.* As articulated in *Burwell v. Wilkerson*, 30 N.C. App. 110, 112, 226 S.E.2d 220, 221 (1976), "a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the Court abused its discretion."

The evidence in the case *sub judice* reveals that the defendants retained the legal services of Mr. Eisele prior to the dissolution of his law firm. Following the dissolution of the law firm, however, neither defendants nor Mr. Eisele informed the court of his new address. As a result, the Clerk's Office mailed the 1987 court calendar to Mr. Eisele's record address. The court calendar was never received. Clearly, his failure to monitor the progress of the proceedings and maintain a reasonable level of communication with the court constitutes "inexcusable neglect."

Ordinarily, negligence of an attorney is not imputed to a client. However, "a client may be charged with the inexcusable neglect if the client himself fails to exercise proper care." *City Finance Co. v. Boykin*, 86 N.C. App. 446, 447, 358 S.E.2d 83, 84 (1987).

The established standard of care provides that "[p]arties to suits are expected to give them [law suits] the attention which a person of ordinary prudence gives his important business." *Standard Equipment Co., Inc. v. Albertson*, 35 N.C. App. 144, 146-47, 240 S.E.2d 499, 501 (1978).

> The distinction between the neglect of parties to an action and the neglect of counsel is recognized by our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not to counsel . . . the client is held to be excusable for the neglect of the attorney to do those things which the duty of his office of attorney requires. *Norton, supra.*

Arguably, defendants acted with ordinary prudence while engaged in transacting important business. Mr. Eisele, not the defendants, had a duty to notify the court of his new mailing address. This omission should not be imputed on the defendants when they are presumed not to know what is necessary, but, merely rely upon their attorney's doing what may be necessary on their behalf. *Id.* at 424-25, 227 S.E.2d at 152. Nevertheless, the trial court considered all of the documentary evidence submitted by the parties and appropriately determined that Mr. Eisele's absence did not cause the summary judgment to be entered against the defendants. Therefore, excusable neglect for purposes of setting aside the final judgment does not exist.

Assuming arguendo, however, that there existed excusable neglect, there must also be a meritorious defense to justify setting aside a final judgment. *Chapparral Supply, supra*, at 120, 331 S.E.2d at 736. A mere denial of indebtedness is not sufficient to constitute a meritorious defense. *Holcombe v. Bowman*, 8 N.C. App. 673, 676, 175 S.E.2d 362, 364 (1970).

In the instant case, defendants aver that they are not indebted to the plaintiff and as such claim to have asserted a meritorious defense. Relying on the aforementioned rule, defendants have failed to establish a meritorious defense. Thus, it would be futile to vacate a judgment if there is no real or substantial defense on the merits. *Norton, supra*, at 425, 227 S.E.2d at 152-53.

Given the forecast of evidence, this Court finds that the trial court did not abuse its discretion in denying the defendants' mo-

tion to set aside the judgment. The judgment of the trial court is therefore

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. DAVID THOMAS CARVER

No. 8915SC241

(Filed 7 November 1989)

1. **Burglary and Unlawful Breakings § 5.7 (NCI3d)— breaking or entering motor vehicle—no evidence as to vehicle owner's lack of consent—evidence not required**

In a prosecution for breaking or entering a motor vehicle, there was no merit to defendant's contention that the case should have been dismissed because the State failed to present testimonial evidence concerning consent or lack of consent of the owner of the vehicle, since N.C.G.S. § 14-56 does not make absence of consent an element of the offense, and since testimonial evidence presented by the State firmly established that the car door had been locked, thus indicating lack of consent to defendant's entry into the car.

Am Jur 2d, Burglary §§ 7, 50.

2. **Burglary and Unlawful Breakings § 1 (NCI3d)— breaking or entering of motor vehicle—willful injury to or tampering with vehicle not lesser included offense**

N.C.G.S. § 20-107 which prohibits the willful injury to or tampering with or removing parts from a vehicle without the consent of the owner is not a lesser included offense of N.C.G.S. § 14-56 which prohibits the breaking or entering of any motor vehicle with intent to commit any felony or larceny therein; moreover, where all of the evidence presented by the State unerringly showed that defendant committed the crime of breaking or entering a motor vehicle with the intent

to commit a felony therein, the trial court did not err in failing to submit as a possible verdict the offense of willful injury or tampering with a vehicle to the jury.

Am Jur 2d, Burglary §§ 7, 24, 52.

3. **Criminal Law § 786 (NCI4th)— compulsion, duress, or coercion—instruction not required**

In a prosecution of defendant for breaking or entering a motor vehicle, the trial court did not err by refusing to give a jury instruction on compulsion, duress, or coercion where the evidence tended to show that an employee search party found defendant inside a car which had been locked in an employee parking lot; one of the employees carried a tomato stick but at no time raised it so as to place defendant in fear of bodily harm; defendant presented no evidence to support an assertion of threats of bodily harm or a reasonable belief of immediate death by the employee search party; and his statement that he had seen someone and was trying to hide because people might think he was "up to something" imports nothing more than a self-induced fear of being caught.

Am Jur 2d, Burglary § 67.

APPEAL by defendant from *Stephens, Donald W., Judge.* Judgment entered 25 October 1988 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 21 September 1989.

Defendant was tried and convicted of breaking or entering a motor vehicle, pursuant to G.S. sec. 14-56. From a judgment imposing an active sentence of two years, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Douglas A. Johnston, for the State.

Jacobs & Livesay, by Robert J. Jacobs, for defendant-appellant.

JOHNSON, Judge.

Uncontroverted evidence presented by the State showed the following: On 20 July 1988, defendant, David Carver, was observed in a stooped position beside a car in the employees' parking lot of Coplan Fabrics. Several employees were notified of the activity and plant gates were closed in preparation of a search. During

the search that subsequently ensued, an employee picked up a tomato stick and carried it "like a walking stick."

A search of several cars effected the capture of the defendant. He was found lying down on the front seat of a car that was later identified as belonging to Donald Wrenn, the son of a Coplan Fabrics' employee. When found by an employee (the employee carrying the tomato stick), no yelling, threats, name calling or physical contact was made toward the defendant. After lying about his identity, defendant informed the employees (conducting the search) that he was in the car since "he had seen someone and he was trying to hide because people might think he was up to something."

Larry Hunt, a deputy sheriff at the Alamance County Sheriff's Department, was called to investigate the incident. He examined the car and found no visible marks or scratches, but did notice an open glove compartment. A search of the car, however, was not conducted. Defendant was thereafter arrested.

Donald Wrenn (owner of the car) was notified of the incident and was asked to inspect the car for possible damage or theft. Mr. Wrenn later testified that during his examination of the car, he "noticed that the area along the stereo under the glove box had been pried and bent back all the way across as though someone tried to remove the stereo." He further testified that he found a stick "made like a police blackjack stick laying up under some pieces of carpet in the car," and that "the buttons on the stereo were switched, as though they had been taken off and then replaced hurriedly."

[1] On appeal, defendant brings forth three questions for the Court's review. In his first Assignment of Error, defendant contends that the trial court erred by denying the motion to dismiss. To support his contention, defendant points to the State's failure to present testimonial evidence concerning consent or lack of consent of the owner of the vehicle.

The trial court denied the motion to dismiss based upon circumstantial evidence from which lack of consent (to be in the car) of the owner was inferred. *State v. Locklear*, 320 N.C. 754, 759, 360 S.E.2d 682, 684-85 (1987). While it is true that no direct evidence was presented as to consent or lack thereof by Mr. Wrenn, it is also true that G.S. sec. 14-56 does not make absence of consent an element of the offense. Nevertheless, testimonial evidence

presented by the State firmly established that the car door had been locked.

In determining whether the State presented sufficient evidence to sustain the denial of a motion to dismiss, all evidence must be viewed and considered

> in the light most favorable to the State, and the State is entitled to . . . every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies are for the jury to resolve. . . . All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made. . . . *State v. Thompson*, 59 N.C. App. 425, 427, 297 S.E.2d 177, 179 (1982).

Utilizing this standard, the direct testimony of Cleatus Wrenn (the car owner's father and actual driver of the car on 20 July 1988) that he had locked the car when he arrived at work, considered in the light most favorable to the State, clearly indicates lack of consent to defendant's entry into the car. The trial court's findings that the offense charged had been committed and that the defendant committed it is amply supported by the evidence. As such, defendant's motion to dismiss was properly denied.

[2] By his second Assignment of Error, defendant argues that the court erred in failing to instruct the jury on a lesser included offense of willful injury or tampering with or removing parts from a vehicle without the consent of the owner. Specifically, defendant contends that G.S. sec. 20-107(a) is a lesser included offense of G.S. sec. 14-56. A lesser included offense is "one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense." Black's Law Dictionary 812 (5th ed. 1979).

G.S. sec. 20-107(a) prohibits "[a]ny person . . . [from] willfully injur[ing] or tamper[ing] with any vehicles or break[ing] or remov[ing] any part or parts of or from a vehicle without the consent of the owner." However, G.S. sec. 14-56 prohibits "any person, with the intent to commit any felony or larceny therein, [from] break[ing] or enter[ing] any . . . motor vehicle." While most of the elements

of G.S. sec. 20-107(a) are present in G.S. sec. 14-56, neither injuring or tampering with the vehicle itself nor breaking or removing a part of it (the car) are part of the greater offense. G.S. sec. 14-56.

In addition thereto, all of the evidence is uncontradicted. This Court has held that, "[i]n the absence of a conflict in the evidence, the contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense." *State v. Coats*, 46 N.C. App. 615, 617, 265 S.E.2d 486, 487 (1980). "It is the task of the jury alone to determine the weight and credibility of the evidence, and to determine the facts." *Id.* The duty of "[i]nstructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Martin*, 2 N.C. App. 148, 151, 162 S.E.2d 667, 670 (1968) (emphasis in original).

Here, all of the evidence presented by the State unerringly showed that defendant committed the crime of breaking and entering a motor vehicle with the intent to commit a felony therein. The State's evidence further showed that defendant was interrupted in his mission by the employee search party. Thus, the mere fact that defendant was unsuccessful in his effort to commit a felony does not entitle him to a charge on the lesser degree of the crime charged. *State v. Thomas*, 52 N.C. App. 186, 196, 278 S.E.2d 535, 542 (1981). We hold therefore that the trial court did not err in failing to submit the offense of willful injury or tampering with a vehicle to the jury, as a possible verdict.

[3] Defendant, by his third Assignment of Error, contends that the trial court erred by refusing to give a jury instruction on compulsion, duress or coercion. Defendant argues that he acted under duress which was derived from fear of the search party. We find this to be meritless.

As a general rule, with respect to criminal charges, a defense of either duress or coercion "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 230-31 (1975). The defense of duress or coercion can, however, be invoked if the duress or coercion is present, imminent or impending. *Id.* There must also

be "a well-grounded apprehension of death or serious bodily harm if the act is not done." *Id.*

In the case *sub judice*, defendant presented no evidence to support an assertion of threats of bodily harm and/or a reasonable belief of immediate death by the employee search party. As a means of supporting his assertion of a threat of bodily harm, defendant makes reference to the tomato stick which was carried by a member of the employee search party. The evidence clearly indicates, however, that the employee carried this tomato stick "like a walking stick," and at no time raised it so as to place the defendant in fear of bodily harm. Defendant also attempts to support this assertion by making reference to the statement he made when questioned by the employee search party. Defendant's statement that "he had seen someone and he was trying to hide because people might think he was up to something" imports nothing more than a self-induced fear of being caught. Defendant cannot avoid punishment by hiding behind the defense of either duress or coercion when he in fact was in control of the circumstances and had a reasonable opportunity to avoid the outcome.

We have carefully reviewed the record and find that defendant had a fair trial free from prejudicial error.

No error.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. DANIEL ANDRE SMITH, DEFENDANT

No. 8914SC172

(Filed 7 November 1989)

1. Searches and Seizures §§ 8, 33 (NCI3d)— warrantless entry into motel room—kidnapping in progress—items in plain view—admissibility

In a prosecution of defendant for robbery, kidnapping, and rape, the trial court did not err in denying defendant's motion to suppress evidence obtained by a warrantless entry into defendant's motel room where a prudent person would

have believed that a robbery or attempted robbery and kidnapping had been committed, that the female at the motel was the victim, and that the man in defendant's room was the perpetrator; exigent circumstances obviated the necessity to secure a warrant where the arresting officer was alone, had reason to believe defendant might be armed, and was standing outside the open door to defendant's room at the end of a closed corridor with a limited view of the suspect; and the items enumerated in defendant's motion to suppress were in plain view, were properly subject to protective search, and were subject to seizure incident to a lawful arrest.

Am Jur 2d, Searches and Seizures §§ 37, 54, 88.

2. **Criminal Law §§ 86.2 (NCI3d), 1181 (NCI4th) — prior guilty plea — use for impeachment or aggravation of sentence — proof of validity of plea not on State**

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence.

Am Jur 2d, Evidence §§ 321, 333.

3. **Criminal Law § 34.7 (NCI3d) — defendant's prior possession of cocaine — admissibility of evidence to show motive**

In a prosecution for robbery, kidnapping, and rape, the trial court did not err in allowing the prosecutor to elicit testimony concerning defendant's possession of cocaine on the day prior to his arrest for the crimes charged, since the evidence was admissible to show an alternative motive for the robbery, and the evidence against defendant concerning the crimes for which he was tried was so overwhelming that it was unlikely that the result at trial would have been different without the testimony about cocaine.

Am Jur 2d, Evidence §§ 325, 333.

APPEAL by defendant from *Hight (Henry W.), Judge*. Order entered 25 July 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 September 1989.

The defendant was tried by jury and found guilty of the offenses of common-law robbery, first-degree kidnapping and two counts of second-degree rape. He was convicted of kidnapping the

victim, "unlawfully confining her, restraining her, and removing her from one place to another without her consent." The jury found that the defendant kidnapped the victim "for the purposes of facilitating the commission of the felonies of rape and common law robbery and facilitating the defendant's flight following his participation in the commission of the felony of common law robbery.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

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

LEWIS, Judge.

[1] The defendant argues that at the suppression hearing, the judge erred in denying defendant's motion to suppress evidence obtained by entry into the defendant's motel room. At the trial, the trial judge also admitted into evidence items that were seen and seized pursuant to an allegedly invalid entry and arrest. The defendant contends that the arresting officers did not have probable cause to arrest the defendant and that they therefore were not entitled to make a warrantless search of the defendant's motel room.

A Durham County police officer responded to a radio message dispatching him to the Happy Inn in Durham where he would find a "possible kidnap victim." On arriving, he interviewed the victim and compiled the following information based on that interview and on the messages which he had received during radio dispatches:

> A female desk clerk at Howard Johnson's was discovered missing from the hotel in the early morning when her relief arrived. Motel security had searched for the victim but did not locate her.
>
> A cash drawer was open and lying on the floor.
>
> The missing woman was located at the Happy Inn and was frantically crying and hysterical and her hair and clothing were in disarray.

The suspect was believed to be in Room 317 of the Happy Inn. The officer saw a man through a partially open door in Room 317, entered and arrested him. He was the defendant. At the suppression hearing, the judge ruled that the officer's entry into Room

317 was justified by probable cause and exigent circumstances, including the gravity of the offenses charged, the reasonable belief that the suspect may be armed, the reasonable belief the suspect was on the premises, the likelihood that the defendant would escape if not arrested swiftly, and the reasonableness of the manner of entry. Based on the facts and circumstances noted above, we agree that a prudent person would have believed that a robbery or attempted robbery and kidnapping had been committed, that the female at the Happy Inn was the victim, and that the man in Room 317 was the perpetrator.

We further find that exigent circumstances obviated the necessity to secure a warrant. *State v. Johnson*, 310 N.C. 581, 586, 313 S.E.2d 580, 583 (1984). The police officer was alone and, given the inherently violent nature of the crimes of robbery and kidnapping, had reason to believe the defendant might be armed. There was potentially a great risk of harm to the lone officer standing outside the open door to Room 317 at the end of a closed corridor with a limited view of the suspect, plus the possibility of the risk to guests in the motel should the defendant attempt to escape. An important consideration in assessing exigency is the likelihood of the destruction of evidence. *See Schmerber v. California*, 384 U.S. 757, 770 (1966). ("The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' ")

Subsequent to the arrest, two police officers searched the immediate surrounding area within reach of the defendant where they found a large roll of money in the pocket of defendant's jeans and a canvas belt with a looped configuration. The victim testified at trial that her hands had been tied behind her back with something that felt like a canvas belt. At the suppression hearing, the judge further ruled that the items enumerated in the defendant's motion to suppress were in plain view or were contained in objects in plain view of anyone lawfully in Room 317, that they were within the area which the defendant might have reached for a weapon and were properly subject to protective search, and that they were subject to seizure incident to a lawful arrest. We affirm these findings.

[2] The defendant also contends that the trial court erred in ruling that the defendant's prior convictions were admissible to impeach

him and to aggravate his sentence. At the close of State's evidence, defense counsel argued that the prior convictions were invalid and inadmissible because there was no showing in the records that defendant's guilty pleas in those cases were knowing and voluntary.

There is no North Carolina case law which addresses the particular question of whether or not prior convictions are admissible in which the defendant made guilty pleas that may not have been knowing or voluntary. However, both the defendant and the State rely on the analogous case of *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), and G.S. Section 15A-980. That statute states that a defendant "has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel" and that, if the defendant "proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction." The defendant argues that he complied with all of the requirements set out in the statute and in *State v. Thompson*. However, this Court notes a clear distinction between the defendant's right to counsel and the right of the defendant to enter guilty pleas knowingly and voluntarily. The former right "to suppress use of . . . prior convictions obtained in violation of right to counsel" is addressed directly by G.S. Section 15A-980. In this case, the defendant had counsel at the time that the guilty pleas were entered. The trial judge did not summon the attorney who formerly represented the defendant or the judge who accepted the prior pleas to testify. We uphold that decision. The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence.

[3] The defendant argues that the trial judge erred in allowing the prosecutor to elicit testimony concerning the defendant's possession of cocaine on the day prior to his arrest for kidnapping, rape and robbery. We hold that the trial court did not commit reversible error in admitting that testimony.

A defense witness testified that he and the defendant played cards and gambled in a neighborhood park on the day before the crimes. The witness stated that on that occasion he thought he saw cocaine in the defendant's hand. He had never seen the defendant with drugs before and he saw no one, including the defendant, in the park using any drugs that day. This testimony is admissible for the purpose of establishing a possible motive for the crimes.

Rule 404(b) of the North Carolina Evidence Code, G.S. Section 8C-1 *et seq.*, provides that evidence of other crimes is admissible to show motive. The defendant's motive for the robbery was a highly contested issue in this case. The victim had already testified concerning one possible motive. During the State's case-in-chief, the victim stated on direct examination that the defendant had told her he needed money for presents for his family. In rebuttal, the defense called the witness in question who testified that the defendant gambled on the day before the robbery and was winning the card game when the witness left. The State's cross-examination of the witness regarding the defendant's possession of cocaine tended to establish an alternative motive for the robbery. *See State v. Emery*, 91 N.C. App. 24, 33, 370 S.E.2d 456, 461, *disc. rev. denied*, 323 N.C. 627, 374 S.E.2d 594 (1988); *State v. Spinks*, 77 N.C. App. 657, 659, 335 S.E.2d 786, 787-88 (1985), *aff'd*, 316 N.C. 547, 342 S.E.2d 522 (1986).

The defendant was not unfairly prejudiced by the witness' testimony on cross-examination. Rule 404(b) states that the defendant would be prejudiced if the evidence in question shows that he has in the past committed similar crimes. *State v. Cashwell*, 322 N.C. 574, 579, 369 S.E.2d 566, 569 (1988). The defendant's alleged possession of cocaine is not a crime which is "similar" to the crimes of rape, kidnapping or robbery nor does it indicate that the defendant has a proclivity towards violence. The witness' testimony also was tentative and was not explicit in that he stated that he was not certain that the defendant had cocaine. It is unlikely that the result at trial would have been different without this testimony about the cocaine since the evidence against the defendant concerning the crime for which he was tried was overwhelming.

No error.

Judges PHILLIPS and COZORT concur.

WILLIAM M. FLOTO, PEGGY V. FLOTO, AND STEVEN M. FLOTO, PLAINTIFFS v. PIED PIPER RESORT, INC., DEVOS ENTERPRISES, INC., MARVIN J. DEVOS, SYLVIA DEVOS, MARVIN DEVOS AND GLADYS DEVOS, DEFENDANTS

No. 8930SC5

(Filed 7 November 1989)

Corporations § 18 (NCI3d)— option to purchase stock—option not exercised within reasonable time

The trial court properly concluded that an option to purchase stock in defendant corporation had not been exercised by plaintiffs where the option and its amendment did not provide for a termination date; plaintiffs did not avail themselves of the benefits of the stock option for over seventeen months; and this was more than a reasonable amount of time to act. N.C.G.S. § 25-2-311.

Am Jur 2d, Corporations §§ 690, 691.

APPEAL by plaintiffs from *Downs, James U., Judge.* Judgment entered 31 December 1987 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 25 August 1989.

Plaintiffs instituted this civil action on 11 March 1987 to contest the validity of a corporation election pursuant to G.S. sec. 55-71. They also requested that the court determine the respective rights of the parties concerning stock ownership and voting rights. This matter was heard in a non-jury trial. Plaintiffs appeal from a decision in favor of the defendants.

James L. Blomeley, Jr. for plaintiff-appellants.

Jones, Key, Melvin & Patton, P.A., by Chester Marvin Jones, for defendant-appellees.

JOHNSON, Judge.

Judge Downs determined the corporation election to be valid. He further determined that the plaintiffs, collectively, owned 410 shares of Pied Piper Resort, Inc. ("Pied Piper") stock. Plaintiffs, however, in their complaint alleged ownership of 2,573 shares of Pied Piper stock. The pertinent underlying facts are as follows:

Pied Piper, a North Carolina corporation, consisted of various real and personal property assets in Cherokee County. Plaintiffs, William Floto and Peggy Floto, served as President and Secretary-Treasurer, respectively, of Pied Piper. Mr. and Mrs. Floto also served as corporate directors. The sole stockholder of the corporation was Devos Enterprises, Inc. ("Devos Enterprises"), another North Carolina corporation. Defendant Marvin J. Devos served as President of Devos Enterprises.

Prior to October 1985, William and Peggy Floto exchanged various parcels of real estate and other assets with Devos Enterprises. Among the exchanges was a transaction involving a small apartment complex known as the Sportsman Apartments and a parcel of land. The apartment complex was located in Anna Marie Beach, Florida, and was owned by the Flotos. The parcel of land was located in Cherokee County, North Carolina, and was owned by Devos Enterprises. This parcel of land later became known as Pied Piper. The Flotos gave Devos Enterprises a contract for deed on the Sportsman Apartments for which a stock option to purchase 2,163 shares of Pied Piper stock was exchanged. All parties agreed to an option price of approximately $84,600.00, which was to be paid prior to the Flotos' exercising the stock option. The stock option was undated as to the date of issuance and undated as to how long it was to remain in existence.

In October 1985, Pied Piper entered into a contract with Homer and Doris Shaffer, whereby the Shaffers were to purchase all outstanding shares of Pied Piper stock. In contemplation of the sale to the Shaffers, the option previously extended to the Flotos to purchase 2,163 shares of Pied Piper common stock was reduced to 2,090 shares. This reduction was contingent upon Devos Enterprises conveying an 8.22 acre tract of land in Cherokee County to Pied Piper, as an additional corporate asset. The deed for the 8.22 acre tract was never executed and/or delivered to Pied Piper. William Floto, thereafter, contacted Attorney William McKeever of Murphy, North Carolina, concerning the possibility of him representing Pied Piper in the transaction with the Shaffers. Numerous instructions regarding closing the pending sale to the Shaffers were subsequently delivered to Mr. McKeever. Although the instructions differed, they in effect provided that upon the closing of the Shaffer deal, William and Peggy Floto would sell to Devos Enterprises their stock option for approximately $84,600.00.

At this time, however, the Flotos still had not tendered the option price to Devos Enterprises.

On 29 May 1986, the Board of Directors of Pied Piper agreed to extend 410 shares of stock in the corporation from Devos Enterprises in exchange for the Flotos' agreeing to sell or exchange the Pied Piper Center and Laundry. Stock certificates for 410 shares of Pied Piper were issued to the Flotos, shortly thereafter.

The proposed sale of all outstanding stock in Pied Piper to the Shaffers was never consummated. As a result, a $10,000.00 deposit on the contract for sale was forfeited by the Shaffers and equally distributed between Devos Enterprises and the Flotos. The payment of approximately $84,600.00 was never paid to the Flotos by Devos Enterprises. In addition, the Flotos never paid the option price or exercised their option to purchase the 2,163 shares of Pied Piper stock. An effort to annul and void the contract for deed for the Sportsman Apartments and the recovery of monetary damages and equitable relief are pending in a Florida court.

The issue before this Court, however, is whether the trial court erred in concluding that the option to purchase stock in Pied Piper had not been exercised by the plaintiffs. We find no error and, therefore, affirm the judgment.

Questions of law and fact were decided by Judge Downs since none of the parties requested a jury trial. "Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary." *General Specialties Company v. Teer Company*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979). The trial judge acts as both judge and jury and therefore must evaluate the credibility of all witnesses. Through this evaluation, the judge must determine the relative weight and reasonable inferences to be drawn from each testimony. *Id.* Pursuant to G.S. sec. 1A-1, Rule 52(a)(1), Judge Downs had a duty to find facts, state separately his conclusions of law and enter an appropriate judgment. On appeal, this Court must review the evidence to determine if it supports the findings of fact and not substitute itself for the trial judge. *General Specialties Co., supra.*

In the case *sub judice*, the record clearly establishes that there is no dispute as to the existence of plaintiffs' option to purchase

2,163 shares of Pied Piper stock. There is also no dispute that the parties amended the terms of the stock option and reduced the shares to 2,090. The only dispute is whether the plaintiffs have exercised the option.

Judge Downs determined this issue to be governed by G.S. sec. 25-2-311, which provides that where an option contract lacks a specified duration, the law will impose upon the optionee a "reasonable and seasonable" amount of time in which to act. The determination of whether time is reasonable is conditioned upon the individual facts. *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986).

Under the facts in this case, the stock option was given to plaintiffs, William and Peggy Floto, prior to October 1985. The terms of the option were subsequently amended. Neither the original agreement nor the amended agreement addressed a termination date and, as such, Judge Downs properly applied G.S. sec. 25-2-311. Therefore, plaintiffs were required to act on the option within a reasonable and seasonable amount of time.

Judge Downs found that between October 1985 and March 1987, plaintiffs neither paid toward exercising the option nor exercised their rights pursuant to either the original or amended agreement. It was further found that in May 1986, stock certificates for 410 shares of stock in Pied Piper were issued to the Flotos in exchange for the Pied Piper Center and Laundry. However, no stock certificates were issued for the additional 2,163 shares plaintiffs assert ownership of. These findings are amply supported in the record by undisputed statements from both the plaintiffs and defendants. All parties acknowledged that no money was exchanged for the stock option and no stocks were purchased in reliance upon the terms of the stock option.

While it is clear that plaintiffs, as the optionees, had no obligation to purchase the Pied Piper stock, it is also clear that defendants, as the optionors, had no obligation to be indefinitely bound to sell the stock. *Sheppard v. Andrews*, 7 N.C. App. 517, 520, 173 S.E.2d 67, 69 (1970). Plaintiffs could have availed themselves of the benefits of the stock option for over seventeen months. We find this to be more than a reasonable and seasonable amount of time to act.

Following a careful review of the evidence in the record, we conclude that Judge Down's findings of fact and conclusions of law support his judgment. The judgment below is

Affirmed.

Judges EAGLES and GREENE concur.

TOMMY J. KING, DAVID B. KING, STEVEN J. KING, AND SALLY MELISSA KING, MINOR, BY HER GUARDIAN AD LITEM, WALTER BRODIE BURWELL, PLAINTIFFS v. CRANFORD, WHITAKER & DICKENS, A NORTH CAROLINA PARTNERSHIP, DWIGHT L. CRANFORD, CARY A. WHITAKER, BRADLEY A. ELLIOTT, WENDELL C. MOSELEY, HOWARD A. KNOX, JR., ROBERT D. KORNEGAY, JR., AND KNOX AND KORNEGAY, A NORTH CAROLINA PARTNERSHIP, DEFENDANTS

No. 896SC133

(Filed 7 November 1989)

Election of Remedies § 4 (NCI3d)— malpractice action—participation in declaratory judgment action—no election of remedies

When the executor of an estate brought a declaratory judgment action to determine distribution pursuant to a codicil, and plaintiffs were named as defendants in that action, their participation in the declaratory judgment action and ultimate settlement of their claim against the estate were made necessary by the actions of others and were not an election of remedies; therefore, plaintiffs were free to pursue their legal malpractice claim against attorneys who represented them as defendants in a prior caveat proceeding which ended unfavorably to them and declared the codicil to be valid.

Am Jur 2d, Attorneys at Law §§ 197 et seq.

APPEAL by plaintiffs from *Brown (Frank R.), Judge*. Judgment entered 26 October 1988 in Superior Court, HALIFAX County. Heard in the Court of Appeals 13 September 1989.

This is an action for legal malpractice. Plaintiffs allege that defendant-attorneys negligently represented them in a challenge to a codicil to a will. The facts of that underlying case are set

out in full in *In re Will of King*, 80 N.C. App. 471, 342 S.E.2d 394, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986). In brief, at his death on 9 August 1983, Emmett J. King left a will and related trust agreement, both executed on 12 February 1982, and a codicil executed the day of his death. He also left a Corporate Stock Redemption Agreement with his business partner, providing that upon the death of one partner, the other partner would purchase the deceased's company stock. The codicil changed the distribution made in the will, the related trust and the stock redemption agreement.

Plaintiffs petitioned the clerk of Superior Court to probate the will. King's eldest daughter and grandson filed a caveat and put forth the codicil for probate. The clerk admitted the will alone to probate, but given that a factual issue was raised, transferred the matter to Superior Court for trial before a jury. In that caveat proceeding, plaintiffs here were named defendants and were represented by defendant-attorneys here. The jury declared the codicil to be valid. That verdict was affirmed by this Court and discretionary review was denied by the Supreme Court.

Following the jury's declaration of the codicil's validity, the Executor of Emmett King's estate, Planters National Bank & Trust Company, filed a declaratory judgment action alleging that the Executor "understands and is prepared to administer the estate according to the terms of the Will since the terms thereof are clear but the terms of the Codicil are not clear." The Executor requested that the court interpret the terms of the codicil since "the Codicil purports to devise property contrary to the terms of the Will and the Petitioner is uncertain as to the meaning of the terms of the Codicil." Anyone who might have received property under the will, codicil and trust agreement was joined as a defendant in the declaratory judgment action. During preparation for trial, the parties settled the dispute and agreed upon a distribution of Emmett King's estate different from that set out in either the will or codicil.

In this malpractice action, plaintiffs allege that defendant-attorneys negligently represented them in the caveat proceeding. Plaintiffs allege defendants were negligent in failing to properly prepare for or represent them at trial. Among other allegations of negligence, plaintiffs allege that defendants failed to present any evidence from Clara "Dee" King, the daughter, who was an

attorney, who drafted the codicil and was responsible for its execution. Plaintiffs allege that defendant-attorneys' malpractice caused them to receive less from Emmett King's estate than they would have received had the codicil been found invalid at the caveat proceeding.

Defendants moved for summary judgment and their motion was granted. From the order granting defendants' motion, plaintiffs appeal.

Beskind & Rudolf, by Donald H. Beskind and Andrea A. Curcio, for plaintiff appellants.

Baker, Jenkins & Jones, by Ronald G. Baker, for defendants Bradley A. Elliott and Wendell C. Moseley; Battle, Winslow, Scott & Wiley, by J. Brian Scott, for Cranford, Whitaker & Dickens, a North Carolina Partnership, Dwight L. Cranford and Cary A. Whitaker; and Valentine, Adams, Lamar, Etheridge & Sykes, by William D. Etheridge and L. Wardlaw Lamar, for defendants Howard A. Knox, Jr., Robert D. Kornegay, Jr., and Knox and Kornegay, a North Carolina Partnership.

ARNOLD, Judge.

Plaintiffs contend the trial court erred in granting defendants' motion for summary judgment. Plaintiffs argue that they did not elect their remedy by agreeing to a settlement of the declaratory judgment action.

Summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56. The parties to the malpractice action agreed on a set of stipulated facts for purposes of the summary judgment motion, so there is no genuine issue as to any material fact. Defendants' motion raises the question whether, on the stipulated facts, defendants are entitled to judgment as a matter of law.

The legal issue raised on defendants' motion is whether plaintiffs elected their remedy by settling the declaratory judgment action filed by the Executor of Emmett King's estate. Defendants argue this case is controlled by two decisions of this Court: *Douglas v. Parks*, 68 N.C. App. 496, 315 S.E.2d 84, *disc. rev. denied*, 311 N.C. 754, 321 S.E.2d 131 (1984), and *Stewart v. Herring*, 80 N.C. App. 529, 342 S.E.2d 566 (1986). In *Douglas*, plaintiff hired an at-

torney to pursue a personal injury claim arising from an automobile collision. The case went to trial, but a directed verdict was entered against the plaintiff. Plaintiff next retained additional counsel to assist the original attorney. Together, counsel filed a motion to vacate the judgment and award a new trial. Before the motion was heard, plaintiff settled his personal injury claim. Plaintiff next filed a malpractice action against his original attorney, alleging that if the original attorney had provided adequate representation at trial, plaintiff would have recovered damages at trial. This Court affirmed a directed verdict in favor of the attorney-defendant, stating that plaintiff had the option to rescind or affirm the settlement and his election to affirm it precluded him from bringing the malpractice action. *Id.*

In *Stewart*, plaintiff retained the defendant-attorney to represent her in an action for alimony. The action was settled when the plaintiff signed a separation agreement which relinquished any claim for alimony. Plaintiff's husband then sued plaintiff for divorce. Plaintiff, believing she was entitled to alimony, hired new counsel and counterclaimed for alimony and to set aside the first separation agreement. Plaintiff negotiated a new agreement for alimony and settled her claim against her husband under a consent judgment in which the marital property was distributed and plaintiff's counterclaim dismissed. Plaintiff then filed a malpractice claim against her first attorney for failure to obtain alimony in the first agreement. The trial court granted summary judgment in favor of the attorney-defendant. This Court affirmed on the basis of *Douglas v. Parks and Davis v. Hargett*, 244 N.C. 157, 92 S.E.2d 782 (1956), writing:

> As we read those cases if a party contends that he or she was deprived of a legal claim because of the action of another and *he pursues the claim against the original defendant* he cannot then make a claim against the party he says caused him to lose all or part of the original claim. This is so even if the settlement the plaintiff is able to make on the original claim is not as good as it would have been if there had been no wrongful action by the third party.

Stewart, 80 N.C. App. at 531, 342 S.E.2d at 567 (emphasis added).

The circumstances of this case are distinct from those in *Douglas* and *Stewart*. The plaintiffs in *Douglas* and *Stewart* each brought a claim for monetary relief. Then, when their claims were af-

fected by their attorneys' alleged negligence, the plaintiffs chose to reassert and settle their original claims. Those plaintiffs could have chosen instead to sue their attorneys for malpractice.

In this case, the plaintiffs did not have these options. The declaratory judgment action was brought by the Executor of King's estate pursuant to N.C.G.S. § 1-254, which in pertinent part provides:

> Any person interested under a . . . will . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.

The plaintiffs here were named defendants in that action pursuant to N.C.G.S. § 1-260, which in pertinent part provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . .

The plaintiffs here did not choose to pursue their underlying claim rather than their malpractice action. Their participation in the declaratory judgment action and ultimate settlement of their claim against the estate were made necessary by the actions of others and were not an election of remedies. Plaintiffs are free to pursue their legal malpractice claim. The summary judgment order is reversed.

Reversed and remanded.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIAM HERMAN GOLDEN

No. 8828SC1430

(Filed 7 November 1989)

Searches and Seizures § 43 (NCI3d) — motion to suppress evidence — untimeliness — waiver of right to contest constitutionality on appeal

When defendant's motion to suppress evidence was not timely, was not in writing, and was not supported by an affidavit, it failed to meet the requirements of N.C.G.S. § 15A-977,

and such failure amounted to waiver of defendant's right to contest on appeal the admission of evidence on statutory or constitutional grounds.

Am Jur 2d, Motions, Rules, and Orders §§ 11-16.

APPEAL by defendant from *Sherrill, W. Terry, Judge.* Judgment entered 18 August 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 August 1989.

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

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Robert P. Tucker, II, for defendant-appellant.

JOHNSON, Judge.

On 12 December 1987, at approximately 7:00 p.m., defendant William Herman Golden was driving his automobile on I-40 in Buncombe County. Ray Anders, who is a Biltmore Estates policeman or security guard and also is a Buncombe County special deputy, was on his way home from work at the same time. He noticed that defendant was driving erratically and observed defendant's vehicle weaving from the right side of the road, then across the center line, then back to the right lane. Officer Anders observed this several times as he followed defendant's vehicle for one-quarter to one-half mile. He decided to stop the vehicle and turned on his siren for a minute to a minute and a half before defendant stopped. Upon approaching defendant's vehicle, Officer Anders found a small child in the car with defendant. He also observed a strong odor of alcohol on defendant. Officer Anders asked defendant to step out of his car and perform a sobriety test of touching his fingers to his nose while his eyes were closed. Defendant was unable to do this. Anders decided that defendant should not be driving and radioed for a Highway Patrolman. He also detained defendant until Trooper Kerr arrived about five minutes later. Defendant was not on Biltmore Estates property during the time Officer Anders observed and stopped him.

Officer Anders informed Trooper Kerr of what he had observed and defendant later stipulated that Trooper Kerr made an independent determination of defendant's condition. Trooper Kerr took defendant into custody, brought him to the courthouse, and put him through the usual processing procedures. Defend-

ant submitted to a breathalyzer test which showed an alcohol concentration of 0.17.

Defendant was charged with driving while impaired in violation of G.S. sec. 20-138.1 and failing to have automobile liability insurance in full force and effect in violation of G.S. sec. 20-313. Defendant pleaded not guilty to both counts in district court on 7 March 1988 and was found guilty of both counts. The district court imposed a 60-day sentence suspended for one year upon conditions. Defendant appealed to superior court for a trial de novo.

Defendant's case came on for trial at the 18 August 1988 session of superior court. Prior to jury selection, defendant orally moved to dismiss the charges on the grounds that his arrest was illegal and unconstitutional and that therefore, defendant claimed, any evidence derived therefrom should be excluded. The court denied the motion and defendant entered a plea of guilty on the DWI charge. The superior court judge imposed a 30-day sentence suspended for one year upon condition that defendant be incarcerated for 24 hours, and pay a $50 fine and costs. Defendant appealed to this Court in apt time.

By this appeal defendant argues that the trial court erred in denying his motion to dismiss. In addressing this question, we first note that G.S. sec. 15A-1444(e) states, in pertinent part, the following:

> Except as provided in subsection (a1) of this section [not applicable to this case] and G.S. 15A-979, . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Pursuant to this provision, we must conclude that defendant has no right to review of a motion to dismiss because he entered a plea of guilty in superior court. He also has not petitioned for review by writ of certiorari. However, the substance of defendant's motion, which we believe is correctly denominated a motion to suppress evidence, actually falls under the exception quoted above for G.S. sec. 15A-979. *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980). That provision states in subsection (b) that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judg-

ment entered upon a plea of guilty." Subsection (d) of G.S. sec. 15A-979 also provides that a motion to suppress is the "*exclusive method* of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974." (Emphasis added.) The grounds for suppression in G.S. sec. 15A-974 are if exclusion is required by the Constitution of the United States or the Constitution of North Carolina, or if the evidence was obtained as a result of a substantial violation of Chapter 15A of the General Statutes, the Criminal Procedure Act.

Defense counsel stated at trial that he moved to dismiss "for the fact that there is not evidence in this case that was Constitutionally obtained that would lead to a conviction." He went on to contend that the stopping of defendant on I-40 by Anders was an illegal and unconstitutional arrest, and "as such any testimony derived therefrom would be excluded under the United States Constitution and the North Carolina Constitution." Clearly, defendant was challenging the admissibility of evidence, presumably the result of the breathalyzer test, on constitutional grounds. Therefore, pursuant to G.S. sec. 15A-979(d), defendant's exclusive method for doing this was a motion to suppress evidence.

Our review of the record discloses that defendant failed to take the steps necessary to move to suppress evidence. G.S. sec. 15A-977(a) states in part that

> [a] motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion.

G.S. sec. 15A-975(a) also provides that such a motion must be made *prior* to trial "unless the defendant did not have reasonable opportunity to make the motion before trial," or when defendant has not received the prescribed statutory notice from the State of its intention to use the evidence, or when additional pertinent facts are discovered during trial. *State v. Satterfield, supra.* Neither of these last two exceptions applies to the instant case, and defendant had ample opportunity to move to suppress since over five months elapsed between defendant's trial in district court and his superior court trial. No advance notice by the State of its intention to use evidence is required when a misdemeanor is appealed for trial de novo in superior court, as in the instant case. G.S. sec.

15A-975(c) and Official Comment; *State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982), *cert. denied*, 307 N.C. 701, 301 S.E.2d 395 (1983).

Treating defendant's motion to dismiss as one to suppress evidence, defendant has the burden of establishing that the motion was proper in form and timely as set forth above. *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984). Defendant's motion was untimely, not in writing, and not supported by an affidavit. Our Supreme Court has held that a defendant's failure to meet the requirements of G.S. sec. 15A-977 waives his right to contest on appeal the admission of evidence on statutory or constitutional grounds. *Id.* Defendant has totally failed to comply with these statutory requirements and has therefore waived his right to appeal.

Dismissed.

Judges EAGLES and GREENE concur.

BENJAMIN FRANKLIN BOWMAN, PLAINTIFF v. JOYCE OVERMAN BOWMAN, DEFENDANT

No. 8815DC1051

(Filed 7 November 1989)

Divorce and Alimony § 30 (NCI3d)— equitable distribution—all marital property not listed—assets valued on date of separation—child support irrelevant

The trial court's equitable distribution judgment is vacated and remanded where it failed to list all the parties' properties and make appropriate findings with respect to them; however, the court properly failed to find as marital property money which was allegedly in a safe in the parties' house approximately five months before they separated, since marital assets are valued on the date of separation, and properly failed to take into consideration defendant's contention that he supported the parties' minor children for over two years after the date of the separation, since child support is irrelevant to equitable distribution under the provisions of N.C.G.S. § 50-20(f).

Am Jur 2d, Divorce and Separation §§ 878 et seq.

APPEALS by plaintiff and defendant from *Betts, Judge*. Judgment entered 27 April 1988 in District Court, CHATHAM County. Heard in the Court of Appeals 14 April 1989.

Gunn & Messick, by Robert L. Gunn, for plaintiff appellant-appellee.

Prickett and Corpening, by J. H. Corpening, II, for defendant appellee-appellant.

PHILLIPS, Judge.

The equitable distribution judgment appealed by both parties undertakes to divide the parties' marital property valued at $399,659 equally, and to achieve that balance requires defendant to pay plaintiff $51,737.

DEFENDANT'S APPEAL

In distributing the marital assets equally the court found, *inter alia*, that defendant already had possession of various items of personal property cumulatively valued at $75,433.50. Her first contention is that the court's findings as to the following items are not supported by competent evidence:

Item		Value
(g)	1970 Volkswagen automobile	$ 500
(i)	Dining room furniture	1,000
(j)	Kitchen small appliances, pots, pans, dishes, china, silverware and crystal	750
(l)	Living room furniture, at farm	600
(m)	Two bedroom suites, including mattress[es] and springs	300
(o)	Mirrors and trunks, at farm	500
(p)	Curtains, at farm	300
(q)	Linens and pillows, at farm	100
(r)	Blankets and rugs, at farm	150
(t)	Recliner, at farm	250
	Total	$4,450

The findings as to items (j), (o), (p), (q) and (r) are clearly supported by evidence, defendant does not argue otherwise, and those findings are affirmed. The findings as to items (g) and (t) are supported by evidence that she gave the car to their adult son and took

the recliner, and we affirm those findings. But confusion surrounds the remaining three items—(i), (l) and (m)—and the findings as to them are vacated; because the evidence of both parties indicates that they own other dining room, living room, and bedroom furniture not accounted for in the judgment, an equitable distribution judgment that fails to list all of the parties' properties and make appropriate findings with respect to them is defective, *Cornelius v. Cornelius*, 87 N.C. App. 269, 360 S.E.2d 703 (1987), and accuracy will be promoted by a determination that includes all such articles owned by the parties. Upon remand the court should determine the status, whereabouts and value of all the various sets of furniture testified to by the parties and distribute those maritally owned. We note that if defendant has sets of dining and living room furniture they apparently were not taken from the farm, since plaintiff acknowledged that he took the dining room set from the farm and that the living room furniture remains there. While completing the distribution of the parties' furniture, the court should also note that the evidence indicates that the following articles of personal property, not mentioned in the judgment, are either marital or separate property and that appropriate findings with respect thereto are necessary: (1) Inventory in the parties' store; (2) the refrigerator at the Pender County house; (3) a key machine and keys at the store; (4) shelving, a meat and beer cooler, a produce cooler, and a milk cooler at the store; and (5) several items of antique furniture which plaintiff testified were his separate property, but defendant maintains are marital property.

Defendant also assigns as error the following findings of the trial court:

> 12. That shortly after October 1, 1986 the defendant, with the assistance of one or more other persons, entered said store premises and took and carried away stock in goods and equipment belonging to plaintiff and worth $19,450.00, without the knowledge, permission or consent of plaintiff, and converted same to her own use.
>
> 20. That it is equitable that defendant reimburse plaintiff for the value of the property taken by her as set forth in Finding of Fact no. 12, and that the distributive award referred to in Finding of Fact no. 18 be increased by said amount, to-wit: $19,450.00.

These findings are unsupported by evidence and we vacate them, for plaintiff concedes that the merchandise defendant removed was purchased with funds from the parties' joint bank accounts, which were marital property. Plaintiff's argument that even so the findings are correct because after defendant had removed most of the funds the remaining funds became his "separate" property and merchandise purchased with it was his separate property is without basis; because property acquired through the use of marital property has the same character. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985). Therefore, upon remand the merchandise so purchased must be treated as marital property and defendant credited accordingly.

Defendant's final contention—that the court erred in requiring her to reimburse plaintiff for one-half of the taxes paid on the parties' Pender and Montgomery County real estate for the tax years 1984, 1985 and 1986 since she did not live at either location after they separated—has no basis and is overruled. A debt incurred during marriage for the joint benefit of husband and wife is a marital debt, and taxes on maritally owned property is such a debt. *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

PLAINTIFF'S APPEAL

Plaintiff's first assignment of error—that the court erred in refusing to find that defendant took and sequestered to her own use a $3,469 checking account the parties had at First Union National Bank in Siler City—is acknowledged by defendant to be well-founded and upon remand the court will so find.

The next error assigned—failing to find as marital property $46,000 that he claims was in a safe at the parties' Pender County house approximately five months before they separated—has no merit and we overrule it for two reasons. First, defendant testified that there was never more than $2,500 in the safe and this conflict in the evidence was for the finder of fact to resolve. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Second, since marital assets are valued on the *date of separation*, *Sharp v. Sharp*, 84 N.C. App. 128, 351 S.E.2d 799 (1987), plaintiff's testimony that five months before then funds were in the safe is no basis for overturning the court's failure to find that the money was there five months later.

The final error cited—finding that the equal division of the marital property was equitable although *he* supported the parties' two minor children for over two years after the date of separation—is also overruled, since child support is irrelevant to equitable distribution under the provisions of G.S. 50-20(f).

In vacating the judgment and remanding the matter to the District Court for further proceedings consistent herewith we leave standing the findings of fact not expressly vacated.

Vacated and remanded.

Judges PARKER and COZORT concur.

BLANCHE LOUISE HARTMAN BRITT, PLAINTIFF v. YVONNE G. UPCHURCH, DEFENDANT

No. 8910SC347

(Filed 7 November 1989)

Wills § 28.3 (NCI3d)— devise of residence—question as to vacant lot next door—latent ambiguity—evidence of testator's intent admissible

Testator's devise to his wife for life of "my residence at 2615 Cooleeme (sic) Street" was a latent ambiguity, since it was not clear whether testator intended to include an adjacent vacant lot as a part of his residence, and the trial court erred in excluding defendant's affidavit that the testator made statements at the time of the execution of his will that he considered the lots separate properties.

Am Jur 2d, Wills §§ 1281, 1282.

APPEAL by defendant from *Bailey (James H. Pou), Judge.* Judgment entered 8 February 1989. Defendant also appeals the entry of the interlocutory order excluding evidence entered 13 January 1989 in Superior Court, WAKE County. Heard in the Court of Appeals 12 October 1989.

Plaintiff brought this action to quiet title to Lot 37 on Cooleemee Street in Raleigh, North Carolina. Lot 37 adjoins Lot 36 on which

is located a dwelling house. County tax records show Lot 36 as "2615 Cooleemee" and Lot 37 as "2613 Cooleemee." Plaintiff is the daughter of Walter Schley Hartman and Lula Lee Hartman. Lula Lee Hartman died in 1976. The defendant is the daughter of Mr. Hartman's second wife, Ada Cassie Hartman, by a previous marriage. Mr. Hartman married Ada Cassie Hartman in 1978.

Mr. Hartman executed his will on 12 March 1979. The will provided: "I give, devise and bequeath unto my said wife [Ada Cassie Hartman] my residence at 2615 Cooleeme (sic) Street, Raleigh, North Carolina, for the term of her natural life. I give and devise the remainder interest in said property to my daughter, BLANCHE LOUISE HARTMAN BRITT." Defendant's mother, Ada Cassie Hartman, was the beneficiary under the residuary clause of Mr. Hartman's will.

Ada Cassie Hartman died April 5, 1988. Her will designated her daughter, Yvonne Upchurch, as the sole beneficiary of her estate.

Nichols, Miller & Sigmon, P.A., by R. Bradley Miller, for plaintiff-appellee.

Merriman, Nicholls & Crampton, P.A., by William W. Merriman, III and Elizabeth Anania, for defendant-appellant.

LEWIS, Judge.

The issue below in this case was whether Mr. Hartman intended for the adjoining lot, No. 37, to pass with the "residence," Lot 36, under the above quoted passage, or whether it was intended to pass in fee to Ada Cassie Hartman under the residuary clause. Defendant assigns as error the entry of summary judgment against her in favor of the plaintiff. Defendant also assigns as error the failure of the trial court to consider the affidavit of Thomas F. Adams, Jr., the attorney who prepared Mr. Hartman's will. We agree with the defendant and reverse.

At the hearing on summary judgment, the trial court refused to consider the affidavit of Thomas F. Adams, Jr., the attorney who prepared Mr. Hartman's will. In his affidavit, Mr. Adams stated:

> It is my best recollection that Mr. Hartman mentioned to me on the day he came to execute his Will that he owned a vacant lot adjacent to the lot on which his residence was located.

> It is also my best recollection that I suggested that the Will be redrawn to clarify that this lot was or was not deemed to be a part of the lot on which his residence was located. My best recollection of his response was to the effect that he had had one or more heart attacks and was very ill; that he wanted to sign his Will without waiting for it to be rewritten; that he wanted his Wife to have the vacant lot and the residuary clause was sufficient to devise it to her; that everyone knew that it was not a part of his residence lot and had never been cleared and made a part of the yard (he said it was covered by trees and undergrowth); and that the residence lot and the vacant lot were purchased at separate times.

Defendant argues that this evidence is admissible as evidence of the testator's intent when he disposed of the two lots. Extrinsic evidence surrounding the circumstances of a devise is admissible when there is a latent ambiguity. *Redd v. Taylor*, 270 N.C. 14, 22, 153 S.E.2d 761, 766 (1967). In the present case, whether "my residence at 2615 Cooleeme (sic) Street" includes the adjacent lot is a latent ambiguity as to what land was included under that designation.

Plaintiff has submitted her own affidavit showing that Mr. Hartman had built a garage and tool shed on Lot 37, a concrete sidewalk from the house to the garage, and partially paved the driveway. Mr. Hartman also erected a doghouse and a pen on Lot 37. All of this evidence was admitted at the hearing on summary judgment to show that the testator and his family treated the two lots as one single residence. In support of her position, plaintiff cites *Thomas v. Summers*, 189 N.C. 74, 126 S.E. 105 (1925), where the testatrix devised to the defendant "my home place on McIver Street." At the time of her death, she owned two lots on McIver Street, one purchased 29 October 1915 and the other on 19 November 1915. Shortly before her death, the testatrix had contracted to have an iron fence placed around the two lots. Plaintiff cites this case for the proposition that extrinsic evidence is admissible to prove that the testator treated the two lots as a single residence. However, the court also considered statements made by the testatrix that she considered the two lots as "my home place." *Id.* at 75, 126 S.E. 106. The court rejected the argument that the statements were incompetent, stating, "if there be a *patent* ambiguity in an instrument, the instrument must speak for itself, and evidence *dehors* cannot be resorted to . . . in cases

of *latent* ambiguity, evidence *dehors* is not only competent, but *necessary." Id.* at 76, 126 S.E. 107 (emphasis original), *accord, Redd v. Taylor*, 270 N.C. 14, 22, 53 S.E.2d 761, 766 (1967).

In the present case, whether the testator considered the adjacent lots to be his single residence is a latent ambiguity. The defendant's affidavit is admissible to show his intent. Both parties have offered affidavits showing contrary intent—the plaintiff's affidavit tends to show that the testator treated the two lots as a single residence; the defendant's affidavit shows that the testator made statements at the time of the execution of his will that he considered the lots separate properties. The weight and credibility to be given to these statements is for the jury to determine as finder of fact. Material issues of fact exist.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

CITY OF RALEIGH v. LEON M. HOLLINGSWORTH, ROSE S. HOLLINGSWORTH, ROBINSON O. EVERETTE, LINDA M. EVERETTE, THE COUNTY OF WAKE

No. 8910SC82

(Filed 7 November 1989)

Eminent Domain § 13 (NCI3d); Attorneys at Law § 7.3 (NCI3d)—inverse condemnation—right to attorney fees

It is consistent with N.C.G.S. § 40A-8(c) to award attorney fees when, as in this case, a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking.

Am Jur 2d, Eminent Domain §§ 465, 476.

APPEAL by plaintiff from order entered 29 September 1988 in WAKE County Superior Court by *Judge Coy E. Brewer, Jr.* Heard in the Court of Appeals 12 September 1989.

Deputy City Attorney Francis P. Rasberry, Jr., for plaintiff-appellant.

Nichols, Miller & Sigmon, P.A., by M. Jackson Nichols and R. Bradley Miller, for defendant-appellees.

BECTON, Judge.

In this condemnation action, defendants seek attorney fees for plaintiff's alleged taking of property not described in plaintiff's Complaint and Declaration of Taking. The trial judge found that defendants sought (and the jury awarded) compensation, in part, for an inverse condemnation of defendant's property. On that basis, the trial judge awarded defendants $3,500.00 in attorney fees. Plaintiff appeals, and we affirm.

I

Plaintiff, the City of Raleigh (the "City"), is a municipal corporation duly organized and existing under the laws of this State. Defendants Leon M. Hollingsworth and Rose M. Hollingsworth are the owners, as tenants by the entirety, of a one-half undivided interest in real property located in the vicinity of Gorman Street and Sullivan Drive in Raleigh. Defendants Robinson O. Everette and Linda M. Everette own, as tenants by the entirety, a one-half undivided interest in the same property. The status of defendant County of Wake is not germane to this appeal.

On 12 May 1988, the City filed a Complaint, Declaration of Taking, and Notice of Deposit, declaring it to be "necessary and in the public interest to acquire by condemnation the real property interest described in Exhibit A . . . ." Exhibit A is denominated "Description of Area Taken" and delineates by metes and bounds the extent of the land claimed by the City. For the taking, the City sought to compensate defendants in the sum of $20,000.00.

On 22 December 1986, defendants filed an Answer and Counterclaim. They alleged that the City had taken, in addition to the property described in Exhibit A, an additional .047-acre parcel. On 22 January 1987, the City filed its Answer to the Counterclaim, denying defendants' allegation. Immediately prior to trial, however, the parties stipulated that the City had taken the parcel in fee.

A trial on the issue of compensation was held during the week of 8 August 1988, and the jury awarded damages to defendants in the amount of $26,402.00. On 6 September 1988, the trial judge heard defendants' motion for attorney fees. Finding that the jury had awarded compensation in part for inverse condemnation, the judge awarded fees to defendants. The City appealed.

II

The City contends that it complied with the statutory requirements for describing the nature and extent of the property it acquired from defendants. Therefore, it argues, no basis exists for the trial judge's awarding of attorney fees.

N.C. Gen. Stat. Sec. 40A-51(a) (1984) provides that if a condemnor takes property for which no complaint containing a declaration of taking has been filed, the landowner may initiate an action to seek compensation for that taking. Such an action is one for "inverse condemnation." *See City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 108, 338 S.E.2d 794, 798 (1986). Under N.C. Gen. Stat. Sec. 40A-8(c) (1984), attorney fees may be assessed against a condemnor "[i]f an action is brought against a condemnor under . . . [Section] 40A-51 seeking compensation for the taking of any interest in property by the condemnor and judgment is for the owner . . . ." Our review of the record satisfies us that the judge's finding that defendants sought and the jury awarded damages for inverse condemnation is correct.

The description in Exhibit A does not encompass the .047-acre parcel, and the City denied in its Answer to defendant's Counterclaim that it had taken this parcel. We reject, therefore, the City's contention that its Complaint and Declaration of Taking included this area within the condemned property. Moreover, the compensation awarded defendants by the jury, some $6,000.00 greater than the sum offered by the City, must have been based, in part, upon the City's taking of that parcel.

The City argues, however, that because defendants dismissed their Counterclaim for inverse condemnation prior to trial, attorney fees could not be awarded them under Section 40A-8(c). We disagree. Defendants dismissed the Counterclaim in consequence of a stipulation entered into between the parties immediately before trial began. The record indicates that the stipulation, in effect, was the City's concession that it had taken the parcel in fee, as alleged by de-

fendants. We hold that it is consistent with Section 40A-8(c) to award attorney fees when, as in this case, a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking. Therefore, we overrule the City's assignments of error.

III

For the foregoing reasons, the judgment of the trial court awarding attorney fees to defendants is

Affirmed.

Judges ARNOLD and COZORT concur.

COPLEY TRIANGLE ASSOCIATES, A FLORIDA GENERAL PARTNERSHIP, D/B/A THE MARKETPLACE, PLAINTIFF-APPELLEES v. APPAREL AMERICA, INC., A FLORIDA CORPORATION; WEST SIDE FASHIONS, INC., A FLORIDA CORPORATION D/B/A VOGUE INTERNATIONAL; GERALD ROSENBLOOM, INDIVIDUALLY; IRVING (RICHARD) ROSENBLOOM, INDIVIDUALLY; AND RICHMOND GARMENT COMPANY, INC., A VIRGINIA CORPORATION, DEFENDANTS-APPELLANTS

No. 8810SC1289

(Filed 7 November 1989)

Process § 9 (NCI3d); Corporations § 1.1 (NCI3d) — disregarding corporate entity — nonresident defendants — jurisdiction of N.C. court

Defendant West Side Fashions was the alter ego of the nonresident Richmond Garment Co., Inc. and the nonresident individual defendants, and defendants were therefore subject to the personal jurisdiction of the N. C. court where it was alleged in the verified complaint that plaintiff leased shopping center space to defendant West Side; the lease was executed by the individual defendants who accepted a check for $36,000 to defray the alleged costs of making the premises suitable for an apparel store; only a small part of the amount was spent in remodeling the premises and the rest was converted by the individual defendants; the store was never fully stocked as an apparel business and operated on a skeleton basis for

a few months; one night the individual defendants and others removed all fixtures, property, and apparel from the leased premises; and defendant West Side was dissolved and had no assets.

Am Jur 2d, Corporations §§ 45, 66.

Judge BECTON concurs in the result.

APPEAL by defendants Apparel America, Inc., Gerald Rosenbloom, Irving (Richard) Rosenbloom, and Richmond Garment Company, Inc. from *Herring, Judge*. Orders entered 15 August 1988, *nunc pro tunc* 10 August 1988, and 12 August 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1989.

Barrow and Redwine, by H. Spencer Barrow, for plaintiff appellee.

David S. Crump for defendant appellants.

PHILLIPS, Judge.

This action—for breach of contract, fraud, and unfair trade practices under G.S. 75-1, *et seq.*—arose out of the leasing of shopping center space in Morrisville, North Carolina by West Side Fashions, Inc., a Florida corporation that is now defunct and virtually without records. Both West Side Fashions, Inc. and Apparel America, Inc. are wholly owned subsidiaries of Richmond Garment Company, Inc., a Virginia corporation, whose stock is wholly owned by defendants Gerald and Irving Rosenbloom, who reside in Florida and are the only directors and officers of all the corporate defendants. The main question raised by the appeal is whether the trial court has personal jurisdiction of the nonresident individual defendants and the foreign corporation Richmond Garment Company, Inc.; not so much because of their direct contacts with the State, which were not extensive, but because of the substantial activities of West Side Fashions, Inc., their alleged *alter ego*, in this State. The trial court held that it does and we agree.

The allegations in the verified complaint bearing upon the question are to the effect that: On 24 April 1986 plaintiff leased the shopping center space involved to West Side Fashions, Inc. for a term of five years; the defendant Rosenblooms executed the lease for the named lessee and under the terms thereof received a check for $36,000 payable to West Side to defray the alleged

cost of making the premises suitable for its apparel store; only a small part of the amount received was spent in remodeling the premises and the rest was converted by the individual defendants; the store was never fully stocked as an apparel business and operated on a skeleton basis for a few months. During the night of 20 September 1987 defendants Irving and Gerald Rosenbloom and others removed all fixtures, property and apparel from the leased premises and defendant West Side has been dissolved and has no assets. The corporate defendants constituted and were operated as one business under the domination and control of the individual defendants, whose intention and purpose was not to operate a *bona fide* retail outlet on the leased premises, but to defraud plaintiff of the $36,000 it advanced to upfit the premises and the rental due on the property.

That the court has jurisdiction over West Side Fashions, Inc., the now defunct and penniless lessee of the local real estate, is obvious and not contested. What is contested—and the appeal turns on the outcome—is that defendant West Side is a mere shell corporation through which its parent, Richmond Garment Company, Inc., and the individual defendants acted in this instance. For if West Side Fashions was but the *alter ego* of the nonresident appealing defendants, its acts were their acts as well and could have subjected them to the court's jurisdiction, since it is the law here, and in most other jurisdictions as well, that when a corporation is a mere instrument of others its corporate veil may be disregarded, and those who have acted through it held accountable when to do otherwise would result in injustice. *Pilot Title Insurance Co. v. The Northwestern Bank*, 11 N.C. App. 444, 450, 181 S.E.2d 799, 803 (1971). Factors which can prompt the piercing of the corporate veil include the inadequate capitalization of the controlled corporation, the siphoning of its funds by those who dominate it, the absence of adequate corporate records, and the debtor corporation's insolvency. *Glenn v. Wagner*, 313 N.C. 450, 458, 329 S.E.2d 326, 332 (1985). "[The] rule with regard to piercing the corporate veil is broad enough to encompass both those situations where there is direct stock ownership of a subsidiary corporation by a parent corporation, and stock control as exercised through a mutual shareholder . . . ." *Glenn v. Wagner*, 313 N.C. at 459, 329 S.E.2d at 333.

The record in this case contains a *prima facie* showing as to all the conditions that indicate a sham corporation and justify

disregarding its corporate veil. Though West Side Fashions is a wholly owned subsidiary of Richmond Garment, and though the individual defendants were its only officers and directors and own all the stock of Richmond Garment, neither Richmond Garment nor the individual defendants, in responding to plaintiff's interrogatories, could produce any information as to West Side Fashions's capitalization; or could account for more than $13,552.63 of the $36,000 it received from plaintiff for "upfitting" the leased premises; or could identify who made the decision to vacate plaintiff's premises; or could state what became of West Side's assets upon its dissolution. This professed ignorance of what they were legally bound to know, along with plaintiff's evidence to the effect that most of the money advanced for upfitting the leased premises was not used for that purpose and that the store was operated on only a token basis during the few months involved, indicates that West Side Fashions was a sham entity without either capital, funds, or records of its own and a mere front for the appealing defendants. These *prima facie* facts support the conclusion that the acts of the sham corporation were in effect those of its masters, the individual defendants and Richmond Garment Company, and that injustice would result if plaintiff could not look to them for redress. Under our long arm statute, G.S. 1-75.4, the contacts that the appealing defendants had with this State through their *alter ego* subjected them to the jurisdiction of this State and exercising that jurisdiction will not violate due process of law as laid down by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945).

The individual defendants further contend that the service of process upon them by certified mail at their respective offices, rather than at their residences, as Rule 4, N.C. Rules of Civil Procedure provides, was invalid. The contention has no merit. The purpose of Rule 4 is to notify a party served of the litigation involved and that purpose is met when the notice is by certified mail addressed to the party and delivered to him. *Waller v. Butkovich*, 584 F.Supp. 909, 926 (M.D.N.C. 1984).

Affirmed.

Judge LEWIS concurs.

Judge BECTON concurs in the result.

IN THE MATTER OF: THE PROPOSED ASSESSMENT OF ADDITIONAL CORPORATE INCOME TAX FOR THE TAXABLE YEAR 1983 AGAINST R. J. REYNOLDS TOBACCO COMPANY

No. 8921SC165

(Filed 7 November 1989)

Taxation § 29 (NCI3d)— corporate income tax—amended return—payment of interest not required

The N. C. Department of Revenue improperly required a taxpayer to pay interest on certain additional State income tax for the year 1983 which it paid the Department of Revenue in 1985 where Forsyth County and its affected municipalities assessed certain property taxes; the taxpayer paid them under protest, took credit for them on its amended 1983 income tax return, as N.C.G.S. § 105-163.03(a) permitted, and appealed to the appropriate reviewing authorities until the assessment was finally invalidated by the Court of Appeals; following receipt of the refunds without interest, the taxpayer correctly recomputed the income tax credit previously taken, and paid the additional corporate income tax which was due; and the Department of Revenue incorrectly claimed interest on the tax from the due date of the original 1983 return until the tax was paid.

Am Jur 2d, State and Local Taxation §§ 858, 864.

APPEAL by petitioner from *Beaty, Judge.* Judgment entered 7 December 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 July 1989.

Hendrick, Zotian, Cocklereece & Robinson, by John A. Cocklereece, Jr. and William A. Blancato, for petitioner appellant R. J. Reynolds Tobacco Company.

Attorney General Thornburg, by Assistant Attorney General Marilyn R. Mudge, for respondent appellee North Carolina Department of Revenue.

PHILLIPS, Judge.

This appeal is from a judgment requiring R. J. Reynolds Tobacco Company to pay interest on certain additional state income tax for the year 1983 that it paid the North Carolina Department of Revenue on 27 September 1985. That all taxes bear interest

after they are due is rudimentary and provided by statute, and the only question before us is when the additional tax became due.

The additional tax was paid because manufacturers are allowed to credit the property taxes they pay municipal and county governments during the tax year against their state income tax, and a few weeks earlier property taxes that Reynolds paid Forsyth County, the City of Winston-Salem, and the Town of Kernersville for 1983 were returned to it. The situation evolved as follows: When Forsyth County and its affected municipalities assessed the taxes involved Reynolds paid them under protest, took credit for them on its amended 1983 return, as G.S. 105-163.03(a) permitted, and appealed to the appropriate reviewing authorities until the assessment was finally invalidated by this Court. *In the Matter of The Appeal of R. J. Reynolds Tobacco Co.*, 74 N.C. App. 140, 327 S.E.2d 607, *disc. rev. denied*, 314 N.C. 116, 332 S.E.2d 483 (1985). Following the receipt of the refunds without interest, the last being received in late August 1985, Reynolds correctly recomputed the income tax credit previously taken, and on 27 September 1985 paid the additional corporate income tax that was due in the amount of $2,089,303, and advised the Secretary thereof. The Department of Revenue recognized the correctness of the tax but claimed interest on it from 15 March 1984, the due date of the original 1983 return, until the tax was paid. Reynolds paid the interest under protest and has been seeking to get it back ever since.

The basis upon which interest is claimed and Reynolds has been ordered to pay it is that G.S. 105-163.03(c), predecessor to the current G.S. 105-163.09, provided that after the Secretary of Revenue was notified that a manufacturer's local property taxes had been refunded that the additional tax, if any, "shall be assessed as provided in G.S. 105-241.1"; and G.S. 105-241.1 provides "(a) [i]f the Secretary of Revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of tax which is due . . ."; and "(i) [a]ll assessments of taxes or additional taxes, exclusive of penalties assessed thereon, *shall bear interest from the time the taxes or additional taxes were due until paid.*" (Emphasis supplied.) But these provisions are of no utility in determining the appeal; for in effect they merely state the admitted fact that all taxes bear interest from the time they "were due," whereas the issue for determination is when the additional taxes became due. Certain-

ly, the additional taxes were not due on 15 March 1984 as the Department maintains and the Superior Court ruled; for the record indisputably shows that all taxes then due were paid and that the additional tax would have never become due if Reynolds had not continued to dispute the assessment for more than a year after that. In our opinion the tax did not become due until after the refunds were received and the tax thereon was computed in accord with G.S. 105-241.1, by which time Reynolds had paid it. To hold otherwise would require us to construe the statutes involved to authorize the Department to collect interest on taxes that counties and municipalities erroneously exact from manufacturers, which we decline to do.

Reynolds' situation in this case is strikingly different from those dilatory, careless, fraudulent, or otherwise delinquent taxpayers the foregoing statutes were enacted to collect interest from; taxpayers who miscompute, understate, underpay, or do not report their taxes. Unlike those taxpayers Reynolds paid not only all the tax that was *then due* when the return was filed, but paid taxes erroneously claimed to be due; it did not retain or withhold any monies that rightfully belonged to the Department and meticulously followed the statutory directives and procedures until the refunds, which gave rise to the tax, were eventually received.

The order of the Superior Court is reversed and the matter remanded for entry of an order directing that the interest paid by R. J. Reynolds Tobacco Company on the additional tax paid 27 September 1985 be refunded.

Reversed and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JOSEPH BEVERLY RICHARDSON

No. 8919SC102

(Filed 7 November 1989)

1. **Automobiles and Other Vehicles § 3.4 (NCI3d) — driving while licensed revoked — notice to defendant — insufficiency of evidence**

The evidence was insufficient to convict defendant under N.C.G.S. § 20-28(a) of driving while his license was revoked where the State offered no evidence that defendant was notified that his license was revoked.

Am Jur 2d, Automobiles and Highway Traffic § 148.

2. **Automobiles and Other Vehicles § 110 (NCI3d) — felony death by vehicle — lesser offense of driving while impaired — sentence for both improper**

It is error to sentence a defendant both for felony death by vehicle and the lesser included offense of driving while impaired. N.C.G.S. § 20-141.4(a1).

Am Jur 2d, Automobiles and Highway Traffic §§ 310, 330, 339, 344.

APPEAL by defendant from judgment of *Judge Carlton E. Fellers* entered 2 August 1988 in RANDOLPH County Superior Court. Heard in the Court of Appeals 31 August 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

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

COZORT, Judge.

Defendant was charged with and convicted of driving while impaired, felony death by vehicle, and driving while his license was revoked; he was sentenced to a total of six years in prison. On appeal, the defendant contends that there was insufficient evidence to convict him of the last charge. We agree.

The State offered evidence tending to show that, on 2 August 1987, defendant Joseph Richardson had been drinking heavily. The evidence included the defendant's admission that, during the morn-

ing of 2 August 1987, he and a friend, Billy Lichtenberg "drank two beers apiece and some Canadian Mist. [Lichtenberg] had some Ever-Clear and we drank some of this" and by mid-afternoon "we were pretty drunk. Everything was fuzzy." At approximately 3:40 in the afternoon, with the defendant driving, he and Lichtenberg left the Millboro Trailer Park in a 1980 Ford pickup truck.

The State's evidence also tended to show that the defendant was at the wheel a short time later when that truck flipped end-over-end as the driver attempted to pass other vehicles on U.S. Highway 64 between Asheboro and Ramseur. Lichtenberg was severely injured in the accident and died en route to the hospital.

Without objection from the defendant, Sergeant Billy Ray McLeod testified at trial that the defendant's driver's license had been revoked prior to the accident. On that issue the State presented no other evidence.

The defendant offered no evidence.

On appeal the defendant raises two issues: (1) whether the evidence was sufficient to convict him of driving while his license was revoked and (2) whether, on that charge, defendant was denied effective assistance of counsel.

We note first that a "defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial." Rule 10(b)(3), N.C. Rules App. Proc. However, we suspend that requirement to prevent manifest injustice to the defendant. Rule 2, N.C. Rules App. Proc.

[1] To convict a defendant under N.C. Gen. Stat. § 20-28(a) of driving while his license is revoked the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked. *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976). The State must also prove that the defendant had "actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this statute." *Id.* With regard to notice, the "State satisfies its burden of proof of a G.S. 20-28 violation when, 'nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 . . . .' " *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985) (quoting *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E.2d 524, 526 (1976)).

In the case below the State offered no evidence that defendant was notified that his license was revoked. The defendant's plea of not guilty required the State to prove beyond a reasonable doubt every element of the offense charged. The State failed to do so. As the State forthrightly conceded in its brief, "the insufficiency of the evidence rises to a fundamental error in the conviction for driving while license revoked. The conviction for that charge should be reversed." In view of our holding on this issue, we need not reach the question of effective assistance of counsel.

[2] Although it was not raised by the defendant, we take note, pursuant to Rule 2 of the Rules of Appellate Procedure, of the State's contention that a separate sentence for the defendant's conviction of driving while impaired was improper. Under N.C. Gen. Stat. § 20-141.4(a1), driving while impaired is a lesser included offense of felony death by vehicle. Upon conviction of felony death by vehicle the lesser offense merges into the greater. Thus, it is error to sentence a defendant both for felony death by vehicle and the lesser included offense of driving while impaired.

Felony death by vehicle is a Class I felony, punishable by a maximum sentence of imprisonment for five years and a presumptive sentence of imprisonment for two years. N.C. Gen. Stat. §§ 20-141.4(b), 14-1.1(a)(9), 15A-1340.4(f)(7) (1988). In the case below the defendant received a four-year sentence for felony death by vehicle and a consecutive two-year sentence for driving while impaired. The total sentence exceeded the maximum allowed by law for felony death by vehicle. Upon remand the trial court may consider mitigating and aggravating factors applicable to the felony death by vehicle conviction.

The defendant's conviction of driving while license revoked is reversed. The sentence for driving while impaired is vacated, and the trial court's judgment as to felony death by vehicle is remanded for resentencing.

Remanded for judgment.

Judges ARNOLD and BECTON concur.

BETTY ANN MOSER, PLAINTIFF-APPELLEE v. SAMMY LEE MOSER, DEFENDANT-APPELLANT

No. 8821DC1200

(Filed 7 November 1989)

Husband and Wife § 12 (NCI3d)— separation agreement—sexual relations—unperformed obligations voided

Acts of sexual intercourse between the parties at different times after they executed a separation agreement and property settlement rendered null and void the unperformed obligations of the agreement, and N.C.G.S. § 52-10.2 which declares that "isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations" did not apply, since that statute became effective more than two years after the occurrences involved.

Am Jur 2d, Divorce and Separation § 855.

APPEAL by defendant from *Reingold, Judge*. Judgment entered 23 August 1988, *nunc pro tunc* 20 May 1988, in District Court, FORSYTH County. Heard in the Court of Appeals 9 May 1989.

White and Crumpler, by Fred G. Crumpler, Jr. and Christopher L. Beal, for plaintiff appellee.

Wright, Parrish, Newton & Rabil, by Carl F. Parrish, for defendant appellant.

PHILLIPS, Judge.

The parties, married in 1972, entered into a Separation Agreement and Property Settlement in December 1983 wherein, *inter alia*, plaintiff received title to two houses in Ohio and defendant agreed to make monthly alimony payments to her. In October 1987 defendant ceased to make the payments and plaintiff sued for specific performance of the agreement. Defendant pleaded as a defense that they had sexual intercourse at different times after the agreement was executed and counterclaimed for the payments made. After extensive discovery both parties moved for summary judgment and following a hearing judgment was entered directing defendant to make the alimony payments agreed to.

The judgment is erroneous because the testimony of plaintiff and defendant alike show that the parties had sexual intercourse several times between the execution of the Separation Agreement and Property Settlement and 1 June 1985, and under the law that existed when the acts of intercourse occurred, they rendered null and void the unperformed obligations of the agreement. *Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1978). Though plaintiff contends otherwise, defendant is not estopped, under the holdings in *Amick v. Amick*, 80 N.C. App. 291, 341 S.E.2d 613 (1986), *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984), and *Harris v. Harris*, 50 N.C. App. 305, 274 S.E.2d 489, *appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981), from asserting the invalidity of the agreement because he continued to make the payments for more than two years after the agreement was nullified by their conduct, as those decisions involved circumstances materially different from the circumstances recorded here and plaintiff suffered no legal detriment by receiving the payments. Nor is plaintiff's position aided by G.S. 52-10.2, which declares that "[i]solated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations," as that enactment became effective 1 October 1987, more than two years after the occurrences involved.

Thus, the judgment appealed from is vacated and the matter remanded to the District Court for the entry of a judgment dismissing plaintiff's action and defendant's counterclaim, which the record shows has no legal basis.

Vacated and remanded.

Judges BECTON and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 NOVEMBER 1989

BAXLEY v. PREFERRED SAVINGS BANK No. 8810SC1375	Wake (87CVS9755)	Affirmed
CULLOP v. PETREE No. 8818SC1168	Guilford (87CVS4382)	Plaintiff's appeal—no error Defendant's appeal—no error
DAVIS v. DAVIS No. 8926DC142	Mecklenburg (86CVD12918)	Affirmed
FERGUSON v. GROCE No. 8923DC304	Wilkes (88CVD228)	Affirmed
IN RE ESTATE OF FLETCHER No. 8923SC36	Yadkin (86E178)	Affirmed
IN RE FARMER No. 8814DC1427	Durham (80J141)	Affirmed
LEVI v. HOOPER No. 8828SC1106	Buncombe (87CVS1143)	Affirmed
POWELL v. ELLISON No. 897DC117	Edgecombe (88CVD02)	Affirmed
ROY BURT ENTERPRISES v. MARSH No. 8920SC372	Moore (87CVS913)	Affirmed in part and reversed in part
SIPPE v. SIPPE No. 8926DC528	Mecklenburg (87CVD12398)	Affirmed
STATE v. GRAVES No. 895SC123	New Hanover (88CRS5715) (88CRS5716) (88CRS5717) (88CRS8077) (88CRS8078) (88CRS8079) (88CRS8475)	Affirmed
STATE v. JAMES No. 8921SC187	Forsyth (88CRS10857)	No Error
STATE v. JOHNSON No. 8918SC141	Guilford (87CRS60131)	No Error

STATE v. MARTELL No. 8918SC201	Guilford (87CRS54964)	Affirmed
STATE v. MYERS No. 8918SC155	Guilford (87CRS20734)	No Error
T. A. LOVING CO. v. McCARTHY BROTHERS CO. No. 898SC85	Wayne (88CVS767)	Affirmed
WALKER v. CITY OF KANNAPOLIS No. 8919SC61	Cabarrus (88CVS1035)	Affirmed
WARD v. ROY H. PARK BROADCASTING CO. No. 883SC1224 No. 883SC1126	Pitt (86CVS2243)	Reversed & Remanded
WELLS v. WELLS No. 8918DC176	Guilford (86CVD5676)	No Error
WILLIAMS v. WILLIAMS No. 8926DC278	Mecklenburg (81CVD713)	Vacated & Remanded
WILSON v. HERRMANN No. 8928DC246	Buncombe (88CVD1903)	Affirmed

RING DRUG COMPANY, INC., D/B/A BOBBITT'S PHARMACIES AND MEDICAL SERVICE COMPANY v. CAROLINA MEDICORP ENTERPRISES, INC., FORSYTH MEMORIAL HOSPITAL, INC., BLUMENTHAL JEWISH HOME FOR THE AGED, INC., ALCO STANDARD CORPORATION, D/B/A JUSTICE DRUG COMPANY, CAROLINA MEDICORP, INC., AND SALEM HEALTH SERVICES, INC.

No. 8921SC175

(Filed 21 November 1989)

1. **Limitation of Actions § 4 (NCI3d); Unfair Competition § 1 (NCI3d)— pharmaceutical supplies—unfair trade practices—termination of contract—statute of limitations**

A claim for unfair trade practices arising from the termination of a contract for pharmaceutical supplies between plaintiff and defendant Blumenthal Jewish Home for the Aged, Inc., was most closely analogous to an action for breach of contract and accrued on the day the contract terminated, 1 September 1984. Even under a notice theory, the earliest that the record would allow notice to be ascribed to plaintiff would be 17 July 1984, and plaintiff's initial complaint would still have been timely under the four-year statute of limitation of N.C.G.S. § 75-16.2 because plaintiff obtained an order extending time to file its complaint on 14 July 1988.

Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices §§ 633, 713.

2. **Limitation of Actions § 12.3 (NCI3d)— amendment of complaint—addition of parties—relation back**

In an action for unfair trade practices arising from the termination of a contract to supply pharmaceutical supplies in which the complaint was amended to add Carolina Medicorp, Inc. and Salem Health Services, the trial court correctly ruled that relation back occurred as to Medicorp but did not occur as to Salem Health. Medicorp had such actual or constructive notice of litigation that it would not be prejudiced in its defense but the record did not demonstrate that plaintiff's failure to name Salem Health resulted from a mistake concerning identity; rather it shows an unjustified failure to name Salem Health in a timely fashion. The court adopted the federal test in *Schiavone v. Fortune*, 477 U.S. 21, for determining when a

party defendant may be added after the limitations period has run. N.C.G.S. § 1A-1, Rule 15(c).

Am Jur 2d, Limitation of Actions §§ 272, 273.

3. **Unfair Competition § 1 (NCI3d) — termination of contract for pharmaceutical supplies — preferential pricing — summary judgment proper**

The trial court did not err by entering summary judgment as to Medicorp, Carolina Enterprises, and Forsyth in an action for unfair trade practices arising from the termination of a contract for pharmaceutical supplies between plaintiff and defendant Blumenthal Jewish Home for the Aged, Inc., where the forecast of defendants' evidence showed that it was Salem Health, and not any of these defendants, which serviced the pharmacy and which purchased the pharmaceuticals it sold to Blumenthal and there was nothing in the record beyond plaintiff's allegations to show that Salem Health received preferential pricing because of the involvement of defendants.

Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices § 409.

APPEAL by plaintiff from judgment entered 17 November 1988 in FORSYTH County Superior Court by *Judge Thomas M. Ross.* Heard in the Court of Appeals 9 October 1989.

Moore and Brown, by B. Ervin Brown, II, and Bowden & Rabil, by S. Mark Rabil, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., and Jeanne Schulte Scott, for defendant-appellees.

BECTON, Judge.

In this action for unfair trade practices, plaintiff alleges that defendants caused the termination of a contract for pharmaceutical supplies between plaintiff and defendant Blumenthal Jewish Home for the Aged, Inc. The trial judge allowed the motion by defendant Salem Health Services, Inc., to dismiss the complaint, or, in the alternative, for summary judgment, on the ground that the statute of limitations had expired prior to Salem Health's becoming a party to the action. The judge also allowed summary judgment in favor of defendants Carolina Medicorp, Inc., Carolina Medicorp Enterprises,

Inc., and Forsyth Memorial Hospital on the ground that "those corporations were not participants in the contractual arrangements between Blumenthal . . . and Salem Health Services . . . ." Final judgment was certified, and plaintiff appealed. We affirm.

I

Plaintiff, Ring Drug Company, Inc., d/b/a Bobbitt's Pharmacies and Medical Service Company ("Bobbitt"), is a retail pharmacy which offers services to nursing homes. Defendant Carolina Medicorp, Inc. ("Medicorp"), is the sole owner and parent corporation of Carolina Medicorp Enterprises, Inc. ("Carolina Enterprises"), Forsyth Memorial Hospital ("Forsyth"), and Salem Health Services ("Salem Health"). Paul Wiles is the chief executive officer for both Medicorp and Forsyth, and he is the registered agent for all four defendants. Additionally, Carolina Enterprises and Salem Health share the same president and chief executive officer.

From 1968 until 1 September 1984, Bobbitt was the exclusive provider of prescription medicines to defendant Blumenthal Jewish Home for the Aged, Inc. ("Blumenthal"). Bobbitt and Blumenthal had a contractual relationship terminable by either party upon 30-days' notice. In March 1984, Bobbitt informed Blumenthal that the former would be unable to provide service to an on-site pharmacy that Blumenthal wished to establish. On 17 July 1984, Blumenthal's director notified Bobbitt by mail that the contract between the two parties would terminate on 1 September.

Bobbitt alleges that Medicorp and its subsidiaries used preferential pricing that Forsyth, as a hospital, received from drug manufacturers to unfairly compete with Bobbitt for the Blumenthal contract, in violation of N.C. Gen. Stat. ch. 75, forbidding unfair trade practices. On 2 August 1988, following an extension of time in which to file its complaint, Bobbitt instituted this action against, among other defendants, Carolina Enterprises and Forsyth. Bobbitt did not initially name Medicorp nor Salem Health as parties to the action. The complaint was served on Paul Wiles, the registered agent, on 8 August 1988.

On 23 September 1988, Bobbitt amended its complaint, seeking to add Medicorp and Salem Health as defendants. The amended complaint was served on Mr. Wiles on 26 September. Subsequently, Medicorp and Salem Health moved to dismiss the complaint, or, alternatively, for summary judgment, on the ground that the com-

plaint had not been timely filed. The judge allowed the motion as to Salem Health but denied it as to Medicorp. The judge granted summary judgment for Medicorp, Carolina Enterprises, and Forsyth, on the ground that those defendants did not engage in the sale of prescriptions to Blumenthal. Allegedly, Salem Health had engaged in all the dealings with Blumenthal.

II

Bobbitt first assigns error to the trial judge's allowing Salem Health's motion to dismiss. Bobbitt contends that the amended complaint relates back to the time the original complaint was filed and that dismissal of Salem Health as a party was thus improper. Salem Health argues that the original complaint was not filed within the applicable limitations period and that, alternatively, a complaint may not be amended to add additional parties.

A. Statute of Limitations

[1] A claim for unfair trade practice must be commenced within four years after the cause of action accrues. N.C. Gen. Stat. Sec. 75-16.2 (1988). Initially, we must determine when Bobbitt's cause of action can be said to have "accrued." Bobbitt argues that the statute began to run on 1 September 1984, the date Blumenthal's termination of the contract took effect. Defendants contend that the alleged conspiratorial activities, if any, were substantially completed by March 1984 and that, in any event, Bobbitt was on notice that its relationship with Blumenthal was threatened when Bobbitt received the 17 July 1984 letter from Blumenthal.

In *Patterson v. DAC Corp.*, 66 N.C. App. 110, 310 S.E.2d 783 (1984), this Court said that the statute of limitations for a claim of unfair trade practice based on misrepresentation began to run at the time the alleged fraudulent statements induced plaintiff to execute a note and deed of trust. *Patterson* was cited by a federal district court for the proposition that "[a] cause of action 'accrues' [under chapter 75] when the alleged violation occurs." *United States v. Ward*, 618 F.Supp. 884, 902-03 (E.D.N.C. 1985).

Bobbitt in essence contends that the violation occurred on the day that Blumenthal ceased its performance of the contract. Defendants argue that Bobbitt has incorrectly applied a breach-of-contract theory to a case in which no breach has occurred. *See Craig v. Price*, 210 N.C. 739, 740, 188 S.E. 321, 322 (1936) (accrual in breach-of-contract action occurs at time of breach). Defendants

argue that, to the extent that Bobbitt's complaint is based on fraud, the action begins to accrue when the fraud is, or should have been, discovered. *See Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970).

In our view, Bobbitt's complaint is most closely analogous to an action for breach of contract, and we hold that the cause of action began to accrue on 1 September 1984, the day Bobbitt's contract with Blumenthal terminated. We note in passing that our review of the record does not support defendants' assertion that Bobbitt had either actual or constructive notice in March 1984 of the alleged activity by defendants. Under a notice analysis, therefore, the earliest that the record would allow us to ascribe notice to Bobbitt would be 17 July 1984, the day it received notice of termination from Blumenthal. Because, on 14 July 1988, Bobbitt obtained an order extending time to file its complaint, Bobbitt's initial complaint would still have been timely under a notice theory.

B. The Amended Complaint

[2] Having held that Bobbitt's cause of action accrued on 1 September 1984, we now examine whether its complaint could be amended subsequently so as to add Medicorp and Salem Health as defendants. Unless "relation back" occurs, the statute of limitations is a defense for Medicorp and Salem Health.

N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 15(c) (1983) states that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." On three occasions, this court has decided whether Rule 15(c) would permit a complaint to be amended to add a new party defendant after the limitations period had expired. In all three cases, this court decided the issue against the plaintiffs. *See Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E.2d 671 (1972); *Callicutt v. American Honda Motor Co., Inc.*, 37 N.C. App. 210, 245 S.E.2d 558 (1978); *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).

In *Teague*, an automobile dealership that plaintiff desired to sue had changed its name, and another company, operating from the same location, had adopted the original name. Plaintiff filed

her complaint against the new company. After the limitations period had run, plaintiff attempted to amend her complaint to bring in the original corporation. We said that, under Rule 15(c), "the claim asserted in the amendment must be against one given notice in the original pleading . . . ." 14 N.C. App. at 739, 189 S.E.2d at 673. Because the new party "was clearly not in court when the amended complaint was filed" and had no knowledge of the litigation, we held that the amended complaint did not relate back to the period before the statute of limitations expired. *Id.*

In *Callicutt*, plaintiff alleged that defendant had both sold and manufactured a motorcycle on which plaintiff was injured. After the limitations period, defendant amended its answer and denied it had manufactured the vehicle. Plaintiff sought to amend its complaint to join the manufacturer. After discussing *Teague*, we held that the record in *Callicutt* did not reveal any evidence "from which the trial court could have concluded that [the manufacturer] had notice of this action prior to plaintiff's motion to add it as a party defendant . . . . [n]or does the record reflect any relationship between defendant and [the manufacturer] to allow us to infer that notice on [defendant] was tantamount to notice on [the manufacturer]." 37 N.C. App. at 212-13, 245 S.E.2d at 560.

Stevens involved a malpractice action brought originally against a partnership and against one of the partners individually. Seven years after the alleged tort occurred, plaintiff attempted to amend her complaint to add another partner individually. This partner had actual knowledge of the original suit. Noting that the issue in *Stevens* was one of first impression in this jurisdiction, we examined decisions from New York—after whose Civil Practice Law and Rules our Rule 15(c) is modeled, 82 N.C. App. at 354, 346 S.E.2d at 182—and the federal courts. We held, ultimately, that the statute of limitations was a bar to plaintiff's amendment because 1) plaintiff chose not to sue the partner individually when she filed the initial complaint, 2) plaintiff's delay of seven years before adding the partner in an individual capacity clearly prejudiced him, 3) the partner's participation in the suit had not misled plaintiff with regard to his liability, and 4) N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 4(j)(b)(7) (1983) requires that a partner be served with summons before he is bound beyond his partnership assets. *Id.* at 357, 346 S.E.2d at 184.

We determine from these cases that whether a complaint will relate back with respect to a party defendant added after the applicable limitations period depends upon whether that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment. If some nexus among defendants will permit the trial judge to infer that the new defendant had notice of the original claim so as not to be prejudiced by the amendment, *Callicutt*, 37 N.C. App. at 213, 245 S.E.2d at 560, Rule 15(c) will allow a complaint to be amended so as to add a new party, expiration of the limitations period notwithstanding. The statute of limitations should furnish the defendant a bar, however, when a plaintiff's use of Rule 15(c) would circumvent any other procedural requirement, *see Stevens*, 82 N.C. App. at 352, 346 S.E.2d at 181, or when the plaintiff's failure to name the defendant originally is solely attributable to the plaintiff.

In light of the foregoing, we adopt the federal test, discussed at length in *Stevens* but not explicitly relied upon in that case, for determining when a party defendant may be added after the limitations period has run. Relation back will occur under the federal rule when 1) the basic claim arises out of the conduct set forth in the original pleading, 2) the party to be brought in receives such notice that it will not be prejudiced in maintaining its defense, 3) the party knows or should have known that, but for a mistake concerning identity, the action would have been brought against it, and 4) the second and third requirements are fulfilled within the prescribed limitations period. *Schiavone v. Fortune*, 477 U.S. 21, 29, 91 L.Ed.2d 18, 27 (1986).

Applying the federal test to the present case, we hold that the trial judge correctly ruled that relation back occurred as regarded Medicorp and did not occur in the case of Salem Health. The claim against Medicorp arose from the same conduct alleged in the original complaint. Because Medicorp is the parent corporation and sole owner of Carolina Enterprises and Forsyth, with the same registered agent as its subsidiaries, the same chief executive officer as Forsyth, and is engaged in the same type of enterprise as Forsyth and Carolina Enterprises, Medicorp's "identity of interest" with the originally-named defendants permitted the trial judge to find that Medicorp had such actual or constructive notice of the litigation that it would not be prejudiced in its defense. *See Callicutt*, 37 N.C. App. at 213, 245 S.E.2d at 560; *Stevens*, 82 N.C. App. at 356, 346 S.E.2d at 183; *see also*, C. Wright,

A. Miller & M. Kane, Federal Practice and Procedure Sec. 1499 (Supp. 1989).

Bobbitt alleges that it failed to name Medicorp originally as the consequence of information supplied it by the Office of the Secretary of State that led Bobbitt to believe that "Carolina Medicorp Enterprises, Inc." was the full name of Medicorp. The record indicates that, as of 9 February 1988, defendants' lawyer was aware that Bobbitt believed that "Carolina Medicorp, Inc., or one of its subsidiaries" operated the in-house pharmacy at Blumenthal. Medicorp knew or should have known, therefore, that but for a mistake, it would have been named in the original complaint. Relation back, therefore, was proper in the case of Medicorp.

The same result does not obtain respecting Bobbitt's efforts to join Salem Health. Bobbitt contends it did not name Salem Health originally because "it was not clear that [Salem Health] was anything but a subdivision or arm of the other 'hospital' defendants." Bobbitt's lawyer, however, received a copy of a letter written 1 March 1988 in which defendants' lawyer asked a drug company for information as to "whether or not Salem Health Services got the benefit of any of the contracts [Medicorp] or [Forsyth] had with the manufacturers." We agree with defendants that the record does not demonstrate that Bobbitt's failure to name Salem Health resulted from a "mistake" concerning identity; rather it shows simply an unjustified failure by Bobbitt to name Salem Health in a timely fashion. Salem Health, therefore, could properly assert the statute of limitations as a plea in bar to Bobbitt's effort to join it to the action, and the trial judge did not err in dismissing Salem Health as a party. We overrule this assignment of error.

Bobbitt has additionally alleged that the judge should have exercised his discretion, pursuant to N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 6(b) (1983), to retroactively extend time for issuance of the summons and service on Salem Health because Bobbitt's failure to name Salem Health resulted from "excusable neglect." We reject, at the outset, Bobbitt's assertion that its neglect was "excusable," and we do not address its argument further. This assignment of error is overruled.

III

[3] Bobbitt assigns error to the trial judge's granting summary judgment for Medicorp, Carolina Enterprises, and Forsyth. Bobbitt

alleges that several genuine issues of material fact still exist in this case, and that there is a need for further discovery concerning these questions. Defendants argue that each of the three counts contained in Bobbitt's complaint is based upon actions allegedly taken by defendants relating to the provision of pharmaceutical services to Blumenthal but that the evidence in the record demonstrates that only Salem Health had any dealings with Blumenthal. Medicorp, Carolina Enterprises, and Forsyth argue, therefore, that summary judgment was appropriate as to them.

Summary judgment is proper only when 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 the moving party is entitled to judgment as a matter of law. *E.g., Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). The remedy of summary judgment should be awarded only when the truth is clear. *E.g., Volkman v. DP Assocs.*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980).

Defendants' affidavits aver that Blumenthal approached Salem Health to discuss having the latter provide pharmaceutical supplies because Blumenthal was dissatisfied with services provided by Bobbitt. The forecast of defendants' evidence further shows that Salem Health purchased the pharmaceuticals it sold to Blumenthal, and that Medicorp and Forsyth were never parties to the contract.

A letter from Bobbitt's lawyer to defendants' lawyer is attached to the affidavit of Ernest J. Rabil, Bobbitt's president. The letter says in part that, in 1985, Mr. Rabil inquired of an employee of "either Carolina Medicorp or Forsyth Hospital" how "Carolina Medicorp" was able to service the Blumenthal pharmacy in a cost-effective manner. This employee allegedly responded that the service could be provided "because of preferential hospital pricing." A 1 March 1988 letter written by defendants' lawyer to the drug company from which Salem Health allegedly purchased the pharmaceuticals asks that company "whether or not Salem Health Services got the benefit of any of the contracts [Medicorp] or [Forsyth] had with the manufacturers." The record contains no answer to this question.

Our review of the record discloses no genuine issue of material fact as to the liability of these defendants. Bobbitt's forecast of the evidence does not demonstrate that defendants were involved

to any extent with the Blumenthal contract. The evidence suggests only that Blumenthal's pharmacy may have been serviced in a cost-effective manner because of preferential pricing. Defendants' evidence shows that it was Salem Health, and not any of these defendants, which serviced the pharmacy and which purchased the pharmaceuticals it sold to Blumenthal. There is nothing in the record beyond Bobbitt's allegations to show that Salem Health received preferential pricing because of the involvement of defendants. We hold, therefore, that the judge's entry of summary judgment was correct.

IV

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

MILFORD R. BALLANCE AND WIFE, DOROTHY MAE BALLANCE, AND WAYNE BALLANCE v. NORRIS DUNN, RONNIE CULEYS, S. B. SEYMOUR AND JOE SEYMOUR

No. 881DC1418

(Filed 21 November 1989)

Judgments § 37.5 (NCI3d) — title to land — trespass action — warranty deeds or adverse possession — judgment res judicata in action based on quitclaim deeds

Judgment entered in plaintiffs' prior trespass action against defendants based on title to land acquired by warranty deeds in 1947 and 1948 or title by adverse possession was res judicata in plaintiffs' second trespass action based on title to the same land acquired by quitclaim deeds in 1984 and 1985 because (1) both cases arose from a single transaction in that the same parties and same parcel of land were involved and, although the alleged trespasses were distinct in time, the purpose of plaintiffs' claims was to establish title in themselves, and (2) the first action did not come to trial until a year after plaintiffs obtained the last quitclaim deed, and plaintiffs could have

added to their pending lawsuit a claim to quiet title based on the quitclaim deeds. N.C.G.S. § 41-10.

Am Jur 2d, Judgments §§ 415, 421, 422, 428.

APPEAL by plaintiffs from Judgment of *Judge Grafton G. Beaman* entered 24 July 1988 in CAMDEN County District Court. Heard in the Court of Appeals 24 August 1989.

Twiford, O'Neal & Vincent, by Edward A. O'Neal, for plaintiff appellants Milford R. and Dorothy Mae Ballance.

E. Ray Etheridge; and White, Hall & Morgan, by Gerald F. White, for defendant appellees.

COZORT, Judge.

Plaintiffs appeal from an order granting defendants' motion for summary judgment. We affirm.

I

This case involved two legal actions alleging trespass to land claimed by the plaintiffs. In the second action (No. 86CVD44), the defendants, citing the judgment in the first action (No. 84CVD41), pled *res judicata* as an affirmative defense and moved for summary judgment, which the trial court granted. To understand the court's ruling it is necessary to review the procedural history of both actions in some detail.

The parcel of land at issue, approximately 255 feet in length and 25 feet in width, is known as "Old Sawyer Road" or "Sawyer Road" and adjoins North Carolina Road 1139 in Camden County. On 22 August 1984, plaintiffs filed a complaint alleging that defendants, on the day before, had destroyed fences and trees on Sawyer Road. The plaintiffs claimed title to this property by virtue of two warranty deeds. The first deed was acquired in September 1947 and recorded the following month; the second deed was acquired in September 1948 and recorded in January 1949. The plaintiffs sought damages and an injunction to prevent defendants from entering the property.

On 23 October 1984, before defendants had answered, plaintiffs, pursuant to Rule 15(a) of the N.C. Rules of Civil Procedure, amended their complaint by alleging, as an alternative basis of title, that they had acquired ownership of Sawyer Road by ad-

verse possession for twenty years. They also alleged, more particularly, that the "property known as Sawyer Road had been abandoned by the public and plaintiffs fenced all of Sawyer Road and have claimed all of said road since September of 1948."

On 23 October 1984, the defendants answered the original complaint. On 16 April 1985, the defendants answered the amended complaint and asserted a counterclaim for damages resulting from the "Restraining Order denying The Chesapeake Corporation of Virginia . . . [and] the defendants" the use of Sawyer Road, "the nearest right of way to the public road." On 8 May 1985 the plaintiffs replied to the defendants' counterclaim.

On 29 September 1986, the first action was tried before a jury. At the close of all the evidence, the trial court ruled that there was insufficient evidence to send to the jury the issue of whether the public had acquired a right of way in Sawyer Road. The only issue submitted to the jury was whether the plaintiffs had acquired title to Sawyer Road by adverse possession. After the jury's verdict against the plaintiffs on that issue, the trial court entered judgment on 2 October 1986 as follows: the plaintiffs did not acquire title to Sawyer Road by adverse possession; the defendants did not commit a trespass as alleged; and the defendants failed to prove that Sawyer Road was a public right of way.

Between the time the plaintiffs filed suit in case No. 84CVD41, and the time the case came on for trial, the plaintiffs acquired two quitclaim deeds purportedly conveying title to Sawyer Road. Plaintiffs obtained the first quitclaim deed on 26 November 1984 and recorded it two days later; they obtained the second on 23 October 1985 and recorded it the same day. E.H.P. Land Co. was the grantor of both deeds, and both deeds recited consideration of one dollar. These quitclaim deeds were not raised in the first lawsuit; however, they formed the basis for the second action in which the plaintiffs again alleged trespass.

Plaintiffs initiated case No. 86CVD44, the action at issue here, on 14 November 1986. Their complaint included an allegation of battery (subsequently referred to by the trial court and the plaintiffs as an alleged assault) and an allegation that the defendants had committed trespass by installing culverts and destroying fences and shrubs within the boundaries of Sawyer Road. Plaintiffs claim record ownership of Sawyer Road based on the quitclaim deeds described above. They requested compensatory and punitive dam-

ages as well as injunctive relief. As an affirmative defense the defendants pleaded the final judgment in case No. 84CVD41 "in bar of plaintiff's right to maintain this action . . . [in that] all matters in this action, either fact or law, were or should have been . . . adjudicated in . . . [the] former action."

On 14 November 1986 the trial court issued the temporary restraining order requested by the plaintiffs. On 22 January 1987, because of the violence and threat of violence associated with the dispute over ownership and use of Sawyer Road, the court entered a preliminary injunction restraining both plaintiffs and defendants "until further Order of the Court or final decision on the merits from entering on the lands described . . . as 'Old Sawyer Road.' "

On 7 April 1988, the defendants moved for summary judgment on all claims. After considering memoranda from both parties and hearing oral argument from counsel on 9 May 1988, the trial court on 24 July 1988 granted the defendants' motion for summary judgment "as to all allegations and matters pertaining to claim or claims relating to ownership of land," denied the defendants' motion for summary judgment on the "alleged assault," and dissolved the preliminary injunction. On 4 August 1988, the plaintiffs gave notice of appeal; on the next day they voluntarily dismissed their claim of assault. Thus, the trial court's order of 24 July 1988 as it related to title to Sawyer Road is before this Court.

II

We turn now to the issue on appeal. Plaintiffs argue that the trial court erred in accepting the judgment in the first case as a bar to the second because distinct causes of action were involved. The first action, alleging a trespass committed on 21 August 1984, was grounded alternatively on title acquired by warranty deeds in 1947 and 1948 or on title acquired by adverse possession. The second action, alleging a trespass committed on 13 November 1986, was grounded on title acquired by quitclaim deeds in 1984 and 1985. Plaintiffs assert that the set of facts surrounding each alleged trespass and the cause of action arising from each alleged trespass are separate and independent. Premised on that assertion, plaintiffs contend that the doctrine of *res judicata* was improperly invoked.

The purpose of *res judicata* is "to strike a delicate balance between, on the one hand, the interests of the defendant and of

the courts in bringing litigation to a close and, on the other, the interests of the plaintiff in the vindication of a just claim." Restatement (Second) of Judgments § 24 Comment b (1982). Our case law has long recognized the balancing function performed by *res judicata*:

> Public policy demands that every person be given an opportunity to have a judicial investigation of the asserted invasion of complainant's rights. . . . But public policy is equally as adamant in its demand for an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred.

Crosland-Cullen Co. v. Crosland, 249 N.C. 167, 170, 105 S.E.2d 655, 656 (1958); *see also Ludwick v. Penny*, 158 N.C. 104, 109, 73 S.E. 228, 231 (1911).

In North Carolina a "final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties and those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). *Res judicata* operates as a bar not only against matters litigated or determined in the prior proceeding but also against "all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1940); *accord Crump v. Bd. of Education*, 93 N.C. App. 168, 177, 378 S.E.2d 32, 36-37 (1989); *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 412, 428, 349 S.E.2d 552, 556 (1986). Therefore, in the case below the issue is whether all of plaintiffs' claims of title could and should have been adjudicated in the prior case.

In setting the limits of a cause of action, or claim, the Restatement provides that when *res judicata* bars the plaintiff's claim,

> the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arises.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treat-

ment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982). Because the same transaction test produces a broad *res judicata* effect, it is appropriately applied only when the procedural rules afford parties ample opportunity to litigate, in a single lawsuit, all claims arising from a transaction or series of transactions. Thus, "when the Federal Rules or comparable rules are in force, it is appropriate to define cause of action broadly," as is the current trend. Friedenthal, Kane, and Miller, Civil Procedure § 14.4 (1985). On appropriate facts our courts have applied the same transaction test. *See Rodgers Builders v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *disc. rev. denied*, 315 N.C. 590 (1986); *In re Trucking Co.*, 285 N.C. 552, 206 S.E.2d 172 (1974); and *Taylor v. Electric Membership Corp.*, 17 N.C. App. 143, 193 S.E.2d 402 (1972).

We hold the case below arose from a single transaction. In both case No. 84CVD41 and case No. 86CVD44 the plaintiffs brought an action in trespass to try title; the same parties and the same parcel of land were involved. The alleged trespasses were distinct in time, but the purpose of plaintiffs' claims was to establish title to Sawyer Road in themselves.

To this end plaintiffs initially alleged record ownership based on warranty deeds of 1948 and 1949; two months later they amended their complaint to allege, in the alternative, ownership by adverse possession. Approximately one month later, in November 1984, plaintiffs bargained for and received a quitclaim deed that purported to convey title to the parcel of land at issue. Approximately eleven months later, in October 1985, plaintiffs acquired another quitclaim deed to the same property. The plaintiffs' first action (case No. 84CVD41) did not come to trial for nearly two years after they obtained the November 1984 deed and nearly one year after they obtained the October 1985 deed. Yet plaintiffs made no attempt to bring forward this evidence of ownership. Instead the quitclaim deeds became the basis for plaintiffs' second action.

It is true, of course, that plaintiffs could not base the first trespass action, filed in August 1984, on record ownership acquired after that date. But plaintiffs, who had already sought equitable relief in the form of an injunction, could have added to their pending lawsuit a claim to quiet title based on the quitclaim deeds.

Any suit to remove a cloud upon title or to quiet title may be brought under N.C. Gen. Stat. § 41-10, which is designed "to establish an easy method of quieting titles of land against adverse claims," *Newman Machine Co. v. Newman*, 275 N.C. 189, 196, 166 S.E.2d 63, 68 (1969), and is "liberally construed 'to advance the remedy and permit the courts to bring the parties to an issue.' " *Wachovia Bank & Trust Co. v. Miller*, 243 N.C. 1, 5, 89 S.E.2d 765, 768 (1955) (quoting *Land Co. v. Lange*, 150 N.C. 26, 30, 63 S.E. 164, 166 (1908)); *see also York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968). Where a defendant, as in the case below, claims a right of way over land, the plaintiff may proceed under N.C. Gen. Stat. § 41-10. *Cannon v. City of Wilmington*, 242 N.C. 711, 714, 89 S.E.2d 595, 597 (1955), *cert. denied sub nom., Cannon v. N.C. State Highway Commission*, 352 U.S. 842 (1956).

In the first action plaintiffs amended their complaint once as a matter of course pursuant to Rule 15(a) of the N.C. Rules of Civil Procedure. At the least they could and should have attempted another amendment to add a quiet title claim. Even before the adoption of our current rules it was permissible " 'to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based.' " *Furniture Co. v. Bentwood Co.*, 267 N.C. 119, 120-21, 147 S.E.2d 612, 613 (1966) (quoting *Mica Industries v. Penland*, 249 N.C. 602, 606, 107 S.E.2d 120, 124 (1959)). Our rules, modeled on the federal rules, now provide that, in addition to amendments of right, a "party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 163 (1970); N.C. Gen. Stat. § 1A-1, Rule 15(a) (1988). "Leave to amend should be freely given pursuant to N.C. Gen. Stat. § 1A-1, Rule 15. The burden is on the party objecting to the amendment to satisfy the trial court that he would be prejudiced thereby." *Saintsing v. Taylor*, 57 N.C. App. 467, 471, 291 S.E.2d 880, 882-83, *cert. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982).

The procedural history of the case below demonstrates that plaintiffs chose not to have all their claims adjudicated in the prior lawsuit. The doctrine of *res judicata* estops them from litigating any of those claims in a second lawsuit.

The trial court's order of 24 July 1988 is

Affirmed.

Judges ARNOLD and BECTON concur.

CHARLENE CODY, WIDOW OF JOHN HOLLIS CODY, DECEASED EMPLOYEE, PLAINTIFF v. SNIDER LUMBER COMPANY, EMPLOYER; SELF-INSURED, (HEWITT, COLEMAN & ASSOCIATES) DEFENDANT

No. 8810IC233

(Filed 21 November 1989)

Master and Servant § 67 (NCI3d)— workers' compensation—heart attack—emotional distress—compensable accident

The Industrial Commission erred by concluding that decedent employee's fatal heart attack was not the result of an injury by accident under N.C.G.S. § 97-2(6) where the decedent was a driver of defendant lumber company's tractor-trailer; a tarp laid over the load on the open trailer caught on something and decedent jerked it three or four times and then walked to the back of the truck to free it; it took decedent four tries to correctly line up the wheels of the truck and to back onto an unloading lift; the truck did not have power steering and decedent had to struggle with the steering wheel; it was July and hot; decedent appeared to be frustrated; he was sixty-two years old and had high blood pressure, preexisting coronary disease and symptoms suggesting angina; and the cause of his death was sudden cardiac arrest. The essence of an accident is not the unusualness of the events which cause it, but their unexpectedness, and the heart attack was an accident even though it was precipitated by mental stimulus rather than physical exertion or contact. Even if excessive exertion or strain is essential to recovery, that has been established by the Commission's findings as to emotional and nervous strain.

Am Jur 2d, Workmen's Compensation §§ 300, 333.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 15 October 1987. Heard in the Court of Appeals 31 August 1988.

Leonard, McNeely, MacMillan & Durham, by Thomas A. McNeely, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe and Jeffrey L. Caddell, for defendant appellees.

PHILLIPS, Judge.

The only question raised by this workers' compensation case is whether the decedent-employee's fatal heart attack, which occurred while he was on the job as a driver of defendant lumber company's tractor-trailer, was the result of an "injury by accident" under G.S. 97-2(6). Based upon findings of fact which plaintiff does not dispute—though she does dispute certain conclusions of law that the Commission misdubbed findings of fact—the Industrial Commission concluded as a matter of law that "the event which transpired on the day in question" was not an accident within the contemplation of our Workers' Compensation Act and denied the claim. We conclude otherwise, and reverse the decision entered.

As a truck driver for defendant lumber company the decedent's duties included *inter alia* hauling trailer loads of wood chips and sawmill residue to paper mills for processing, backing the trailer onto the unloading lift, dumping the contents, and returning the empty trailer to his employer. The trailer had no top; when loaded a synthetic mesh tarp was laid over the load to prevent the chips and residue from being blown away, and before dumping the load the tarp had to be removed. The Commission found that the circumstances leading to the worker's death were as follows:

> 2. Decedent drove to the Bowater Plant in Rock Hill, South Carolina on July 10, 1984 with a load of residue. The outdoor temperature was hot . . . At some point, the tarp became caught on something. In order to free it, decedent jerked hard on it three or four times . . . When it remained snagged, he walked to the rear of the trailer to release it . . . .
>
> 3. Decedent got in the truck and began to back it up the ramp. . . . It took him four tries in order to line the wheels up correctly and back the truck onto the lift. His truck did not have power steering, so he had to struggle with the steering wheel in order to guide the truck on the ramp.
>
> 4. . . . He appeared to be frustrated. . . . The cause of his death was sudden cardiac death.

5. Decedent was 62 years old and had had high blood pressure, preexisting coronary disease and symptoms suggesting angina. Although he had been active up to the time of his death, he was at risk of having a heart attack.

6. . . . The exertion and frustration plaintiff underwent during the 15 to 20 minute period in which he removed the tarp, backed the truck onto the lift and began to dump the residue aggravated his preexisting condition so that he sustained a heart attack.

7. The only occurrence which could be found to have been out of the ordinary on this occasion was that the tarp became hung. However, decedent's heart attack did not occur until 15 to 20 minutes later after he had been involved in much more strenuous activity than his jerking on the tarp. His pulling on the tarp was not proven to be and is found not to be the precipitating cause of the heart attack. Rather, it was his emotional response to the situation in that he became aggravated and frustrated which was the precipating (sic) factor. . . . The emotional response he had on this occasion does not constitute an injury by accident arising out of and in the course of his employment.

8. . . . This was a typical July day, and the temperature was no hotter than it usually gets in July. Plaintiff did not prove that there was anything unusual in these activities of decedent on this occasion nor that there was an interruption of his regular work routine.

9. The heart attack decedent sustained on July 10, 1984 was not the result of an injury by accident arising out of and in the course of his employment.

Plaintiff questions the conclusions stated in finding of fact 9 and the last sentence of finding of fact 7 and excepts to the significance apparently given to the several findings concerning unusualness. Thus, the findings as to unusualness as well as the others not excepted to are deemed to be established. *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E.2d 762 (1954). The conclusions, though misdubbed findings—that the decedent was not injured by accident—can be properly regarded as either conclusions of law, or mixed findings of fact and law, or findings of jurisdictional fact, and are therefore not binding upon us. *Perkins v. American Mutual Fire Insurance*

Co., 274 N.C. 134, 161 S.E.2d 536 (1968); *Alford v. Quality Chevrolet Co.*, 246 N.C. 214, 97 S.E.2d 869 (1957).

The conclusions are erroneous because the unchallenged findings as to the events that occurred, instead of supporting the conclusion that the worker's injury was not "by accident," establish that he was injured by accident and plaintiff is entitled to the compensation authorized. For having properly found that the unexpected, fortuitous, annoying and frustrating events that occurred in the performance of decedent's duties—the sticking of the tarp, the tugging and re-tugging to get it loose, the unsuccessful attempts to back the truck on the lift—caused the frustration which precipitated his fatal heart attack, the Commission concluded therefrom that his injury and death were not accidental because frustration was not unusual in his work as a truck driver, and that the only occurrence in the sequence that was out of the ordinary was the tangling up of the tarp and that did not cause the heart attack. These conclusions and the findings as to unusualness are apparently based upon the misapprehension that for an injury, such as decedent's heart attack, to be compensable under our Workers' Compensation Act it must be caused by an unusual event and cannot result from mental or emotional stimulus. This is not correct as we understand the law. Because the stated purpose of our workers' compensation law without qualification is to compensate workers "injured by accident," G.S. 97-2(6), and the essence of an accident is not the unusualness of the events which cause it, but their unexpectedness. "Accident" is defined by Webster's New International Dictionary 15 (2d ed. 1953) as "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event"; by the Oxford American Dictionary 6 (1980) as "an unexpected or undesirable event, especially one causing injury or damage"; and by The Modern Library Dictionary 4 (1959) as "anything that happens unexpectedly or by chance." The leading author in the field says "[t]he basic and indispensable ingredient of 'accident' is unexpectedness." 1B Larson, Workmen's Compensation Law Sec. 37.20 (1987). And our Supreme Court's definition is not different: In *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947), accident was defined as "[a]n unexpected, unusual *or* undesigned occurrence," (emphasis supplied); and in *Gabriel v. Town of Newton*, 227 N.C. 314, 316, 42 S.E.2d 96, 97 (1947), as "an unlooked for and untoward event which is not expected or designed by the injured employee."

Thus, the facts properly found by the Commission establish as a matter of law that the worker suffered an injurious heart attack by accident because the events that precipitated it—the tangled tarp, the difficulty in lining up the tractor-trailer on the ramp—were obviously unexpected, undesigned, untoward, fortuitous and unlooked for, and no evidence is recorded from which it could be found otherwise. The tarp getting hung up and the decedent failing to place the truck into proper position on the lift were apparently as unexpected and accidental, it seems to us, as a factory machine clogging or an automobile drifting across the highway center line as it rounds a curve. Nor was the injury—the heart attack—not caused by accident, as the Commission concluded, because it was precipitated by a mental stimulus, frustration, rather than physical exertion or contact. In *Ballenger v. ITT Grinnell Industrial Piping, Inc.*, 80 N.C. App. 393, 342 S.E.2d 582 (1986), we held that a plumber's heart attack, which resulted from the shock of being unexpectedly sprayed with water from a pipe not cut off, was compensable though being sprayed with water is hardly an unusual occurrence in the life of a plumber, and in regard to the unexpectedness of the spray and its temperature, we said:

> Mr. Ballenger's case does not rise or fall on the precise temperature of the water in the cold water line at the time of the accident. The hypothetical question posed to each of the medical experts required them to consider the effect of Mr. Ballenger's being hit with a full volume of water from the cold water line. Expert witnesses testified that the water incident could have caused the vaso-constriction of the blood vessels or arterial spasm, either of which would have reduced the amount of blood going to the heart and increased the pressure on the heart muscle. This, they say, could have triggered the heart attack. In the alternative, the experts testified that the stress and excitement resulting from the water incident could have placed an increased demand on his already diseased heart, thus precipitating the myocardial infarction. The precise temperature of the water was not material to this determination.

Id., at 398, 342 S.E.2d at 586.

Nor do we understand that plaintiff's claim is barred by the holding in *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 82 S.E.2d 410 (1954), as defendants argue, since the physical ex-

ertions required of the worker in untangling the tarp and backing the truck were neither unusual nor excessive, as the Commission found. Though *Lewter* is sometimes cited for the unqualified proposition that unusual exertion or strain is necessary before a heart attack will be compensable, *see, e.g., Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 358 S.E.2d 380, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 84 (1987), a careful reading of *Lewter* indicates to us that unusual strain or exertion is only required when the heart attack was not precipitated by accidental, unexpected, untoward events, and when accidental events precipitate a heart attack compensability necessarily follows under the plain, unqualified wording of the statute. Our decisions in *Ballenger v. ITT Grinnell Industrial Piping, Inc., supra, Weaver v. Swedish Imports Maintenance, Inc.*, 61 N.C. App. 662, 301 S.E.2d 736 (1983), and *Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 237 S.E.2d 542 (1977), all heart attack cases, were based upon that understanding, and apparently *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E.2d 762 (1954), was also.

But even if excessive exertion and strain is essential to recovery in this case it has been established by the Commission's findings. For though the *physical* exertion because of the unexpected events was found not to be excessive, the finding as to *emotional and nervous strain*, which can lead to results as baleful as strain upon lungs, muscles and sinews, was otherwise. For the Commission found that the worker's emotional reaction to those events was sufficiently acute and strenuous to precipitate his death; a finding supported by medical testimony to the effect that emotional reactions, particularly anger and frustration, are perhaps the most stressful of all influences on the heart, in that they cause catecholamines to be released into the system which cause a rush of heart activity and a sharp jump in blood pressure. The nervous stress that resulted from the events involved, sufficient to cause the worker's death, appears to be no less severe than that which can develop from chasing a criminal or wrestling a drunk. In any event, the brain and nervous system are bodily parts, no less than bones and sinews, and injuries caused by the reaction of stressful nerves to accidental events are as much within the purview of the Act, we believe, as those caused by the reaction of stressful vertebras or other bodily parts.

Thus, we reverse the Commission's conclusions that the worker's death did not result from an injury by accident, conclude that his

death did result from an injury by accident under G.S. 97-2(6), and remand the matter to the Industrial Commission for entry of a revised opinion and award in favor of the plaintiff in accord herewith.

Reversed and remanded.

Judges WELLS and BECTON concur.

LAUCRESTA REYNOLDS v. ERVIN JUNIOR MOTLEY

No. 8910DC178

(Filed 21 November 1989)

1. **Parent and Child § 10 (NCI3d); Bastards § 10 (NCI3d)— URESA action—filed in name of mother—Social Services real party in interest**

Although the name of the mother, Laucresta Reynolds, was improperly substituted for that of the Virginia District Division of Child Support Enforcement (DCSE) when the action was docketed, it was not necessary to dismiss the appeal because the record clearly shows that the action was prosecuted on behalf of DCSE, the real party in interest. N.C.G.S. Chapter 52A, N.C.G.S. § 1A-1, Rule 17.

Am Jur 2d, Bastards § 85.

2. **Parent and Child § 10 (NCI3d)— URESA action—standing of Social Services to bring action**

The Virginia District Division of Child Support Enforcement had standing under N.C.G.S. § 52A-8.1 to bring an URESA action, even though it did not have custody of the alleged children-obligees, because the children-obligees had, by receiving public assistance in Virginia, effected an assignment of their rights of enforcement under URESA to DCSE by operation of law.

Am Jur 2d, Bastards § 85.

3. Parent and Child § 10 (NCI3d)— URESA action—determination of paternity—subject matter jurisdiction lacking

The trial court erred in an URESA action by denying defendant's motion to dismiss for lack of subject matter jurisdiction where defendant was presumed to have been present in North Carolina during the period or part of the period for which support was sought because there was no showing to the contrary; North Carolina's substantive laws thus apply to determine defendant's duties of support; no certified copy of the certificate of birth was attached to the DCSE petition as required by N.C.G.S. § 49-14(a); North Carolina was therefore without subject matter jurisdiction to adjudicate defendant's paternity; and there was no prior judicial determination of defendant's paternity. Defendant's so-called "acknowledgment" of paternity was neither executed in accordance with the requirements of N.C.G.S. § 110-132 nor accompanied by written affirmation of paternity executed by the mother of the alleged children-obligees, and the mere fact that defendant made child support payments cannot of itself be dispositive of the jurisdictional question.

Am Jur 2d, Bastards §§ 76, 104, 112.

APPEAL by defendant from *Bullock, Stafford G., Judge.* Order entered 7 October 1988 in WAKE County District Court. Heard in the Court of Appeals on 10 October 1989.

The record discloses that on 6 May 1988, the Danville, Virginia District Division of Child Support Enforcement ("DCSE") brought an action against defendant, a North Carolina resident, under the Uniform Reciprocal Enforcement of Support Act ("URESA"). The verified petition, filed in the Danville, Virginia Juvenile and Domestic Relations District Court alleged, *inter alia*, that defendant and Laucresta Reynolds, never married, were the parents of the dependents Michael, Marie, and Tamela Reynolds, and that pursuant to an "acknowledgment of paternity" and "administrative determination" by the Danville Department of Social Services, defendant was responsible for the children's support. The petition further alleged that defendant had been making child support payments under a voluntary wage assignment, that such payments were in arrears, and that DCSE was an obligee as defined by URESA, by virtue of the children's receipt of public assistance in Virginia. The relief sought by DCSE was an order requiring

defendant to pay arrears and reimbursement for the period of 1 January 1979 to 1 April 1988, and to pay continuing child support. An incomplete, undated form purporting to be defendant's acknowledgment of paternity and a document purporting to be defendant's record of child support payments were appended to the petition. No written agreement to support the children, executed by defendant, was produced, and no prior judicial proceedings to determine defendant's paternity and duty to support was shown to have ever been instituted.

The Virginia court certified the petition and ordered that the action be transmitted to the Wake County, North Carolina District Court for enforcement pursuant to URESA. Upon receipt, the cause was docketed and summons was issued naming Laucresta Reynolds as plaintiff. Defendant answered, denying both his paternity and any obligation to support the children. He admitted, however, having paid child support in the past. Defendant's motions to dismiss for failure to state a claim and for lack of subject matter jurisdiction were denied, and a hearing was held at the 30 September 1988 civil session of the Wake County District Court. At the close of plaintiff's evidence, defendant moved for directed verdict. This motion was also denied. The court thereafter entered an order containing no findings of fact and requiring defendant to pay both arrearage and continuing child support to DCSE. From this order, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith and Associate Attorney General Bertha Fields, for plaintiff-appellee.

Sally H. Scherer for defendant-appellant.

WELLS, Judge.

[1] At the outset, we consider *ex mero motu* whether plaintiff is the proper party to prosecute this URESA action in North Carolina. URESA is a procedural device, adopted in every state, which provides a mechanism for the expedited enforcement of duties of child support. *See* N.C. Gen. Stat. ch. 52A (1984 and Supp. 1988); 23 Am. Jur. 2d 966, *et seq.* Under URESA, an obligee (i.e., one "to whom a duty of support is owed") who seeks to enforce child support obligations against an out-of-state obligor must file a verified complaint in the initiating state. N.C. Gen. Stat. §§ 52A-3(6), -10; *accord*, Va. Code Ann. §§ 20-88.13(8), -88.21 (1983 and Supp. 1989).

The court in the initiating state must then determine whether the complaint "sets forth facts from which it may be determined that the defendant owes a duty of support and [whether] a court of the responding state may obtain jurisdiction of the defendant[.]" N.C. Gen. Stat. § 52-11; *accord*, Va. Code Ann. § 20-88.22. If it finds these requirements to be satisfied, the initiating court transmits certified copies of the complaint to the court of the responding state for prosecution of the action. *Id.* When a court of North Carolina, acting as responding state, receives such copies from the court of the initiating state, it must, *inter alia*, docket the cause and notify the district attorney, who appears "on behalf of the obligee." N.C. Gen. Stat. §§ 52A-10.1, -12.

The record discloses that the present action was instituted in Virginia by the DCSE, which filed a verified petition in the initiating court. That court, upon making the required findings, transmitted certified copies of the petition to the Wake County District Court, the jurisdiction of defendant's residence. In docketing the action, it appears that the name of the alleged mother, Laucresta Reynolds, was improperly substituted as plaintiff for that of DCSE. Laucresta Reynolds is neither an obligee as defined by URESA, nor did she file a verified complaint in the initiating state as required by URESA. We need not, however, dismiss the appeal for this technical defect, inasmuch as the record clearly shows that the action was prosecuted on behalf of DCSE, the real party in interest. *Settle v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983); N.C. R. Civ. P., Rule 17 (1983). Accordingly, we turn to addressing the merits of the arguments brought forward by defendant.

[2] Defendant first contends that the court erred in denying his motion to dismiss in that DCSE, because it did not have custody of the alleged children-obligees, had no standing to bring this action. We disagree.

G.S. § 52A-8.1 controls this issue. It provides:

> Whenever a county of this State furnishes support to an obligee, it has the same right to invoke the provisions [of URESA] as the obligee to whom the support was furnished for the purpose of securing reimbursement for such support and of obtaining continuing support[.]

Our courts have held that an out-of-state governmental entity has standing to bring an action under this provision when (1) such

entity has furnished support to an obligee via public assistance funds and (2) the obligee to whom such support was provided has assigned the right of enforcement under URESA to that governmental entity. *Dept. of Social Services v. Skinner*, 48 N.C. App. 621, 269 S.E.2d 678 (1980). Under URESA, such an assignment occurs by operation of law immediately upon the obligee's receipt of public assistance funds. N.C. Gen. Stat. § 52A-8.1; *accord*, Va. Code Ann. § 20-88.19; *cf.*, N.C. Gen. Stat. § 110-137 (1988) (acceptance of public assistance constitutes an assignment of rights to the state or county). In this case the alleged children-obligees, by receiving public assistance in Virginia, effected an assignment of their rights of enforcement under URESA to DCSE by operation of law. Thus, DCSE has standing to bring this action. *Dept. of Social Services, supra.*

[3] Defendant next contends that the court erred in denying his motion to dismiss for lack of subject matter jurisdiction in that his paternity and thus his duty of support under URESA was not established.

It is well settled that "paternity must be judicially established to warrant relief [under URESA]." *Smith v. Burden*, 31 N.C. App. 145, 228 S.E.2d 662 (1976). The record discloses that no judicial determination of defendant's paternity with respect to the alleged children-obligees had been made at the time this action was initiated. This, however, is not fatal, inasmuch as North Carolina courts are expressly granted the authority to "adjudicate the paternity issue" in actions brought under URESA. N.C. Gen. Stat. § 52A-8.2. Nevertheless, URESA, being a procedural mechanism for the enforcement of duties of support, does not provide additional substantive grounds for determining the existence of the duty of support. *Stevens v. Stevens*, 68 N.C. App. 234, 314 S.E.2d 786, *cert. denied*, 312 N.C. 89, 321 S.E.2d 908 (1984); *see also Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954) (outlining the history of URESA). *A fortiori*, URESA does not provide additional grounds for determining paternity. Consequently, a North Carolina court adjudicating the issue of paternity in a URESA action must look to the applicable substantive law governing the determination of paternity. This, in turn, must be determined by reference to the statutory choice of law directive pertaining to URESA actions. *Pieper v. Pieper*, 323 N.C. 617, 374 S.E.2d 275 (1988).

The statutory choice of law directive pertaining to URESA actions is found at G.S. § 52A-8 which provides that

> [d]uties of support applicable under [URESA] are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

Because there has been no showing to the contrary, defendant is presumed to have been present in North Carolina, the responding state, and thus our State's substantive laws apply to determine defendant's duties of support. *Pieper, supra.*

Under North Carolina law, the duty of a putative father to support his illegitimate child is predicated on the judicial establishment of his paternity with respect to such child "pursuant to G.S. 49-14." N.C. Gen. Stat. § 49-15 (1984); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976); *see also Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (1989). G.S. § 49-14(a) provides, in pertinent part, that "[a] certified copy of a certificate of birth of the child shall be attached to the complaint." In the instant case, the record discloses that no such certified copies of the birth certificates of the alleged children-obligees were attached to the DCSE petition. Because this statutory prerequisite was not complied with, we are compelled to conclude that the North Carolina court was without subject matter jurisdiction to adjudicate defendant's paternity. *See Dept. of Social Services v. Williams, infra.* Since there was neither a prior judicial determination of defendant's paternity nor jurisdiction to adjudicate the issue of paternity, defendant's motion to dismiss for lack of subject matter jurisdiction should have been granted by the court.[1]

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1. The State's assertion at oral argument that, notwithstanding plaintiff's failure to comply with the statutory requirements, the court had subject matter jurisdiction under URESA to adjudicate defendant's paternity in that, pursuant to G.S. § 52A-19, the verified petition of DCSE constituted *prima facie* evidence of the facts stated therein is unavailing. Careful reading of G.S. § 52A-19 persuades us that the Legislature did not intend for that statute, as part of the expedited procedures applying under URESA, to obviate the requirements of G.S. § 49-14 in a paternity adjudication incident to an URESA action. To hold otherwise would create a clear disparity in the procedural protections afforded to putative fathers defending paternity actions under G.S. § 49-14 and those afforded to putative fathers defending paternity actions incident to the "typically open-and-shut" proceedings under

The State counters that a judicial determination of paternity is unnecessary in that defendant executed a written acknowledgment of paternity which was appended to DCSE's verified petition. The State urges that this acknowledgment, coupled with defendant's actions in paying support in the past, constitutes sufficient evidence that defendant is the responsible party. We are not persuaded.

It is true that G.S. § 110-132 allows a written acknowledgment of paternity "[i]n lieu of . . . any legal proceeding instituted to establish paternity" in actions to enforce duties of support under G.S. ch. 110. Such an acknowledgment must, however, be "sworn to before a certifying officer or notary public" and "accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child" for whom support is sought. *Id.* G.S. § 110-132 also provides that "a written agreement to support [a] child by periodic payments" is enforceable as an order of support, if such an agreement complies with the enumerated statutory requirements.

Assuming *arguendo* that this statute applies in actions under URESA to enforce duties of support as against a putative father, its requirements clearly have not been satisfied in this case. The so-called "acknowledgment" of paternity was neither executed in accordance with the above statutory requirements nor accompanied by a written affirmation of paternity executed by the mother of the alleged children-obligees. Moreover, the record fails to disclose that a written agreement to support the children was ever executed by defendant. Where the requirements of G.S. § 110-132 are not complied with, the court has no jurisdiction to enforce child support duties under G.S. ch. 110. *Dept. of Social Services v. Williams*, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Finally, with respect to defendant's actions in paying child support to the alleged children-obligees in the past, we do not deny that such actions may constitute some evidence that defendant owes a duty of support, once the jurisdictional barrier has been surmounted through compliance with the statutory requirements. The mere fact that defendant made such payments, however, cannot of itself be dispositive of the jurisdictional question, in view

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URESA. *See 2 Lee on North Carolina Family Law* § 169 at 350 (1980). This we cannot do.

of the clear statutory prerequisites to maintaining actions under either G.S. § 49-14 or G.S. § 110-132.

For the foregoing reasons, the judgment is

Reversed.[2]

Judges JOHNSON and ORR concur.

DAVIS AND DAVIS REALTY CO., INC., PLAINTIFF v. JEROME T. RODGERS, AND J. T. RODGERS CORP., A CORPORATION, JOINTLY AND SEVERALLY, DEFENDANT

No. 8926SC310

(Filed 21 November 1989)

Brokers and Factors § 6.1 (NCI3d)— realtor—commission—earned on signing of contract

The trial court correctly denied defendants' motions for directed verdict or judgment n.o.v. in an action to collect a real estate commission where plaintiff realtor had negotiated on behalf of defendants for several months for the purchase of a 196-acre tract of land in Mecklenburg County; a purchase price of $8,000 per acre was offered with a commission of 7% of the sale price to be paid by the sellers; plaintiff and defendants subsequently agreed on a purchase price of $7,100 per acre with a commission of $50,000 to be paid by the purchaser; plaintiff succeeded in getting all of the owners to sign a sales contract; defendant executed the contract and paid an earnest money deposit to plaintiff as escrow agent; the contract provided a 30-day period in which to inspect the property and terminate the contract; defendant did not terminate the contract within that period; and defendant elected not

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2. Because our holding that the court lacked subject matter jurisdiction is dispositive, we do not address defendant's second argument challenging the court's denial of his motion for directed verdict or his third argument challenging the court's order on the grounds that it failed to include findings of fact. With respect to the latter, however, we note that under *Grimes v. Grimes*, 78 N.C. App. 208, 336 S.E.2d 664 (1985), such findings must be present in a support order entered under URESA.

to purchase the property. Any inconsistencies in plaintiff's evidence with regard to when the commission was actually due and payable was for resolution by the jury, and there was evidence supporting the jury's verdict that the commission was earned when the property owners agreed to sell the property to defendant and that plaintiff was under no duty to see the sale through to completion.

Am Jur 2d, Brokers §§ 183, 196, 204.

APPEAL by defendants from *Allen, C. Walter, Judge*. Judgment entered 3 November 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 12 October 1989.

Defendant, Jerome T. Rodgers, is actively engaged in the business of real estate development and investment in Charlotte, North Carolina. Defendant, J. T. Rodgers Corporation, is wholly owned by Jerome T. Rodgers and is in the business of real estate management and development.

Plaintiff, Davis and Davis Realty Company, Inc., buys, sells, and brokers transactions in real estate. W. Cleve Davis is the president of plaintiff corporation.

For several months during early 1986, plaintiff unsuccessfully negotiated on behalf of defendants for the purchase of a 196-acre tract of land (the Hall property) which was located in Mecklenburg County. During the original negotiations a purchase price of $8,000 per acre was offered and a commission of 7% of the sale price was to be paid to plaintiff by the sellers of the property (the Hall heirs). In September 1986 Jerome T. Rodgers and W. Cleve Davis again discussed the potential acquisition of the Hall property. The outcome of this discussion was that a reduced purchase price of $7,100 per acre was to be offered for the Hall property and a real estate commission of $50,000 would be paid to the plaintiff by the purchaser of the property.

In October 1986 plaintiff succeeded in getting the Hall heirs to sign a sales contract with the corporate defendant under the above specified terms, including the reduced purchase price of $7,100 per acre. Jerome T. Rodgers executed the contract as president of J. T. Rodgers Corp. An earnest money deposit was paid to plaintiff as escrow agent. The sales contract provided in part that J. T. Rodgers Corp. had a 30-day period in which to inspect the

property and terminate the contract if it so desired. J. T. Rodgers Corp. did not terminate the contract within the 30-day period; however, it elected not to purchase the Hall property. The earnest money was forfeited and no commission was ever paid to the plaintiff. At trial plaintiff asserted that the commission was obtained upon the signing of the sales contract by the Hall heirs. Defendants asserted that the commission was not due unless the corporate defendant actually acquired the property. From a jury verdict in favor of plaintiff, defendants appealed.

Bradley, Guthery, Turner and Curry, by Tate K. Sterrett, for plaintiff-appellee.

Murchison, Guthrie, Davis & Henderson, by Robert E. Henderson and K. Neal Davis, for defendant-appellants.

WELLS, Judge.

Defendants contend that the trial court erred by refusing to grant their motions for directed verdict or judgment notwithstanding the verdict. Defendants contend that plaintiff's testimony concerning when his commission was due is so inconsistent as to establish as a matter of law that no agreement was ever reached by the parties. For the following reasons we disagree.

The jury found that: (1) a contract existed between plaintiff and either defendant whereby either defendant was to pay to the plaintiff a real estate commission on the Hall property and (2) the contract was breached by defendants' refusal to pay the commission. The parties stipulated at trial that the verdict would be binding on both defendants, jointly and severally.

When determining whether to grant a motion for directed verdict or judgment notwithstanding the verdict the same standard applies. *Williams v. Jones*, 322 N.C. 42, 366 S.E.2d 433 (1988). Both motions test the legal sufficiency of the evidence to take the case to the jury. *Taylor v. Walker*, 84 N.C. App. 507, 353 S.E.2d 239, *reversed on other grounds*, 320 N.C. 729, 360 S.E.2d 796 (1987). In ruling on either motion the court must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmovant. *Williams, supra* at 48, 366 S.E.2d at 437. Conflicts and inconsistencies in the evidence

are to be resolved in favor of the nonmovant. *Id.* at 48, 366 S.E.2d at 437.

In their answer defendants admit that Jerome T. Rodgers, in his capacity as president of J. T. Rodgers Corp., agreed to pay a real estate commission to W. Cleve Davis in connection with the acquisition of the Hall property. The factual dispute in this case concerns whether defendants were required to pay the commission when the Hall heirs signed the sales contract or whether defendants were obligated to pay plaintiff the commission only if the sale actually closed. In resolving this factual dispute in favor of plaintiff, the jury had more than a scintilla of evidence that plaintiff's entitlement to its commission was established when the Hall heirs signed the contract and was not contingent upon the sale being consummated. *See, e.g., Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E.2d 32 (1986) (If there is more than a scintilla of evidence supporting each element of nonmovant's case, the motion for directed verdict [or judgment notwithstanding the verdict] should be denied.) (Citations omitted).

According to Davis' testimony, in order for plaintiff company to be entitled to the $50,000 commission he had to "secure the acceptance of [Mr. Rodger's offer by] the Hall family members, and have them execute the contract." Davis further testified that the "proposal was that he [Rodgers] would have 30 days after he signed the contract to examine the property to be sure it was satisfactory . . . after the initial 30-day period of time he would . . . pay us [Davis and Davis Realty] our commission for the work that we had performed." Davis testified that during a telephone conversation with Rodgers 26 December 1986, Rodgers informed Davis that he was not going to "close the contract" on the Hall property because there was "no money in it for him." Since the time for terminating the sales contract was past, Davis advised Rodgers that the binder deposit he had paid must be released to the Hall heirs. Davis next testified that he wrote defendant Rodgers a letter requesting payment of his commission. He read the letter to the jury which in pertinent part read:

> [W]e are writing to you in reference to services rendered to you by our firm in connection with the contract covering the Hall property . . . . We would like to receive payment for services we have rendered in connection therewith.

> In September, 1986, you advised that you were prepared to purchase the Hall property provided we secure a firm commitment from the Hall family on the terms and conditions which you specifically specified, and are a part of the contract which was executed by the Hall interest in connection therewith.
>
> You further advised that you would pay this office the sum of $50,000 following the initial 30 day period which would give you time to determine the suitability of the site for your purpose. The subject contract was not cancelled within the initial 30 day period, and thus we feel that our firm has earned the fee which you agreed to pay in connection therewith.
>
> By demand we are requesting that you forward your check in the amount of $50,000 for services rendered to you by this company in negotiating a contract in accordance with the specific terms and conditions which you set forth and accepted.

On cross-examination Davis was asked to read selected portions of an affidavit he had submitted earlier. It included the following statement:

> Mr. Rodgers promised to pay my company a commission of $50,000, and was not contingent upon the contract actually being closed out and performed. He promised to pay the commission if we could get the Hall heirs to sign the contract for a price of $7,100 per acre and other terms.

On cross-examination of Davis, defendants attempted to show that because of the termination clause in the sales contract, the commission agreement between defendants and W. Cleve Davis was nullified or repudiated. In response to questions concerning when the commission was due plaintiff repeatedly answered that the commission was due when the contract of sale was signed by the Hall heirs, unless defendant corporation exercised its right under the sales contract to terminate the sale within 30 days. In an effort to clarify the relationship between the oral agreement concerning the commission and the buyer's termination clause in the written sales contract, the following exchange took place between W. Cleve Davis and his attorney:

> Q. Mr. Davis, there have been a lot of questions about when you expected—or when your company expected to receive payment of some commission. In the real estate community, when is a commission normally considered earned?

A. At the time you bring the buyer and seller together and they sign a contract.

. . .

Q. (By Mr. Sterrett) Now, sometimes is it possible that the commission is not earned unless certain things happen?

A. That's correct.

Q. Is there any particular custom or practice in the community as far as when the commission is paid as opposed to when it is earned?

A. No, it is by negotiation on each contract.

. . .

Q. There have been a lot of questions about whether there was some condition about your company's entitlement of payment relating to this 30 day period. With respect to the promise that was made to pay your company a commission of $50,000, would you state whether or not that promise was conditioned upon the closing actually occurring?

A. No, sir, it was not.

This evidence tends to support the jury's verdict which essentially found that the $50,000 commission was earned when the Hall heirs agreed to sell the property to defendant and that plaintiff was under no duty to see the sale through to completion. Any inconsistencies in the plaintiff's evidence with regard to when the commission was actually due and payable were for resolution by the jury. *Murray v. Murray*, 296 N.C. 405, 250 S.E.2d 276 (1979). Furthermore, plaintiff's evidence, albeit somewhat contradictory concerning whether the commission was payable immediately upon seller's signing of the contract or only payable within 30 days after execution if defendant-buyer did not terminate the sale, did not rise to the level of binding adverse testimony, as argued by defendants. *See, e.g., Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979) (equivocal, uncertain, or inconsistent statements distinguished from unequivocal repudiation of allegations sufficient to justify a directed verdict). While the 30-day termination clause in the sales contract may have extended the time for payment of plaintiff's commission by 30 days, it did not conclusively alter the commission agreement to the extent that plaintiff was re-

quired to see the sale through to completion. This issue was for the jury and their verdict in plaintiff's favor was supported by sufficient evidence.

No error.

Judges JOHNSON and ORR concur.

INTERNATIONAL PAPER COMPANY v. CORPOREX CONSTRUCTORS, INC.

No. 8910SC236

(Filed 21 November 1989)

1. **Contracts § 10 (NCI3d)— construction injury—indemnification of attorney fees—one provision void—severable**

In an action for indemnification of attorney fees arising from a construction injury where plaintiff had contracted with defendant for the design and construction of an expansion of one of its facilities and the injury occurred to a subcontractor's employee, a clause in an indemnity provision in the contract which violated N.C.G.S. § 22B-1, which declares void and unenforceable those construction indemnity agreements which attempt to hold one party responsible for the negligence of another, was severable. The offending term was not a central feature of the contract or even of the provision; the court does not rewrite the contract or substitute its own terms by striking the offending language.

Am Jur 2d, Indemnity §§ 9, 15, 16.

2. **Contracts § 10 (NCI3d)— construction injury—indemnity provisions—not in conflict—ambiguous**

Two indemnity clauses in a construction contract were not in conflict where the meaning of each clause was clear and it was reasonable to conclude that one extended the indemnity clause of the other; however, based on the contract language alone, it could not be said as a matter of law that defendant had no duty to indemnify plaintiff for the negligence of subcontractors.

Am Jur 2d, Indemnity §§ 13, 14.

INTERNATIONAL PAPER CO. v. CORPOREX CONSTRUCTORS, INC.

[96 N.C. App. 312 (1989)]

APPEAL by plaintiff from *Johnson, E. Lynn, Judge*. Judgment entered 3 January 1989 in WAKE County Superior Court. Heard in the Court of Appeals 21 September 1989.

Plaintiff, International Paper Company, brought this action against defendant, Corporex Constructors, Inc., seeking recovery of attorney's fees under an indemnification agreement set out in a construction contract between the parties. Both parties moved for summary judgment. From the trial court's grant of defendant's motion for summary judgment, plaintiff appeals.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Reid Russell and Kari L. Russwurm, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr. and Evelyn M. Coman, for defendant-appellee.

WELLS, Judge.

On 6 April 1983 plaintiff and defendant entered into a contract by which defendant agreed to design and construct the expansion of plaintiff's facility in Raleigh, North Carolina. The contract embodied the full and complete agreement between the parties as to insurance and indemnification in relation to the expansion of the facility. Indemnity provisions appear in two different places in the contract. One indemnity provision appears in Article 9, Section 4 of the agreement which was set out on a form regularly used by International Paper. The other indemnity clause is Article 3.16.1 of the general conditions section which was incorporated into the contract as part of an addendum. The indemnity provisions are not identical; specifically, the clause in Article 9, Section 4 does not cover negligent acts of subcontractors while the clause in Article 3.16.1 does cover the negligent acts of both contractor and any subcontractors hired to work on the project.

Corporex subcontracted the roofing portion of the work to Mid-Western Commercial Roofers, Inc. On 13 October 1983, while performing roofing work at the Raleigh facility, an employee of the subcontractor fell through the roof and was injured. The employee, Douglas Wayne Williams, through his *guardian ad litem* brought suit against plaintiff, defendant, and others for his personal injuries.

International Paper demanded that Corporex assume the defense of the Williams action against International Paper. Corporex re-

fused. International Paper then employed counsel at its own expense to defend the Williams action. The Williams action against International Paper was eventually dismissed. International Paper subsequently brought this suit against Corporex seeking indemnification for $16,372.85 in attorney's fees it incurred in defending the Williams suit. The parties stipulated, among other things, that Douglas Wayne Williams' damages and injuries were not due to an act of, or the neglect of, International Paper. The parties further stipulated that Williams' damages and injuries were caused in whole or in part by a negligent act or omission of a subcontractor, or by someone directly or indirectly employed by a subcontractor.

Plaintiff assigns as error the trial court's grant of defendant's motion for summary judgment and its denial of plaintiff's summary judgment motion. Plaintiff asserts that the indemnification provision in Article 3.16.1 of the contract allows for the recovery of its attorney's fees. Defendant counters that the provision in Article 3.16.1 is void because it contains a clause which violates N.C. Gen. Stat. § 22B-1 (1986). G.S. § 22B-1 in pertinent part provides as follows:

> Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.

The defendant further argues that because the contract provision in Article 9, Section 4 is clear and unambiguous it establishes as a matter of law that defendant is not obligated to indemnify the plaintiff, including the cost of attorney's fees, for the negligence of subcontractors. In the alternative defendant argues that if both indemnity clauses are valid, then the clause in Article 9, Section 4 takes precedence over the clause in the general conditions. Plaintiff maintains that the offending language is severable and, therefore, the indemnity provision in Article 3.16.1 is valid and controlling on these facts. We first address the issue of severability.

[1] The indemnity provision in Article 3.16.1 of the contract's general conditions section provides as follows:

> The Builder shall indemnify and hold harmless the Owner and his agents and employees from and against all claims, losses, and expenses, including attorney's fees arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Builder, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

The last clause of the indemnity provision violates the provisions of G.S. § 22B-1. It is therefore against public policy and is void and unenforceable. This does not end the inquiry, however. When a contract contains a provision which is severable from an illegal provision and is in no way dependent upon the enforcement of the illegal provision for its validity, such a provision may be enforced. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973). Severability may apply to terms within a particular provision as well as to entire contract provisions if the party seeking to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing. Restatement (Second) of Contracts § 184 (1981).

The indemnity provisions to which G.S. § 22B-1 apply are those construction indemnity provisions which attempt to hold one party responsible for the negligence of another. The parties in this case have stipulated that Douglas Wayne Williams' damages and injuries were not due to an act of, or the neglect of, International Paper. The statute specifically does not apply to a contract, promise, or agreement in which one agrees to indemnify another "against liability for damages resulting from the *sole* negligence of the promisor, its agents or employees." (Emphasis added.) G.S. § 22B-1.

Moreover, the offending term in this indemnity provision is not a central feature of the contract or even of the provision. It is easily severed from the provision. The general meaning of the provision—that Corporex will indemnify International Paper

for injury or damage resulting from the negligent acts of Corporex, its subcontractors, and their employees—is not affected. By striking the offending language the Court does not rewrite the contract or substitute its own terms in the provision for those of the parties. We merely sever the portion that is void as against public policy from an otherwise valid indemnity provision.

Defendant correctly points out that this Court has applied G.S. § 22B-1 to an indemnity clause and found the entire provision against public policy, void and unenforceable. *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.*, 90 N.C. App. 310, 368 S.E.2d 438, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 110 (1988). *Miller* is factually distinguishable from this case. In *Miller* the illegality permeated the entire provision making severance impossible. The issue of severance was not before the *Miller* court. Here, unlike in *Miller*, severance is possible. Accordingly, *Miller* does not control on these facts.

[2] The next issue raised by this appeal is whether the two indemnity provisions are in conflict with each other. It is well settled that a contract is construed as a whole. The intention of the parties is gleaned from the entire instrument and not from detached portions. *See Robbins v. Trading Post*, 253 N.C. 474, 117 S.E.2d 438 (1960). Individual clauses are to be considered in context. All parts of the contract will be given effect if possible. *Id.* at 477, 117 S.E.2d at 440-41. This Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous. *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 217 S.E.2d 682, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975). The court in *Lowder* also maintained that contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible. In this case the meaning of each clause is clear. The clause in Article 3.16.1 covers the negligence of subcontractors, the clause in Article 9 does not. The clauses do not mean the same thing; however, they are not necessarily in conflict. It is reasonable to conclude that Article 3.16.1 extends the indemnity coverage of Article 9, Section 4 to include the negligent acts of subcontractors. When the contract is read as a whole, Corporex appears to have agreed to indemnify International Paper from claims arising from the negligence of the general contractor or of any subcontractors.

When a court is asked to interpret a contract its primary purpose is to ascertain the intention of the parties. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973). A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. *Id.* at 410, 200 S.E.2d at 624. When an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury. *Silver v. Board of Transportation*, 47 N.C. App. 261, 267 S.E.2d 49 (1980). If the writing leaves it uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties. *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968).

In this case the existence of two indemnity provisions, each with clearly different scopes of coverage, creates an ambiguity as to the true intention of the parties. Based on the contract language alone we cannot say as a matter of law that defendant had no duty to indemnify plaintiff for the negligence of subcontractors. There is some evidence in the record to indicate that the provision providing indemnity exclusively for the negligent acts of contractors was specifically negotiated by the parties. However, there is no indication in the contract that this provision is to override or negate the other indemnity clause. Ambiguities in contracts are to be resolved by a trier of fact upon consideration of a range of factors including the expressions used, the subject matter, the end in view, the purpose and the situation of the parties. *Silver, supra.*

A party moving for summary judgment is entitled to such judgment only if he can show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). Because we hold that the offending clause in Article 3.16.1 was severable, defendant was not entitled to summary judgment. However, this does not resolve the issue of whether the parties intended to extend indemnification to cover the negligent acts of subcontractors. In order to resolve this ambiguity we must remand this case to the superior court for further proceedings.

Reversed and remanded.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. JOHN ALBERT SEAGLE

No. 8818SC1398

(Filed 21 November 1989)

1. **Criminal Law § 188 (NCI4th)— driving while impaired—statements to officers—motion to suppress—State precluded from arguing motion untimely or improper**

In a prosecution for driving while impaired in which defendant's oral motion to suppress statements made prior to his arrest was denied, the State was precluded from arguing on appeal that defendant's motion was untimely or improper where the State neither objected nor excepted to defendant's oral motion to suppress. N.C. Rules of App. Procedure, Rule 10.

Am Jur 2d, Criminal Law § 785.

2. **Criminal Law § 75.7 (NCI3d)— driving while impaired—statements to officers—non-custodial interrogation—Miranda warning not required**

A trial court order suppressing statements made to officers prior to defendant's arrest for driving while impaired was erroneous where defendant was detained for only a few minutes on a public thoroughfare, and there were never more than three officers present; the only questions asked were directed to ascertaining the identity of the driver of a wrecked automobile, information necessary for the officer to complete an accident investigation report; and, at that time, there was no crime investigation under way, no suspects, and no interrogation.

Am Jur 2d, Criminal Law §§ 794, 938.

APPEAL by the State from order of *Judge James A. Beaty, Jr.*, entered 12 September 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 29 August 1989.

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

Michael A. Schlosser and Associates, by Charles E. Neill, III, for defendant, appellee.

COZORT, Judge.

On 25 October 1987, at approximately 1:00 a.m., Officer Joe Smith of the Greensboro Police was called to the scene of a traffic accident on Summit Avenue in Greensboro. Smith found an automobile in a ditch on the side of the road with fresh blood and dirt in the interior. There were no persons present at the scene when Smith arrived. He radioed in the registration plate number of the vehicle and learned that it was registered to Albert Dale Seagle.

Officer Frank Young was patrolling near the scene of the accident and overheard Officer Smith's radio transmission. Young observed two white males walking along the roadside on Summit, and he stopped and asked the two men what happened. Officer Young testified at the suppression hearing that the two men appeared to have red dirt all over them.

When asked what happened, both men responded that they had been in an accident. Officer Young asked for their driver's licenses and radioed Officer Smith to advise him of what had occurred. Defendant had blood on his shirt and one of his arms, and Officer Young asked defendant if he needed medical assistance, which he declined.

Approximately ten or fifteen minutes later, Officer Smith, accompanied by Officer Johnson, arrived at the place where Young and the two men were. Officer Smith questioned the men and asked why they had left the scene of the accident. Defendant stated that he had gone to a convenience store to call his parents. Smith also asked the two men who had been driving, and defendant replied that it was he.

As Officer Smith was questioning defendant, Smith detected the odor of alcohol about defendant. Smith requested defendant to perform a few sobriety tests, and after defendant complied he was arrested for driving while impaired.

Defendant was taken to the Greensboro Police Station where he submitted to a chemical analysis of his blood. It was not until this time that defendant was advised of his *Miranda* rights.

Defendant pled not guilty when he was tried in district court, but he was found guilty. He then appealed to the superior court for a trial *de novo*. At the outset of his trial, defendant made

an oral motion to suppress any statements made by him prior to his arrest. The trial court conducted a hearing and concluded that these statements should be suppressed.

The State certified to the trial court that the suppressed statements were necessary for the trial of its case and appealed the suppression order.

[1] First, the State argues that defendant's oral motion to suppress was not timely or properly filed. The State contends that pursuant to N.C. Gen. Stat. § 15A-976(b), defendant failed to make his motion within ten working days of the district court judgment.

For any exception to be properly preserved for review by this Court, an objection must have been made at the trial court level. *See* Rule 10, N.C. Rules of App. Proc. (effective for all judgments of the trial division entered prior to 1 July 1989). Furthermore, our Supreme Court has stated that "[t]he jurisdiction of the Supreme Court [and likewise this Court] on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court." *State v. Hedrick*, 289 N.C. 232, 234, 221 S.E.2d 350, 352 (1976) (quoting *Gasque v. State*, 271 N.C. 323, 339, 156 S.E.2d 740, 751 (1967), *cert. denied*, 390 U.S. 1030, 20 L. Ed. 2d 288, 88 S.Ct. 1423 (1968)).

The State neither objected nor excepted to defendant's oral motion to suppress. Instead, the district attorney stated that he was prepared to go forward with a hearing so that he could show why the statements made by defendant were admissible. Such objection and exception was not deemed to have been made by operation of law, and the State is precluded from arguing on appeal that defendant's motion was untimely or improper. *See* Rule 10, N.C. Rules of App. Proc. (effective for all judgments of the trial division entered prior to 1 July 1989).

[2] Second, the State argues that the questionings by Officers Smith and Young were noncustodial interrogations and a *Miranda* warning was not required. In holding that the admission by the defendant (that he was the driver of the car) should be suppressed, the trial court stated:

> Based upon these findings, the Court concludes, as a matter of law, that the defendant was in custody to the extent that he had his license taken from him and the Court finally con-

cludes as a matter of law, that the person or a person, a reasonable person, in the defendant's position, would not, or would have believed that he was in custody and deprived of his freedom of action. I'll allow the Motion to Suppress any statements made by the defendant to the officers on-the-scene.

The trial court's findings of fact and conclusions of law are entitled to great deference on appeal. Nonetheless, a trial court's legal conclusion on whether a statement should be suppressed is reviewable on appeal. *See, e.g., State v. Allen*, 90 N.C. App. 15, 367 S.E.2d 684 (1988); and *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). We find the facts below lead to the legal conclusion that the defendant was not being interrogated; rather, the officer asked the minimal questions required to complete his accident investigation report. The defendant was not "in custody" for the purpose of giving the *Miranda* warnings.

The proper standard for determining custody in cases where persons are stopped for traffic offenses is set out in *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317, 104 S.Ct. 3138 (1984). Concerning the standard and whether there was custody, the Supreme Court stated that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 442, 82 L. Ed. 2d at 336, 104 S.Ct. at 3141.

The facts in *Berkemer* are similar to this case. In *Berkemer*, the defendant was observed by an Ohio State Trooper weaving in and out of a lane of traffic. The trooper followed defendant for a couple of miles and then stopped him. The defendant had difficulty standing and was asked by the trooper to perform a field sobriety test. The defendant was unable to complete the test successfully. The trooper asked defendant whether he had been using intoxicants, and he replied that he had consumed two beers and had smoked several joints of marijuana. Defendant was then arrested and at trial sought to exclude those statements.

The Supreme Court held that a *Miranda* warning was not required prior to the defendant's arrest in *Berkemer. Id.*, 82 L. Ed. 2d at 336, 104 S.Ct. at 3141. The Court reasoned that there are several factors which mitigate the danger that a person questioned incident to a traffic stop will be induced to speak when he would not otherwise do so. A traffic stop is temporary and brief, and a detainee's expectations are that he will ultimately be free to proceed, albeit with a possible citation. Also, the Court

pointed out that a detainee does not feel that he is at the mercy of the police. Both the detainee and the policeman are stopped by the roadside, in public view, with passersby on foot and in automobiles. The Court also determined that a detained motorist is normally confronted by only one or, at the most, two policemen, and that fact mutes the sense of vulnerability. *Id.* at 437-38, 82 L. Ed. 2d at 333-34, 104 S.Ct. at 3149.

In the case below, defendant was detained for only a few minutes, on a public thoroughfare, and there were never more than three officers present. The only questions asked were directed to ascertaining the identity of the driver of a wrecked automobile, information necessary for the officer to complete the accident investigation report. At that time, there was no crime investigation underway, no suspects, and no interrogation. We find *Berkemer* controlling and the trial court's conclusion to the contrary erroneous.

Our finding of no custodial interrogation is consistent with prior decisions handed down by this Court. In *State v. Gwaltney*, 31 N.C. App. 240, 228 S.E.2d 764, *disc. rev. denied*, 291 N.C. 449, 230 S.E.2d 767 (1976), the defendant was transported to the hospital after being involved in an accident. A police officer traveled to the hospital and asked the defendant several questions while she was outside the emergency room awaiting treatment. While asking the questions, the officer formed the opinion that the defendant was under the influence of intoxicating liquor. When defendant was released from the emergency room, she was placed under arrest and was taken to the police station. At the police station, she was advised of her *Miranda* rights. The defendant moved to suppress the responses to the questions directed to her at the hospital emergency room. In affirming the trial court's denial of the motion to suppress, this Court, in an opinion by Chief Judge Brock, stated:

> Such questioning is necessary for the purpose of preparing the official accident report which is required to be filed. They are investigatory and not accusatory. The *Miranda* warnings and waiver of counsel are only required when a defendant is being subjected to custodial interrogation.

Id. at 242, 228 S.E.2d at 765.

In *Stalls v. Penny*, 62 N.C. App. 511, 302 S.E.2d 912 (1983), a police officer saw the petitioner standing alone near a car which

was in a roadside ditch. The officer stopped and asked the petitioner what had happened. The petitioner replied that a truck had run him off the road. After observing that petitioner was unsteady on his feet and detecting a strong odor of alcohol on his breath, the officer arrested the petitioner for driving under the influence and read petitioner his *Miranda* warnings. The trial court found that petitioner's arrest was unconstitutional because his statement that he was driving the car was elicited by the officer before he was advised of his *Miranda* rights. In reversing the trial court, this Court held:

> The main purpose of the *Miranda* rule . . . is to prevent the police from imposing their will upon and swaying those accused of crime who are under their dominion and control. The *Miranda* rule is not concerned with the routine, investigative questioning of people at the scene of a motor vehicle accident.
>
> That the officer may have suspected that petitioner had driven the car and even that he was under the influence of some intoxicant makes no difference. . . . Accidents involving damage and injury to property or persons, and possible violations of the law, must be investigated. The investigation conducted here, voluntarily cooperated in by the petitioner, violated no right of the petitioner, constitutional or otherwise.

Id. at 514, 302 S.E.2d at 914.

The trial court's order is reversed and the case is remanded for trial.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

ROBERT A. GRIFFIN v. ALMEDA S. GRIFFIN (NOW ROUSE)

No. 893DC58

(Filed 21 November 1989)

Divorce and Alimony § 24.4 (NCI3d)— child support arrearage— equitable estoppel

The trial court improperly applied equitable estoppel as a bar to child support arrearages where plaintiff husband was ordered in 1974 to pay $200 a month child support to the Clerk of Court's office, as well as major medical and dental bills of the children; plaintiff never paid any medical or dental bills of his children; payments were made directly to defendant and not to the Clerk's office; and plaintiff twice unilaterally reduced the payments. Child support is governed primarily by statute and defendant was entitled to proceed as she did, the touchstone being the welfare of the child, not freedom of contract. One parent may not evade the obligations of child support by citing the failure of the other parent to insist immediately upon such support. Moreover, even assuming equitable estoppel, plaintiff cannot show detrimental reliance. N.C.G.S. § 50-13.10, N.C.G.S. § 50-13.4(f)(8).

Am Jur 2d, Divorce and Separation § 1074.

APPEAL by defendant from judgment of *Judge James E. Ragan, III*, entered 6 October 1988 in CARTERET County Superior Court. Heard in the Court of Appeals 31 August 1989.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by James Q. Wallace, III, for plaintiff appellee.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by George L. Wainwright, Jr., for defendant appellant.

COZORT, Judge.

This action has its origins in a divorce decree entered 27 March 1974 in which the plaintiff-husband was ordered to pay $200 per month in child support. The defendant-wife initiated the present action on 13 August 1987 with a motion in the cause to reduce child support arrearages to judgment. The plaintiff's response raised, among other defenses, equitable estoppel. The trial court, apply-

ing equitable estoppel, entered judgment for the plaintiff on 6 October 1988. On appeal the defendant contends that the trial court erred in concluding that she is equitably estopped from reducing her ex-husband's child support arrearages to judgment when his child support obligations mandated by the divorce decree have vested. We agree and reverse.

The judgment granting plaintiff and defendant an absolute divorce ordered the plaintiff to pay $200 per month to the office of the Carteret County Clerk of Court as support for the infant children Angela Renee Griffin and Robert A. Griffin, Jr. These installments were to continue until the younger child, Robert, reached majority. The decree also ordered the plaintiff to pay "for major medical and dental bills" of the children during their minority. The plaintiff never paid any medical or dental bills of his children; nor did he ever make support payments to the clerk's office as ordered. Such payments as he did make were sent directly to his ex-wife.

After the divorce decree was entered in March of 1974, the plaintiff paid $200 per month to the defendant for five months. Plaintiff then lost his job, remained unemployed for approximately five weeks, and found a new job which paid less than his previous employment. At about this time, the plaintiff wrote defendant a letter (the date of which is uncertain) announcing his decision

> to send the kids one hundred dollars a month because I do not think that it take [*sic*] two hundred dollars for my kids to live on and I do not intend to pay your way living the way you are. If you won't [*sic*] to take it to court you can I do not care anymore but if you do you can be prepared for more than a fight over money.

Plaintiff paid $80 per month until August 1981. Thereafter, he paid $40 per month until December 1986. Plaintiff's younger child, Robert A. Griffin, Jr., became eighteen years old that month, and plaintiff ceased making any support payments. In 1987 the trial court found that plaintiff "is employed at Cherry Point, North Carolina . . . has an excellent credit rating and, over the years, has borrowed money from lending institutions."

Eight months after the support payments ended, defendant brought a motion in the cause seeking judgment for $17,680 in arrears. At trial the plaintiff testified that in 1974, while he was

unemployed, his ex-wife agreed to accept the "very best I could [pay in child support], however, much it [might] be." The defendant testified as follows: "Q. At any point in time, did you ever verbally or in writing agree that you would take a lesser amount of child support than what was dictated in that court order? A. No, sir. There's no way I could have done that."

The trial court made the following findings of fact pertinent to its conclusion that equitable estoppel precludes judgment against the plaintiff for the arrears of child support payments ordered by the divorce decree:

> 10. Upon losing his job [in 1974], Plaintiff immediately contacted the Defendant and informed her of his situation and that he could not make the regular scheduled child support payments. Plaintiff told Defendant that he would attempt to pay as much as he could toward the child support and the Defendant agreed to accept what he could pay.
>
> * * * *
>
> 24. That the Defendant's conduct in accepting reduced child support payments for over ten (10) years, having no contact whatsoever with the Plaintiff, and making no inquiry nor taking any action conveyed the impression to the plaintiff that the Defendant acquiesed [*sic*] in Plaintiff's reduced payments and that Defendant had abandoned her rights to the regular child support payments.
>
> 25. The Defendant's conduct as mentioned above induced the Plaintiff to believe such conduct was intended to be relied upon or acted upon by the Plaintiff.

Turning to the sole question presented on appeal, whether the trial court properly invoked equitable estoppel, we note first that child support is governed primarily by statute. N.C. Gen. Stat. § 50-13.10 provides in pertinent part that

> (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 the payment is due, then promptly after the moving party is no longer so precluded.

(b) A past due child support payment which is vested pursuant to G.S. 50-13.10(a) is entitled, as a judgment, to full faith and credit in this State and any other state, with the full force, effect, and attributes of a judgment of this State, except that no arrearage shall be entered on the judgment docket of the clerk of superior court or become a lien on real estate, nor shall execution issue thereon, except as provided in G.S. 50-13.4(f)(8) and (10).

(Emphasis added.) N.C. Gen. Stat. § 50-13.4(f)(8) provides in turn that "past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments." Thus, defendant was entitled to proceed as she did.

In the case below, the father was legally obligated to support his children according to the terms of the divorce decree of March 1974. Instead, he twice reduced the amount of those payments without approval from the court. As this Court has held, the "proper procedure for the father to follow was to apply to the trial court for relief. This he failed to do. He had no authority to unilaterally attempt his own modification." *Gates v. Gates*, 69 N.C. App. 421, 428, 317 S.E.2d 402, 407 (1984) (citations omitted), *aff'd*, 312 N.C. 620, 323 S.E.2d 920 (1985). Quoting *Halcomb v. Halcomb*, 352 So. 2d 1013, 1016 (La. 1977), this Court explained:

> Support for this rule is found in a proper regard for the integrity of judgments. Such a regard does not condone a practice which would allow those cast in judgment to invoke self-help and unilaterally relieve themselves of the obligation to comply. Any other rule of law would greatly impair the sanctity of judgments and the orderly processes of law. To condone such a practice would deprive the party, in whose favor the judg-

> ment has been rendered, of an opportunity to present countervailing evidence, and at the same time deny the judge an opportunity to review the award in light of the alleged mitigating cause which had developed since its rendition.
>
> . . . This policy applies equally in North Carolina.

Gates, 69 N.C. App. at 428-29, 317 S.E.2d at 407 (citation omitted).

Plaintiff's argument, based on his ex-wife's alleged silence and inaction in enforcing what he characterizes as her rights, is misguided. The touchstone in cases involving child custody and support is the welfare of the children, not freedom of contract. As our Supreme Court has observed,

> no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.

Fuchs v. Fuchs, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); *accord*, *Voss v. Summerfield*, 77 N.C. App. 839, 840, 336 S.E.2d 144, 145 (1985). Just as our case law does not countenance agreements between parents that operate to the detriment of their children's rights, so it does not allow one parent to evade the obligations of child support by citing the failure of the other parent to insist immediately on such support.

Even assuming that on some set of facts equitable estoppel might properly bar a claim for child support arrears, it is clearly inapplicable on the facts below. A party seeking to rely on equitable estoppel must show that, in good faith reliance on the conduct of another, he has changed his position for the worse. 31 C.J.S. *Estoppel* § 59 (1964). In this case the plaintiff can show no such detrimental reliance. The only change made in his position was the retention to his benefit of money owed for the support of his children. On similar facts this Court recently rejected the plea of equitable estoppel as a bar to child support arrearages. *Adkins v. Adkins*, 82 N.C. App. 289, 291, 346 S.E.2d 220, 221-22 (1986).

In addition to the doctrine of equitable estoppel, plaintiff raised the applicable statute of limitations as a defense to payments due for more than ten years. Such sums are barred by N.C. Gen. Stat. § 1-47. *Larsen v. Sedberry*, 54 N.C. App. 166, 169, 282

S.E.2d 551, 553 (1981), *disc. rev. denied*, 304 N.C. 728, 288 S.E.2d 381 (1982).

Upon remand the court may enter judgment for the appropriate balance of child support arrearages.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

CLAUDE E. NASH AND JANIS WESSOLLECK v. MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC., CHARLES ROBINSON, MOTOROLA, INC. AND AIRCALL, INC.

No. 8829SC1266

(Filed 21 November 1989)

Unfair Competition § 1 (NCI3d); Limitation of Actions § 8.2 (NCI3d) — unfair trade practices — electronic paging business — accrual of cause of action

In an action for unfair trade practices arising from the termination of plaintiff's FCC license and electronic paging business, the statute of limitations on plaintiff's claim did not begin to run until 29 January 1982, the date of actual notice of the violation to plaintiff by the FCC. Where plaintiff, by reasonably diligent effort, could not have ascertained that he was in violation of FCC regulations, he would have had no cause of action against defendants for fraudulent misrepresentation. N.C.G.S. § 75-1.1.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 633, 713.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff Claude E. Nash (Nash) from judgment entered 29 June 1988 in HENDERSON County Superior Court by *Judge Hollis M. Owens, Jr.* Heard in the Court of Appeals 17 May 1989.

On 12 January 1986, plaintiffs Nash and Janis Wessolleck (Wessolleck) filed a complaint against named defendants alleging unfair trade practices under G.S. 75-1.1. From an order granting summary judgment to defendants, Motorola, Inc. (Motorola), Motorola Communications and Electronics (Motorola C & E) and Charles Robinson (Robinson), Nash appeals.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers and Robert J. Lopez, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Roy W. Davis, Jr. and Michelle Rippon, for defendant-appellees.

LEWIS, Judge.

Undisputed facts in the record reveal that from January or February 1981 until January 1982 plaintiff was involved in the electronic paging business. This business consisted of three separate and allegedly independent components: 1) Nash Equipment Leasing: operated by Nash and furnishing through lease or sale individual paging devices, 2) Secre-Tel: operated by Wessolleck and providing message dispatching services, and 3) Fletcher Seamless Guttering: owned by James Fletcher who held the actual Federal Communications Commission (FCC) license and with whom individual paging customers would contract to share the use of his license. This licensing arrangement was called a "shared arrangement" and was formed allegedly in an attempt to conform to certain FCC regulations and restrictions which disallowed one person or entrepreneurial business from combining the sales and leasing of paging or communications equipment with dispatching services.

On 29 June 1981 defendant Aircall, Inc. (Aircall), a radio common carrier service operating in the same geographic area as plaintiff, filed a complaint against plaintiff with the FCC alleging among other things: 1) plaintiff's operation was not in reality a "shared arrangement" but a common carrier service and in violation of FCC regulations, and 2) plaintiff's business had operated without a valid FCC license since December 1980 because plaintiff's original licensee, Walter Jecker, had died in December and the FCC had not assigned his license to Fletcher nor issued Fletcher a new license. Aircall also filed a complaint with the North Carolina Utilities Commission (NCUC) on 24 July 1981 setting forth similar allegations in regard to state regulations. NCUC held a hearing on the matter on 5 January 1982 but did not issue a ruling. On 29

January 1982 the FCC notified plaintiff and Fletcher to cease and desist operation of the paging business because they were not in compliance with FCC regulations. Upon advice of legal counsel, Fletcher voluntarily surrendered his license to the FCC and plaintiff discontinued operating his business. Subsequently, and in light of plaintiff's actions, NCUC granted Aircall's motion to dismiss its complaint with prejudice.

In his complaint, plaintiff specifically alleges that defendants Robinson, Motorola and Motorola C & E made false or deceptive statements to him regarding the setup of his paging business to persuade him to purchase equipment and that defendants in effect used plaintiff as a "guinea pig" to test the acceptability of his licensing arrangement under state and federal communications regulations when they knew or should have known of its potential illegality. By way of their answer, defendants affirmatively pled the statute of limitations, asserting that the four-year statute of limitations ran as of 12 January 1986, while the plaintiffs filed their complaint on 29 January 1982.

G.S. 75-16.2 provides that "[a]ny civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." Plaintiff contends the action accrued on 29 January 1982 when the FCC notified plaintiff to cease and desist operation of his business. Defendants contend that the action accrued at the earliest in the summer of 1980 when plaintiff and Robinson first made contact and the misrepresentations were allegedly first made, or at the latest in the summer of 1981 when the FCC and NCUC complaints were filed.

Plaintiff's action under G.S. 75-1.1 is based on fraudulent misrepresentation. Under North Carolina law, "an action accrues at the time of the invasion of plaintiff's right." *Rothmans Tobacco Co., Ltd. v. Liggett Group, Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985). For actions based on fraud, this occurs at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence. *Id.* Given that plaintiff was not actually notified that he was in violation of FCC regulations until 29 January 1982, the issue is whether plaintiff can be presumed to have had inquiry notice of the violation and hence constructive knowledge of the alleged fraudulent misrepresentation of defendants prior to 12 January 1982. Plaintiff will be deemed to have had inquiry notice

if, once he became aware of the FCC and NCUC complaints against him in June 1981, he could have ascertained by a reasonably diligent effort from facts available to him that he was in violation. *See Vail v. Vail*, 233 N.C. 109, 116, 63 S.E.2d 202, 207 (1951).

Upon our review of the record and of FCC Regulations and Reports, we cannot determine that plaintiff's shared licensing arrangement was in clear violation of previously stated FCC policies. Where we cannot so determine, neither can we presume that plaintiff could have done so. We therefore conclude that plaintiff did not have inquiry notice of the illegality of his shared licensing arrangement prior to 12 January 1982. *Id.* Where plaintiff, by a reasonably diligent effort, could not have ascertained that he was in violation of FCC regulations, he would have had no cause of action against defendants for fraudulent misrepresentation. We conclude that the statute of limitations did not begin to run until 29 January 1982, the date of actual notice of the violation to the plaintiff by the FCC. For these reasons, we believe the plaintiff should have his day in court.

Reversed.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

I concur only in the result of the majority opinion. The reason the statute of limitations did not start to run until the Federal Communications Commission made plaintiffs stop operating their business, in my opinion, is that before then plaintiffs had not been damaged, had nothing to sue about, and an action would have been dismissible on its face. And whether plaintiffs ought to have known before then that the FCC could prevent them from operating as planned is immaterial since the record does not suggest, much less establish, that the ways of the FCC about matters of this kind are so predictable that communications law specialists, much less ordinary businessmen, should have known that the Commission would ban the activity involved. Instead, the record suggests that in opening, closing, or otherwise regulating the airways the FCC has the discretion to make and does make all kinds of exceptions and that its policies and practices can be as important to those

subject to them as the wording of a regulation. Thus, whether defendants represented that they knew that the FCC's policy was not to forbid operations like plaintiffs', and whether plaintiffs had a right to rely thereon are issues of fact that the judge had no authority to decide.

CHARLES F. TOMPKINS, ADMINISTRATOR OF THE ESTATE OF GARY F. LUZNAR, PLAINTIFF v. LOG SYSTEMS, INC., D/B/A LINCOLN LOG HOMES, INC., DEFENDANT

No. 8929SC270

(Filed 21 November 1989)

1. **Rules of Civil Procedure § 41.1 (NCI3d)— voluntary dismissal without prejudice—summary judgment for defendant denied in first action—granted in second**

The trial judge in a wrongful death action arising from the collapse of a log home kit was not foreclosed from considering defendant's summary judgment motion where another judge had denied defendant's summary judgment motion in the initial action, plaintiff took a voluntary dismissal without prejudice of that action, plaintiff then refiled his claim within the one-year time limit, and defendant again moved for summary judgment. The refiling began this case anew for all purposes; once refiled, the case must be considered on its merits without reference to the disposition of the prior action. N.C.G.S. § 1A-1, Rule 41(a)(1).

Am Jur 2d, Dismissal, Discontinuance and Nonsuit §§ 23, 73.

2. **Negligence § 29.2 (NCI3d); Death § 3.6 (NCI3d)— collapse of log home kit—summary judgment for defendant—improper**

Summary judgment was improperly granted for defendant in a wrongful death action arising from the collapse of a wall during construction of a log home kit where plaintiff presented expert opinion testimony that the wall collapsed because it was constructed significantly out-of-plumb and that the plans and diagrams furnished by defendant were totally lacking in instructions on how to assure the construction of a wall in

plumb, how to brace the wall during construction, and other safety-related matters. Viewed in the light most favorable to plaintiff, the forecast of evidence for the trial court presented an issue of material fact as to whether defendant was negligent in failing to provide complete instructions and whether such negligence led to faulty construction of the wall and caused its collapse.

Am Jur 2d, Summary Judgment §§ 6, 27.

APPEAL by plaintiff from *Lewis, Robert D., Judge.* Order entered 19 December 1988 in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 21 September 1989.

Defendant corporation manufactures and markets packaged log home kits to dealers and individual consumers. On 11 October 1982 plaintiff's decedent, Gary F. Luznar, was helping his father, Edward J. Luznar, Sr., construct a log home manufactured by defendant. He was installing subflooring material in the north end of the loft when a portion of the north gable wall collapsed and fell on him. Gary F. Luznar died as a result of the injuries he sustained. Plaintiff initiated a wrongful death action, alleging that Gary Luznar's death was caused by the negligence of defendant. After voluntarily dismissing his original action in December 1986, plaintiff refiled the present action in October 1987. From summary judgment in favor of defendant, plaintiff appeals.

Averette & Barton, by H. Paul Averette, Jr., for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Russell P. Brannon and Michelle Rippon, for defendant-appellee.

WELLS, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment for two reasons: First, plaintiff asserts that the present action is substantially similar to the prior action which was voluntarily dismissed. Summary judgment in defendant's favor had been denied in that cause of action. Plaintiff also asserts that the evidence presented raises a genuine issue of material fact, including whether the negligence of defendant proximately caused the death of plaintiff's decedent.

[1] In his first assignment of error plaintiff contends that because summary judgment was denied by Judge Kirby in the original action on this claim, to uphold the grant of summary judgment by Judge Lewis in this subsequent action on the same claim impermissibly allows one superior court judge to overrule another on the same legal issue. *See, e.g., Smithwick v. Crutchfield*, 87 N.C. App. 374, 361 S.E.2d 111 (1987) (Ordinarily one superior court judge may not overrule the judgment of another superior court judge previously made in the *same* action.). (Emphasis added.) For the following reasons we disagree.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1983 & Supp. 1988) specifically addresses how a voluntary dismissal by the plaintiff affects an action. Rule 41(a)(1) says in pertinent part: "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, ... If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, *a new action* based on the same claim *may be commenced* within one year after such dismissal . . . ." (Emphasis added.)

In this case plaintiff was granted a voluntary dismissal without prejudice of his original action. At that point it was as if the suit had never been filed. *Webb v. Nolan*, 361 F. Supp. 418 (M.D.N.C. 1972), *affirmed*, 484 F.2d 1049 (4th Cir 1973), *appeal dismissed*, 415 U.S. 903, 94 S.Ct. 1397, 39 L.Ed.2d 461 (1974). Plaintiff then refiled his claim within the one-year time limit established by the statute. Such refiling began this case anew for all purposes. Once refiled the case must be considered on its merits without reference to the disposition of the prior action. Therefore, Judge Kirby's ruling in the prior action did not foreclose Judge Lewis from considering defendant's summary judgment motion in this new action.

[2] The second issue presented for review is whether summary judgment in favor of defendant was appropriate on these facts. Summary judgment is properly granted where a movant has shown that there is no genuine issue as to a material fact and that they are entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983 & Supp. 1988); *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). Our courts have traditionally held that summary judgment is rarely appropriate in negligence actions. *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988). However, a defendant may be granted summary judgment in a negligence

case if the forecast of evidence shows that there can be no recovery even if the facts claimed by the plaintiff are true. *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E.2d 646 (1984). Likewise, summary judgment is appropriate where it is clearly established that defendant's negligence was not the proximate cause of plaintiff's injury. *Street v. Moffitt*, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

Plaintiff alleges that defendant was negligent in connection with the manufacture and sale of the log home kit in that defendant failed to (1) use reasonable care in selecting a design safe for the use for which it was intended; (2) make reasonable tests and inspections of the prepackaged home to discover latent hazards involved in the use of the product; and (3) provide adequate instructions for erection of the home, given the defendant's representation that the log home could be built as a "do-it-yourself" project. Plaintiff further contends that this alleged negligence, especially the failure to include adequate construction instructions, caused the north gable wall to be constructed "out of plumb" and this faulty construction led to the subsequent collapse of the wall onto plaintiff's decedent.

Plaintiff's forecast of evidence tended to show that Edward J. Luznar, Sr., father of the decedent, had attempted to construct the log home using only the help of his family, none of whom were skilled carpenters or builders. The defendant provided Edward Luznar with blueprints and a set of instructions concerning the sequence for assembling the logs. There were no additional instructions provided including information concerning how to secure the gables during construction. On his own initiative, Edward Luznar attempted to secure the north gable wall by nailing 2 × 4's to the wall and to the floor beams. On these facts a reasonable person could find that a log home company dealing in prepackaged kits for construction by nonprofessionals as well as professionals owes a duty to its customers to provide complete and detailed instructions covering all phases of the construction process.

Defendant contends that even if such allegations of negligence are accepted as true and the plans were somehow incomplete, plaintiff has failed to show that such negligence was the proximate cause of plaintiff's decedent's injury. Plaintiff's evidence in support of his contention that defendant's negligence was the proximate cause of Gary Luznar's death consists primarily of an affidavit by William O. Moser, a licensed general contractor and builder and dealer of log home packages. Edward Luznar, who was work-

ing near his son at the time the wall collapsed, was facing in the opposite direction and did not see the accident as it happened. Moser inspected Luznar's log home in August and September 1988. At that time he took measurements inside and outside of the north wall and north gable wall which had subsequently been re-erected. Moser states that his measurements reveal "that the north gable wall was noticeably 'out-of-plumb' by at least 1¼" at a distance of 8' above the first floor level. The wall continued to be out of plumb up to the gable peak, at 20' above the first floor level." He also states that he inspected the plans and diagrams furnished by defendant to Edward Luznar and found them to be "totally lacking in instructions on how to assure the construction of a wall in plumb, how to brace the wall during construction and other safety-related matters." He concludes that a wall built out of plumb has a high probability of collapsing and that in his opinion the north gable wall collapsed because "the inadequacy of the plans, diagrams and instructions permitted the wall to be erected out-of-plumb and without proper bracing by a person unfamiliar with construction techniques as applied to log home construction."

Defendant, citing *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E.2d 71 (1966), and *Smith v. Motors, Inc.*, 34 N.C. App. 727, 239 S.E.2d 608 (1977), contends that Moser's testimony as to the cause of the wall's collapse should be disregarded because it amounts to guess, conjecture, or speculation. We disagree. While both *Hubbard* and *Smith* can be distinguished from this case on the facts, it is more pertinent to note that both those cases were decided long before the enactment of our statutory Rules of Evidence in 1983.

Expert opinion testimony is admissible—and therefore pertinent—"[i]f the [expert's] scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." N.C. Gen. Stat. § 8C-1, Rules of Evidence 702 (1988).

Viewed in the light most favorable to the plaintiff we cannot say that Mr. Moser's evidence amounts only to speculation. Moser indicated that his personal examination of the building, albeit six years after the collapse, revealed circumstances which established the cause of the collapse—namely, that the wall was constructed significantly out of plumb. The forecast of evidence before the trial court presented an issue of material fact as to whether defendants were negligent in failing to provide complete instructions

and whether such alleged negligence led to faulty construction of the wall and caused its subsequent collapse.

Reversed.

Judges JOHNSON and ORR concur.

HELEN KING, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN CARROL KING, DECEASED, PLAINTIFFS v. CAPE FEAR MEMORIAL HOSPITAL, INC., JOSEPH L. SOTO, ADMINISTRATOR OF CAPE FEAR MEMORIAL HOSPITAL, INC., DR. OLIVER R. HUNT, OLIVER R. HUNT, P.A., CARROL JOHNSON, C. BULLOCK AND E. KRAMER, DEFENDANTS

No. 895SC263

(Filed 21 November 1989)

1. **Death § 4 (NCI3d) — wrongful death action — medical malpractice — statute of limitations**

The trial court did not err by granting defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) a wrongful death action arising from medical malpractice due to the statute of limitations. The cause of action for wrongful death is provided only by statute and must be asserted in conformity with the applicable statutory provisions. The statute of limitations for bringing wrongful death claims, N.C.G.S. § 1-53(4), contains no discovery exception for latent or nonapparent injuries. N.C.G.S. § 1-15(c).

Am Jur 2d, Death §§ 60, 71; Physicians, Surgeons, and Other Healers §§ 316, 321.

2. **Trespass § 2 (NCI3d); Limitation of Actions § 5 (NCI3d) — intentional infliction of emotional distress — statute of limitations**

The trial court did not err by granting defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6), of an action for intentional infliction of mental distress arising from medical malpractice because the action was barred by the statute of limitations. Because it is not specifically denominated under any limitation statute, the cause of action for emotional distress falls under the general three-year provision of N.C.G.S.

§ 1-52(5) and the discovery exception of N.C.G.S. § 1-15(c) does not apply.

Am Jur 2d, Death §§ 60, 71; Physicians, Surgeons, and Other Healers §§ 316, 321.

3. Husband and Wife § 9 (NCI3d); Limitation of Actions § 4 (NCI3d)— loss of consortium—wrongful death—statute of limitations

The trial court did not err by granting defendants' motion for dismissal under N.C.G.S. § 1-A-1, Rule 12(b)(6), of a claim for loss of consortium arising from wrongful death where the action was barred by the wrongful death statute of limitations. An action for loss of consortium is available only when it is joined with any suit the deceased spouse may have instituted to recover for his or her personal injuries, and the only action available to plaintiff's deceased husband was one for wrongful death through his personal representative.

Am Jur 2d, Husband and Wife §§ 453, 454.

4. Rules of Civil Procedure § 12.1 (NCI3d)— Rule 12(b)(6) motion—matters outside the pleadings

The trial court did not erroneously refuse to consider several affidavits offered by plaintiff in her response to defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), where the other matters considered by the court, which plaintiff contended were matters outside the pleadings converting the motions to motions for summary judgment, were only requests, explanations, and arguments of counsel on both sides with respect to defendants' Rule 12(b)(6) motions. Even assuming that the trial court improperly refused to consider plaintiff's affidavits, such error was not prejudicial because all of plaintiff's claims were at least indirectly precluded by the statute of limitations.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 62, 63.

APPEAL by plaintiff from *Tillery, Judge*. Order entered 9 December 1988 in District Court, NEW HANOVER County. Heard in the Court of Appeals 11 October 1989.

This is a civil action wherein plaintiff, individually and as administratrix of her deceased husband's estate, seeks damages for wrongful death, loss of consortium, and intentional infliction of emotional distress resulting from the medical care her husband received during his final illness. Evidence presented at trial established the following facts:

1) On 30 July 1985, John King underwent lung surgery at defendant hospital for the removal of a cancerous lesion.

2) On 27 August 1985, King's family, upset with his progress and with the treatment he was receiving, dismissed King's doctor (defendant Hunt) and had another physician assume his care.

3) On 2 September 1985, King died due to complications resulting from the surgery performed on 30 July.

4) On 29 August 1988, plaintiff brought suit against the named defendants alleging medical malpractice, wrongful death, loss of consortium, and intentional infliction of emotional distress.

All defendants subsequently filed motions to dismiss pursuant to Rule 12(b)(6) for failure to state a claim to which relief could be granted. From an order allowing the motions to dismiss, plaintiff appealed.

Otho L. Graham and Wallace, Morris, Barwick & Rochelle, P.A., by Fitzhugh E. Wallace, Jr., for plaintiff, appellant.

Ward and Smith, P.A., by Thomas E. Harris and C. David Creech, for defendants, appellees Cape Fear Memorial Hospital, Inc., Joseph L. Soto, Carrol Johnson, M.D., Paula S. Bullock and Elizabeth Kramer.

Yates, Fleishman, McLamb and Weyer, by Dan J. McLamb, for defendants, appellees Dr. Oliver R. Hunt and Oliver R. Hunt, P.A.

HEDRICK, Chief Judge.

[1] In her first assignment of error, plaintiff contends the trial court erred in granting defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6). She argues her claims were not barred by the applicable statutes of limitations because of the discovery exception for medical malpractice actions in G.S. 1-15(c) which provides in pertinent part:

> Whenever there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . 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. . . .

Plaintiff, as administratrix of her husband's estate, attempted to bring a claim against defendants for wrongful death under G.S. 28A-18-1 based on alleged acts of medical malpractice. She argues that this claim, because it was based on acts of medical malpractice, was preserved by the discovery exception in G.S. 1-15(c). We disagree.

The cause of action for wrongful death did not exist at common law but is a right provided only by statute. *Bell v. Huskins*, 249 N.C. 199, 105 S.E.2d 642 (1959). Therefore, any action brought for wrongful death must be asserted in conformity with the applicable statutory provisions. *Webb v. Eggleston*, 228 N.C. 574, 46 S.E.2d 700 (1948). G.S. 1-53(4) imposes a two-year limitation period for bringing wrongful death claims beginning on the date of decedent's death. This statute, unlike G.S. 1-15(c), contains no discovery exception for latent or nonapparent injuries. As a result, plaintiff was required to bring her wrongful death claim within two years of the deceased's death. Because she did not do so, her claim was barred.

[2] Plaintiff also argues her complaint alleges a personal cause of action for intentional infliction of mental distress which is not barred by the statute of limitations. She claims this cause of action was also preserved by the discovery exception in G.S. 1-15(c). This argument has no merit. Because it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of G.S. 1-52(5). The record in the present case indicates that any intentional tortious conduct by the deceased's treating physician (defendant Hunt) must have taken place on or before 27 August 1985 when the doctor was dismissed. Plaintiff's failure to file her complaint by 27 August 1988 therefore resulted in the loss of any potential claim for emotional distress. The discovery exception of G.S. 1-15(c), which by its terms concerns only acts or omissions constituting malpractice, does not apply to preserve actions for emotional distress.

[3] Plaintiff additionally contends her complaint stated a claim for loss of consortium. Once again, however, her action is barred. Although the spouse of a deceased victim may maintain an action for loss of consortium due to the negligence of a third party, such an action is available only when it "is joined with any suit the other [deceased] spouse may have instituted to recover for his or her personal injuries." *Nicholson v. Chatham Memorial Hospital*, 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980). As stated previously, the only action available to plaintiff's deceased husband was one for wrongful death through his personal representative. Since that action was barred by the two-year statute of limitations, plaintiff's claim for loss of consortium is likewise precluded.

[4] Finally, plaintiff complains the trial court erroneously refused to consider several affidavits offered by her in response to defendants' Rule 12(b)(6) motions. She claims the trial court considered "matters outside the pleadings" in ruling on the motions, thereby converting them to motions for summary judgment under Rule 56 and requiring the trial court to consider her affidavits. A motion to dismiss for failure to state a claim is "converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979); *Baugh v. Woodard*, 56 N.C. App. 180, 181, 287 S.E.2d 412, 413, *disc. rev. denied*, 305 N.C. 759 (1982); North Carolina Rules of Civil Procedure, Rule 12(b). In addition to plaintiff's complaint, the trial judge considered the following in ruling on defendants' motions:

> 1) Plaintiff's motion to make more definite and certain and to delay hearing on defendants' Rule 12(b)(6) motion and memorandum and affidavit in support of motion.
>
> 2) Defendants' supplemental motion to dismiss for failure to state a claim; and
>
> 3) Defendants' response to plaintiff's motion to make more definite and certain the 12(b)(6) motions of defendants.

These materials constitute only requests, explanations, and arguments of counsel on both sides with respect to defendants' Rule 12(b)(6) motions. As such, they are not matters outside the pleadings within the meaning of Rule 12(b). Moreover, assuming *arguendo* that the trial court improperly refused to consider plaintiff's affidavits, such error was not prejudicial. The record estab-

lishes that all of plaintiff's claims were at least indirectly precluded by the statute of limitations. Such a bar is therefore insurmountable, notwithstanding any additional facts or arguments plaintiff's affidavits may have contained.

For the reasons stated, we hold the trial judge properly allowed defendants' motions to dismiss.

Affirmed.

Judges ARNOLD and BECTON concur.

CHARLES B. NYE v. TIMOTHY E. OATES AND WIFE, AMY BLAUGH OATES

No. 8814SC1431

(Filed 21 November 1989)

1. **Fraudulent Conveyances § 3.1 (NCI3d)— action to set aside deeds—fraud upon creditors—12(b)(6) dismissal improper**

The trial court erred by granting defendant Amy Oates' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) an action to recover $28,106.07 and to set aside deeds as a fraud upon creditors where the complaint indicated that, while unable to pay a claim that had been pending against him for two years and while he had no other assets with which to pay his creditors, Timothy Oates gratuitously conveyed his solely owned real property to himself and his wife by the entireties and gratuitously had title to other land that he purchased later put in her name. It is immaterial that plaintiff was not a creditor of Timothy Oates at the time of the first conveyance because Concrete Service Corporation was a creditor and plaintiff succeeded to its rights by virtue of a bond and payment made thereunder, and it is also immaterial that the grantee was ignorant or innocent of the fraud.

Am Jur 2d, Fraudulent Conveyances §§ 25, 26.

2. **Fraudulent Conveyances § 3.1 (NCI3d)— facilitation of fraud upon creditors—12(b)(6) dismissal improper**

The trial court erred by granting defendant Amy Oates' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) a claim

for agreeing with her husband to defraud plaintiff creditor. While there is no recognized action for civil conspiracy in North Carolina, our law nevertheless permits one defrauded to recover from anyone who facilitated the fraud by agreeing for it to be accomplished. Plaintiff explicitly alleged in the complaint the necessary elements that the defendants agreed to defraud him in that defendant Timothy Oates committed an overt tortious act in furtherance of the agreement and plaintiff suffered damages from that act.

Am Jur 2d, Fraudulent Conveyances §§ 25, 26.

APPEAL by plaintiff from *Hight, Judge.* Order entered 9 August 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 August 1989.

Jerry L. Jarvis, C. Howard Nye, and Charles B. Nye, pro se, for plaintiff appellant.

Michael E. Mauney for defendant appellee Amy B. Oates.

PHILLIPS, Judge.

This appeal is from an order dismissing the complaint against defendant Amy Blaugh Oates for failure to state a claim for which relief can be granted pursuant to the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure. The alleged basis for plaintiff's action against defendants—to recover $28,106.07 and set aside as a fraud on creditors deeds that defendant Amy Blaugh Oates either received from or at the directive of Timothy Oates—is that: Timothy Oates, a fellow lawyer and longtime friend, induced him to indemnify a judgment creditor of his and to make good his worthless check by falsely representing that he and his wife had conveyed certain real estate to him as security; that Amy Blaugh Oates conspired with her husband to accomplish the frauds; and that while he was indebted to plaintiff's indemnitee and others Timothy Oates gratuitously conveyed or had conveyed property to his wife in fraud of his creditors. More specifically, the complaint's allegations and the exhibits incorporated therein indicate the following: In January 1983 Concrete Service Corporation sued Timothy Oates for several thousand dollars allegedly owed because of an unfair or deceptive trade practice. While that action was scheduled for trial, on 11 April 1985 Timothy Oates conveyed certain solely owned real estate to himself and his wife as tenants by the entireties.

A week later the case was tried and Concrete Service Corporation obtained judgment against Timothy Oates for $14,098.20. Following the Sheriff's unavailing search for assets upon which to levy under the judgment, a receiver was appointed to take charge of Timothy Oates' assets, the principal one of which was his law practice. On 29 August 1985, in reliance upon Timothy Oates' false representation that the defendants had already secured him against loss by executing a deed of trust to their home in his favor and recording it in the office of the Durham County Register of Deeds, plaintiff posted a $30,000 bond to secure Concrete Service Corporation's judgment and the receivership was dissolved. On 15 May 1986 at the request of Timothy Oates plaintiff made good a worthless check of his in the amount of $3,697.58. On 21 May 1986 plaintiff had to pay $24,408.49 into court under the bond given to secure Concrete Service Corporation. Defendants never executed or recorded any deed of trust in favor of plaintiff. In October 1987 defendant Timothy Oates paid for a tract of land and without legal consideration had the deed issued to defendant Amy Blaugh Oates. No payment has been made by Timothy Oates on any of the above debts.

[1] Assuming that the facts above alleged are true, as we must since the sufficiency of a complaint to state an enforceable claim is being determined, *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976), it is manifest that two claims for which the law affords relief are stated and the order dismissing the complaint is erroneous. One claim authorized by law that the complaint clearly states is for setting aside the deeds defendant Amy Blaugh Oates received from or at the direction of the insolvent Timothy Oates as a fraud upon his creditors. For under G.S. 39-15, and before that enactment the common law, every gift or conveyance devised to hinder, delay, or defraud creditors or others of their debts is void, and that the grantee is ignorant or innocent of the fraud is immaterial.

> If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

Aman v. Walker, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914). A conveyance is voluntary if a reasonably fair price is not paid for it,

Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979), and the allegation here is that nothing was paid and the conveyances were gratuitous. Fraudulent intent may be established by circumstances, and a close family relationship coupled with less than reasonable consideration and outstanding debts that the debtor is unable to pay is strong evidence of fraud. *Id.* at 130, 252 S.E.2d at 833. The complaint indicates that while unable to pay a claim that had been pending against him for two years and while he had no other assets with which to pay his creditors Timothy Oates gratuitously conveyed his solely owned real property to himself and his wife by the entireties and gratuitously had title to other land that he purchased later put in her name. If these circumstances are established the conveyances are invalid to existing creditors as a matter of law, *Aman v. Walker, supra*, and from these circumstances it can properly be inferred that the conveyances were also fraudulent as to subsequent creditors. *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891). That plaintiff was not a creditor of Timothy Oates at the time of the first conveyance (but was at the time of the second conveyance) is immaterial because Concrete Service Corporation was a creditor and plaintiff succeeded to its rights by virtue of the bond and payment made thereunder. 73 Am. Jur. 2d *Subrogation* Sec. 59 (1974); *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 336 S.E.2d 694 (1985). And, of course, Timothy Oates' fraudulent conveyances being properly alleged the question cannot be completely and effectively resolved without the joinder of Amy Blaugh Oates, the grantee in the challenged conveyances. *Aman v. Walker, supra* at 228, 81 S.E. at 164. And, as stated above, in order to divest her of title to the properties fraudulently conveyed to her it need not be shown that she either participated in or even had knowledge of the fraud; for "[i]t is a principle of the common law, as old as the law itself . . . that [a debtor] shall be just to his creditors before he is generous to his family." *Michael v. Moore*, 157 N.C. 462, 465, 73 S.E. 104, 105 (1911).

[2] The other legally cognizable claim that the complaint states against Amy Blaugh Oates is for agreeing with her husband to defraud plaintiff. While there is no recognized action for civil conspiracy in North Carolina, *Fox v. Wilson*, 85 N.C. App. 292, 365 S.E.2d 737 (1987), and this claim is couched in the language of conspiracy, our law nevertheless permits one defrauded to recover from anyone who facilitated the fraud by agreeing for it to be

accomplished. *Fox v. Wilson, supra.* The basis for liability of the agreeing facilitator is analogous to *respondeat superior, Reid v. Holden,* 242 N.C. 408, 88 S.E.2d 125 (1955), as "[t]he charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence." *Shope v. Boyer,* 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966). To prove his case against the appellee plaintiff must show: (1) that the defendants agreed to defraud him; (2) that defendant Timothy Oates committed an overt tortious act in furtherance of the agreement; and (3) that plaintiff suffered damages from that act. *Coleman v. Shirlen,* 53 N.C. App. 573, 281 S.E.2d 431 (1981). All three elements of the claim are explicitly alleged in the complaint and ways of proving them are not unknown to the law.

Thus, the order dismissing the complaint against Amy Blaugh Oates is reversed and the case remanded to the trial court for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. MICHAEL LLOYD BRUNSON

No. 881SC1148

(Filed 21 November 1989)

Constitutional Law § 34 (NCI3d)— driving while impaired—bench trial—attachment of jeopardy

The trial court erred in a prosecution for driving while impaired where defendant appeared when scheduled, requested a continuance when the prosecutor called the docket; that motion was denied; the case was called for trial shortly after 5:00 that afternoon; the charges were read and defendant pled not guilty; the prosecutor then immediately moved for a continuance on the grounds that essential State witnesses were not present; no witnesses had been sworn or any evidence presented; the trial judge denied the motion, stating that he had denied defendant's earlier motion and that the District Attorney could either try the case or dismiss it; the District Attorney dis-

missed the case, but immediately had new warrants issued for the same charges; defendant moved to dismiss the new charges on grounds of double jeopardy; that motion was denied, defendant was convicted and appealed to superior court; defendant's double jeopardy motion was granted in superior court; and the State appealed. It is inherent that jeopardy arises from action that jeopardizes the defendant; the action that jeopardizes the defendant is beginning his trial; and the only way that a bench trial can begin is by the State offering evidence against the defendant. Furthermore, it is apparent that the General Assembly also regards the introduction of evidence as the action in a bench trial that subjects the defendant to jeopardy because N.C.G.S. § 15A-931 requires that voluntary dismissals of criminal prosecutions be accompanied by notation by the Clerk as to whether a jury has been empaneled or evidence has been introduced.

Am Jur 2d, Criminal Law § 259.

Judge BECTON dissenting.

APPEAL by the State from *Small, Judge.* Order entered 23 May 1988 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 11 May 1989.

Attorney General Thornburg, by Associate Attorney General Hal F. Askins, for the State.

Twiford, O'Neal & Vincent, by Edward A. O'Neal, for defendant appellee.

PHILLIPS, Judge.

The order the State is appealing dismissed its warrant charging defendant with impaired driving on the ground that it would twice put him in jeopardy for the same offense in violation of the guarantees contained in Article I, Sec. 19 of the North Carolina Constitution and the Fifth Amendment of the United States Constitution. That there was an earlier prosecution for the same offense which was voluntarily dismissed by the District Attorney because of the absence of the State's witnesses is not questioned; the only question is whether jeopardy attached in it. We hold that it did not and vacate the order.

The facts pertinent to this question follow: On 5 May 1987 in the District Court of Pasquotank County the State charged defendant with two misdemeanors within its original jurisdiction—impaired driving in violation of G.S. 20-138.1; and leaving the scene of an accident involving property damage without providing the required information in violation of G.S. 20-166. Our District Courts do not have juries and in criminal cases misdemeanors are tried to the judge with defendants having a right to a trial *de novo* in the Superior Court before a jury if convicted. The case was scheduled to be tried on 20 July 1987 and that morning between 9:30 and 10:00 o'clock when the Assistant District Attorney prosecuting the docket called the calendar to ascertain what defendants were there, which ones were represented by counsel, and what pleas would be submitted defendant stated that he would plead not guilty and needed a continuance because the lawyer he wanted to hire had to be elsewhere that day. The court denied the motion to continue and defendant then signed a waiver of counsel and waited in court the rest of the day for the call of his case. Shortly after 5 o'clock that afternoon the case was called for trial, the charges were read to him, and he pled "not guilty" to each charge. Immediately thereafter, before any witnesses were sworn or any evidence presented, the Assistant District Attorney moved for a continuance on the ground that some essential witnesses for the State were not there. Judge Chaffin denied the motion, stating that he had denied defendant's motion earlier and the District Attorney could either try the case or dismiss it. The District Attorney dismissed the case, but immediately had new warrants issued for the same charges. Defendant moved to dismiss the new charges on the ground that he had been placed in jeopardy on the charges in the earlier proceeding. Judge Beaman found facts essentially as above stated, but denied the motion because in the prior proceeding no witnesses were sworn and no evidence was presented. In the bench trial that followed defendant was acquitted of leaving the accident scene and convicted of impaired driving. The conviction was appealed to the Superior Court where defendant again moved to dismiss on the constitutional ground asserted earlier. In addition to the facts stated above, in granting the motion Judge Small also found that in the former proceeding defendant was duly arraigned and the charges were dismissed because of the unavailability of the witnesses and he concluded that jeopardy attached when the District Court Judge ordered the State to either try the case or dismiss it.

When jeopardy attaches in a criminal prosecution before a jury is well established. It attaches when a defendant is placed on trial (1) on a valid indictment or information; (2) before a court of competent jurisdiction; (3) after arraignment or its waiver; (4) after plea; and (5) when a competent jury has been impaneled and sworn. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977); 4 Strong's N.C. Index 3d, *Criminal Law* Sec. 26.2 (1976). When jeopardy attaches in a bench trial is not so well established, at least in this jurisdiction, as our Supreme Court has not addressed the question as far as we can tell. In *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973), where the District Court judge impermissibly continued the trial of a drunk driving charge after the testimony of a State's witness failed to meet the District Attorney's expectations and permitted the defendant to be retried from the beginning, a panel of this Court unnecessarily expressed the view that in a bench trial, the other requisites for a valid criminal prosecution being present, the impaneling and swearing requirement in a jury trial is satisfied by an authorized judge being present to hear the case. The comparison is not sound. The elements compared differ strikingly in both character and significance; for parties to a jury trial select the jurors, but parties to a bench trial have no voice in selecting the judge; and the impaneling and swearing of a jury is an event during a criminal trial from which ordinarily there can be no turning back until the defendant is either convicted of or delivered from the charge, while the presence of an authorized judge on the bench is not an event at all, much less one that enhances the defendant's peril. So far as we are aware the view advanced in *Coats* has not been adopted by any court. The views that have been adopted by different courts are that in a bench trial jeopardy attaches "when the trial begins," or when witnesses are sworn, or when testimony or evidence is introduced. Annot., 49 A.L.R.3d 1039 (1973). This latter view was adopted by another panel of this Court in a later case, and we follow it.

In reviewing a juvenile adjudication by a District Court judge, this Court held in *In re Hunt and In re Dowd*, 46 N.C. App. 732, 266 S.E.2d 385 (1980), that jeopardy attaches when the judge as trier of fact begins to hear evidence. That is clearly the sounder view we think. For it is inherent that jeopardy arises from action that jeopardizes the defendant; it does not arise from parties, witnesses and court officials being quiescent though ready to act.

In a bench trial, no less than in a jury trial, the action that jeopardizes the defendant is beginning his trial; for until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge," jeopardy does not attach, so the Supreme Court said in *United States v. Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543, 553, 91 S.Ct. 547, 554 (1971). And the only way that a bench trial can begin in our judgment is by the State offering evidence against the defendant. Furthermore, it is apparent that the General Assembly also regards the introduction of evidence as the action in a bench trial that subjects the defendant to jeopardy, for G.S. 15A-931 requires that voluntary dismissals of criminal prosecutions be accompanied by a notation of the Clerk's as to "whether a jury has been impaneled or *evidence has been introduced.*" (Emphasis supplied.)

In this case the dismissal was taken to avert the necessity of introducing evidence rather than after its introduction; and in cases such as this it is the introduction of evidence, not its unavailability, that causes jeopardy to attach. Thus, the order dismissing the warrant charging defendant with impaired driving is vacated and the case remanded to the Superior Court for trial on that charge.

Vacated and remanded.

Judge LEWIS concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that defendant was twice put in jeopardy on the impaired driving offense in violation of guarantees contained in our State and the United States Constitutions, I dissent.

In criminal cases, jeopardy attaches when the prosecutor calls the case for trial *and* the tribunal is constitutionally or statutorily ready to hear the case. In jury trials, the tribunal is ready to hear the case when jurors are impaneled and sworn. Jeopardy attaches then—at that moment—and not later when witnesses are sworn or when evidence is presented. The rule should not be different in bench trials. In my view, when the prosecutor calls the case for trial and the judge is constitutionally or statutorily ready to hear the case, jeopardy attaches. I therefore dissent. *See State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

STATE OF NORTH CAROLINA v. WILLIE EDWELL SMITH

No. 8911SC211

(Filed 21 November 1989)

Criminal Law §§ 412, 419 (NCI4th)— opening argument—reference to prior conviction—motion for mistrial untimely

The trial court properly denied defendant's motion for a mistrial in an arson prosecution where the prosecutor referred to a prior conviction in the opening remarks but defendant did not raise the issue until after closing arguments had been made, after the court had instructed the jury, and after the jury had retired for deliberations. The court denied the motion, gave a curative instruction to the jury, and then asked the jury whether it could follow the curative instructions. N.C.G.S. § 15A-1446.

Am Jur 2d, Trial §§ 208, 210.

APPEAL by defendant from *Barnette, Henry V., Jr., Judge.* Judgment entered 28 October 1988 in HARNETT County Superior Court. Heard in the Court of Appeals 10 October 1989.

On 22 August 1988, bills of indictment were returned against defendant charging one count of first-degree arson in violation of G.S. § 14-58 and one count of second-degree arson, also in violation of G.S. § 14-58. The charges were joined for trial.

The evidence at trial tended to establish that at about 2:00 a.m. on 4 July 1988, a fire occurred at the residence of defendant's parents. The residence was occupied by defendant's father. The fire department was dispatched to the fire at 2:21 a.m. and extinguished the flames within twenty minutes. Defendant's father escaped unharmed. An investigation determined that the fire had been deliberately set in two separate places, the den and the back porch.

The next day, at approximately 7:45 p.m., the fire department was again called to the residence, this time to extinguish a fire in the upstairs bedroom. An investigation determined that this second fire had been deliberately set on the bed of defendant's father. Defendant was observed at the scene and appeared to be happy. He jumped up and down, saying, "it's burning."

Defendant and his parents had had a dispute regarding ownership of the house. Two days before the first fire, defendant told his sister that, "[I]f he could not have the house . . . nobody would."

The jury found defendant guilty of first-degree arson and guilty of burning an uninhabitable house. Pursuant to the sentencing hearing, the court found one factor in aggravation, one factor in mitigation, and that the former outweighed the latter. A sentence of thirty years' imprisonment was imposed.

From the judgment entered upon the jury's verdicts of guilty, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard L. Griffin, for the State.

Neill McK. Ross for defendant-appellant.

WELLS, Judge.

We note at the outset that defendant did not discuss his second assignment of error in the brief. Therefore, it is deemed abandoned. N.C. R. App. P., Rule 28(a).

By his remaining assignment of error, defendant challenges the court's denial of his motion for mistrial. For the reasons discussed below, we conclude that defendant has failed to preserve this issue for review.

To place this issue in the proper context, the record discloses that the following sequence of events occurred at trial.

Opening statements to the jury were made on the afternoon of 26 October 1988. In the State's opening statement, these remarks were made in reference to defendant's prior conviction:

> You'll hear from State Trooper Terry McLeod, who lives in the same neighborhood the defendant does. State Trooper McLeod will tell you he was building a house and his house burned. You will receive a certified judgment from this Court showing where the defendant pled guilty to setting Trooper McLeod's house on fire.

No objection was made to these remarks, and no curative instruction was requested. Defendant instead proceeded with his own opening statement. At the conclusion of opening statements, the proceedings were recessed overnight.

When the court reconvened the next morning, defendant, out of the jury's presence, addressed the court with respect to his prior conviction as follows:

> *[W]hen the evidence is offered, . . . since the district attorney indicated that he intended to offer it,* I would object . . . . I would move to suppress that evidence now[.]

(Emphasis added.) The court reserved ruling on this motion. Defendant did not at this time object to the content of the State's opening remarks pertaining to his prior conviction, and no further motion was made.

Later in the trial, after extensive *voir dire*, the court granted defendant's motion to suppress the evidence of his prior conviction. Defendant again made no motion at this time with respect to the State's remarks in its opening statement.

After all the evidence had been presented, after closing arguments had been made, after the court had instructed the jury, and after the jury had retired for deliberation, defendant—for the first time—raised the issue of the content of the State's opening remarks pertaining to his prior conviction in a motion for mistrial. The ensuing discussion on the record as to the merits of defendant's motion clearly evidences confusion on the part of all concerned, both as to the content of the State's questioned opening remarks and as to whether defendant had, in fact, objected to them at their making.

Following an overnight recess, the court denied the motion and gave a curative instruction to the jury, before it resumed deliberations, to disregard any remarks by the State in its opening statement pertaining to a prior conviction. The court then took the further precaution of asking the jury whether it could follow the curative instructions. By a show of hands, all twelve jurors responded in the affirmative.

The requisites for preserving the right to appellate review of alleged errors in a criminal trial are set forth at N.C. Gen. Stat. § 15A-1446 (1988). That statute provides, in pertinent part, that error

> (a) . . . may not be asserted upon appellate review unless the error has been brought to the attention of the trial court *by appropriate and timely* objection or motion[.]

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal[.]

(Emphasis added.) The sound rationale which undergirds this requirement is the recognized need that alleged errors in the trial "[be] made clear to the trial judge, at some time *sufficiently close to the occurrence of the error[s] to permit [their] correction.*" *Id., Official Commentary* (emphasis added). This is not merely a matter of judicial economy. Rather, it is a crucial means of ensuring that trials are conducted free from the taint of prejudice. This is particularly true in the context of a motion for mistrial, the very purpose of which is to provide a remedy where "substantial and irreparable prejudice" results from error in the proceedings. N.C. Gen. Stat. §§ 15A-1061, -1062.

The sequence of events in this case is illustrative of precisely the kind of circumstances which the timeliness requirement of G.S. § 15A-1446 was instituted to avoid. Assuming *arguendo* that the State's comment in its opening remarks regarding defendant's prior conviction was inappropriate, it was incumbent upon defendant to timely bring the alleged error to the attention of the court. By failing to do so, defendant deprived the court of the opportunity to appropriately rectify the alleged error, deprived the State of the opportunity to take the proper measures to correct its alleged error, and—most importantly—deprived the jury of the opportunity to hear the evidence, from the beginning, in the clear light of a trial unclouded by the alleged error. The plain language of G.S. § 15A-1446 does not permit defendant to raise on appeal the denial of his eleventh-hour motion for mistrial.

No error.

Judges JOHNSON and ORR concur.

LILA LEE STYRON v. DUKE UNIVERSITY HOSPITAL, D/B/A SEA LEVEL HOSPITAL

No. 8910IC68

(Filed 21 November 1989)

Master and Servant § 77.1 (NCI3d)— workers' compensation— change of condition— award of total permanent disability proper

The Industrial Commission properly found in a workers' compensation action that plaintiff was totally permanently disabled where the Commission had determined on 18 September 1984 that plaintiff sustained a 32.5% permanent partial disability to her back; plaintiff reopened the claim based on an alleged change in condition and the Industrial Commission on 30 September 1988 affirmed the Chief Deputy Commissioner's finding of a change in condition and award of compensation for permanent total disability; two of plaintiff's physicians testified that her physical condition was worse at the time of the second hearing but had first observed her after the initial award; and her original treating physician testified that she was completely disabled at both times. There is no reason to inhibit an applicant's ability to prove a change in condition by limiting proof to the testimony of a physician who had examined the plaintiff before and after the change in condition; furthermore, the Commission, not the testifying physician, makes the crucial comparison of conditions.

Am Jur 2d, Workmen's Compensation §§ 340, 600.

APPEAL by defendant from Opinion and Award of Full Commission filed 30 August 1988. Heard in the Court of Appeals 1 September 1989.

Wallace, Morris, Barwick & Rochelle, P.A., by F. E. Wallace, Jr., for plaintiff-appellee.

Newsom, Graham, Hedrick, Bryson & Kennon, by Joel M. Craig, for defendant-appellant.

GREENE, Judge.

Defendant Duke University appeals from an Industrial Commission Opinion and Award finding a change in plaintiff's condition and thus increasing an earlier award.

On 24 December 1982, the plaintiff Lila Lee Styron injured her back while employed at Duke University's Sea Level Hospital. As a result of this injury, the Industrial Commission on 18 September 1984 determined the plaintiff sustained a 32.5% permanent partial disability to her back. Within apt time, Ms. Styron re-opened the claim based on an alleged change in condition. The Industrial Commission on 30 September 1988 affirmed the Chief Deputy Commissioner's finding of the change in condition and award of compensation for permanent total disability. In support of her application for increased compensation due to a change in condition, the plaintiff produced testimony of Dr. Robert Wilfong, her original treating physician. She also produced testimony of Dr. Rudolph Maier, her neurologist, and Dr. William Adams, her psychiatrist. Both Dr. Maier and Dr. Adams first observed and treated the plaintiff after the September 1984 award. Their testimony tended to prove that her physical condition was worse at the time of the second hearing than in 1984. Dr. Wilfong testified she was completely disabled at both times.

Dr. Adams diagnosed the plaintiff as suffering from "an adjustment disorder with a depressed mood. . . ." He further characterized her condition as a "major depressive episode with a chronic pain syndrome." He stated that cervical and back injuries contributed to her mental condition. As a result of her physical and mental condition, he concluded: ". . . it's hard for me to imagine her being able to hold any gainful employment."

Dr. Maier observed that the plaintiff experienced pain down the backs of both legs and pain in her neck and head, resulting in difficulty in standing and walking. He related her pain to "back injuries in which the pain may radiate down the back of a leg along the distribution of one of the nerve roots originating in the back." In explaining the plaintiff's back and leg pain, Dr. Maier also found significant a recent CAT scan of the lumbosacral spine which revealed "concentric bulging of the disc between L4 and L5 which does extend somewhat into the spinal canal and into the foramina, the exits of the nerve roots. . . ." Dr. Maier also diagnosed the plaintiff as suffering from an arthritic change as a result of the injury and back surgery which followed, and he observed fibromyositis, chronically painful nodules arising in the muscles. Dr. Maier opined that the plaintiff was incapable of engaging in meaningful and gainful employment.

The issue presented is whether the evidence supports the Commission's finding that the plaintiff proved a compensable change in condition following an earlier compensation award.

Defendant argues that the plaintiff submitted insufficient evidence to support the Commission's finding that plaintiff sustained a compensable change of condition since plaintiff's case depended on the testimony of physicians who had not examined the plaintiff prior to her first award. N.C.G.S. § 97-47 provides:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded. . . .

N.C.G.S. § 97-47 (1985). In reviewing an award of the Industrial Commission, we are "limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions." *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). The defendant's appeal requires only the former inquiry, as they assign error only to that issue.

The defendant notes that Dr. Wilfong, the only testifying physician who saw the plaintiff both before and after the 1984 compensation award, opined that her condition in 1986 was about the same as in 1984. He rated her as totally disabled at both times. The defendant argues that the testimony of Drs. Maier and Adams is incompetent to prove her condition deteriorated after the 1984 award since neither physician had observed the plaintiff prior to the 1984 award. We see no reason to inhibit an applicant's ability to prove a change in condition by limiting proof to the testimony of a physician who had examined the plaintiff before and after the change in condition. Generally speaking, such physician may be unavailable for testifying during a later hearing for greater benefits. Further, the Commission, not the testifying physician, makes the crucial comparison of conditions. From an expert's testimony of the plaintiff's current condition, the Commission may observe that this condition is worse than the condition described at an earlier point in time by other experts.

The Industrial Commission, in 1984, awarded the plaintiff compensation for a 32.5% permanent partial disability to her back.

At that time, evidently, the Commission did not find Dr. Wilfong's testimony of total disability convincing. However, on the plaintiff's reapplication for greater benefits, the Commission received testimony from two other physicians describing physical and mental conditions different from those existing in 1984. The defendant does not dispute that the physical and mental conditions described by Drs. Maier and Adams are the result of the industrial injury occurring on 24 December 1982. The Commission decided that the conditions described by these physicians were worse than those proven in the first application for compensation, and granted her an award for total permanent disability. We find that the evidence supported the Commission's conclusion that the plaintiff is totally permanently disabled, and that her condition was caused by the December 1982 injury. *See Hubbard v. Burlington Indus. Inc.*, 76 N.C. App. 313, 316, 332 S.E.2d 746, 748 (1985) (when Commission originally finds permanent partial disability, later Commission finding based on additional evidence of plaintiff's total disability will support conclusion condition has changed). Since the evidence tended to prove the plaintiff has no earning capacity, the Commission's finding that she is permanently unable to work is proper. *See Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E.2d 438 (1951).

Affirmed.

Judges JOHNSON and EAGLES concur.

MARY J. ADAMS v. H. L. MOORE AND J. RAY BUTLER

No. 8921DC100

(Filed 21 November 1989)

1. Unfair Competition § 1 (NCI3d) — unfair or deceptive trade practice — purchase of house by fiduciary — Rule 12(b)(6) dismissal improper

The trial court erred by granting defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action arising from the purchase and sale of a house by a pastor because, under notice pleading, plaintiff may show that defendants buy and sell houses as a business, in which event N.C.G.S. Chapter 75 would apply. The action is not barred by the four-

year statute of limitations of N.C.G.S. § 75-16.2 since the complaint alleged the unfair purchase was on 19 March 1984 and the action was filed on Monday, 21 March 1988.

Am Jur 2d, Brokers §§ 84, 91, 245.

2. **Fiduciaries § 1 (NCI3d)— breach of fiduciary duty—transfer of house to pastor—Rule 12(b)(6) dismissal improper**

The trial court erred by granting defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action arising from the transfer of plaintiff's house to her pastor because plaintiff sufficiently alleged that a fiduciary relationship existed and was abused. When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains an inordinate benefit as a result. The claim was not barred by the three-year statute of limitations of N.C.G.S. § 1-52(9), as the ten-year limitation of N.C.G.S. § 1-56 applies to constructive fraud based on breach of fiduciary duty.

Am Jur 2d, Brokers §§ 84, 91, 245.

3. **Quasi Contracts and Restitution § 1.2 (NCI3d)— unjust enrichment—transfer of house to pastor—Rule 12(b)(6) dismissal improper**

A claim for unjust enrichment by a fiduciary arising from the transfer of plaintiff's house to her pastor was sufficiently alleged and the trial court erred by granting defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b))6).

Am Jur 2d, Fraud and Deceit §§ 336, 338.

APPEAL by plaintiff from *Keiger, Judge.* Order entered 23 August 1988 in District Court, FORSYTH County. Heard in the Court of Appeals 11 July 1989.

Legal Aid Society of Northwest North Carolina, Inc., by Susan Gottsegen and Ellen W. Gerber, for plaintiff appellant.

Donald R. Buie for defendant appellees.

PHILLIPS, Judge.

The order appealed from dismissed plaintiff's complaint under the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure. The

reference in the order to Rule 56 is inappropriate and feckless, as no materials other than the pleadings were presented. *Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E.2d 808 (1980). The complaint adequately states three alternative claims for which relief are allowed under our law—unfair trade practice, breach of a fiduciary duty, and unjust enrichment—and the order dismissing the complaint is vacated.

All three claims are based upon allegations of fact to the effect that: In March 1984 plaintiff was the sole owner of a house and lot in Winston-Salem worth about $32,000 on which there was a mortgage balance of about $12,000 payable in monthly installments; plaintiff was two months behind in the mortgage payments and turned to her pastor, defendant Moore, in whom she had trust and confidence, for counsel and advice; Moore assured her that he could help her and a few days later he and defendant Butler, also a preacher, told her that they would assume the mortgage and pay her $1,000 if she would deed the place to them; relying upon the defendants to treat her fairly in discharge of their fiduciary duty, plaintiff deeded the place to them and was paid the $1,000; a few months later, in November, 1984, defendants sold the house for $32,000, thereby unjustly enriching themselves in the amount of $18,000 on a cash outlay of no more than $2,000, counting the mortgage payments made; and acquiring and selling the house under the circumstances was an unfair or deceptive trade practice and a breach of their fiduciary duty.

[1] The unfair or deceptive trade practice claim was apparently dismissed on the ground that the transaction alleged—the sale of a dwelling house—is not an "act in or affecting commerce," and thus was beyond the purview of G.S. 75-1, *et seq.* While the mere purchase and sale of a residence is not an act "in or affecting commerce" under G.S. 75-1.1, *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988), the law is otherwise as to persons who buy, sell, or lease houses as a business. *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984). The complaint does not show that defendants' purchase of plaintiff's home was an isolated occurrence, and under the notice allegations stated plaintiff may show, if she has evidence to that effect, that defendants buy and sell houses as a business, in which event Chapter 75 would apply. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Nor is the claim necessarily barred by the four-year statute of limitations, G.S. 75-16.2, since the complaint

alleges that defendants' unfair purchase was on 19 March 1984, and this action was filed on Monday, 21 March 1988. G.S. 1A-1, Rule 6(a), N.C. Rules of Civil Procedure.

[2] As to the breach of fiduciary duty claim: When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains an inordinate benefit as a result of it. *Watts v. Cumberland County Hospital Systems, Inc.*, 317 N.C. 110, 343 S.E.2d 879 (1986). That such a relationship existed between plaintiff and the defendants and was abused is sufficiently alleged. For under our law a fiduciary relationship can be found to exist anytime one person reposes a special confidence in another, in which event the one trusted is bound to act in good faith and with due regard to the interests of the other. *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931). Nor is this claim barred by the three-year statute of limitations contained in G.S. 1-52(9), as the ten-year statute of limitations under G.S. 1-56 applies to *constructive* fraud claims based upon a breach of fiduciary duty. *Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981); *Speck v. North Carolina Dairy Foundation, Inc.*, 64 N.C. App. 419, 307 S.E.2d 785 (1983), *reversed on other grounds*, 311 N.C. 679, 319 S.E.2d 139 (1984).

[3] As to the unjust enrichment claim, unjust enrichment has been defined as follows:

> 'Unjust enrichment' is a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another. . .

Ivey v. Williams, 74 N.C. App. 532, 534, 328 S.E.2d 837, 838-39 (1985), *citing* 66 Am. Jur. 2d *Restitution and Implied Contracts* Sec. 3, at 945 (1973). That this claim, an alternative or duplicate of the breach of fiduciary duty claim, is also sufficiently alleged is too manifest to require discussion.

The order dismissing the complaint is vacated and the claims alleged returned to the District Court for further proceedings consistent herewith.

Vacated and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA, APPELLEE v. WELDON GILBERT, APPELLANT

No. 894SC369

(Filed 21 November 1989)

1. **Witnesses § 1.2 (NCI3d)— child witness—no voir dire to determine competency—evidence supports conclusion of competency**

There was no prejudicial error in a prosecution for taking indecent liberties with a minor where the trial judge allowed the six-year-old victim to testify without a voir dire to determine competency where, prior to being sworn, the witness told the judge her name, that she understood what an oath was, that she could place her hand on the Bible and swear to tell the truth, and that she knew what the truth was; after taking the stand, she testified without objection that she was six years old and had one brother who was eight years old; and she also named the school she attended, gave her teacher's name, where she lived, and said that she was going to tell the truth. This evidence clearly supports the trial judge's conclusion that the witness was competent to testify.

Am Jur 2d, Witnesses §§ 88, 89.

2. **Criminal Law § 73.2 (NCI3d)— indecent liberties—out-of-court statements—offered for corroboration—not hearsay**

The trial court did not err in a prosecution for taking indecent liberties with a minor by admitting a number of out-of-court statements made by the victim's older brother and others where the statements were offered for the sole purpose of corroborating the six-year-old victim's testimony. N.C.G.S. § 8C-1, Rule 801(c).

Am Jur 2d, Witnesses §§ 641, 653, 655.

3. **Criminal Law § 1179 (NCI4th)— indecent liberties—aggravating factor—position of trust and confidence**

The trial court did not err when sentencing defendant for taking indecent liberties with a minor by finding in ag-

gravation that defendant took advantage of a position of trust and confidence to commit the offense where the victim was a frequent visitor in defendant's home, defendant gave her candy and let her play with his dog on numerous occasions, and the victim and other children were given money by defendant for doing odd jobs around his house.

Am Jur 2d, Infants §§ 5, 16, 17.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 10 November 1988 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 October 1989.

Defendant was charged in a proper bill of indictment with taking indecent liberties with a minor child in violation of G.S. 14-202.1. Evidence presented at trial tends to show that on 23 April 1988, defendant engaged in various sexual acts with a six-year-old girl who had been playing at his home. A jury found defendant guilty as charged. From a judgment imposing a prison sentence of nine years, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Joseph E. Stroud, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] In his first assignment of error, defendant contends the trial judge improperly allowed the six-year-old victim to testify at trial because her competency was never established. Defendant asserts the trial court was required to conduct a *voir dire* examination of the witness to determine her competency. By failing to make this formal inquiry, defendant argues, the trial judge had no evidence from which he could determine the six-year-old child was competent to testify. We disagree.

The issue of a witness' competency "rests in the sound discretion of the trial court based upon its observation of the witness." *State v. Spaugh*, 321 N.C. 550, 554, 364 S.E.2d 368, 371 (1988), *citing, State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). "Absent a showing that the trial court's ruling could not have been the result of a reasoned decision, it will not be disturbed on appeal." *Id.* Our Supreme Court has held that if evidence presented "clearly supports a conclusion that the witness is competent, the

trial court's failure to conduct a *voir dire* inquiry and make specific findings and conclusions concerning the witness' competency is, at worst, harmless error." *Id.* at 555, 364 S.E.2d at 372. The record indicates that prior to being sworn, the six-year-old witness told the trial judge her name, that she understood what an oath was, that she could place her hand on the Bible and swear to tell the truth, and that she knew what the truth was. After taking the stand, she testified without objection that she was six years old and had one brother who was eight years old. She also named the school she attended, gave her teacher's name, where she lived, and said that she was going to tell the truth. This evidence clearly supports the trial judge's conclusion that the six-year-old victim was competent to testify. Thus, we hold the trial judge's failure to conduct a *voir dire* examination to establish her competency was not prejudicial error.

[2] Defendant also argues the trial court erred by admitting into evidence a number of out-of-court statements made by the victim's older brother and others. These statements, according to defendant, were inadmissible hearsay. To qualify as hearsay, an out-of-court statement must be offered into evidence to prove the truth of the matter asserted. North Carolina Rules of Evidence, Rule 801(c). In the present case, the out-of-court statements objected to were offered for the sole purpose of corroborating the six-year-old victim's testimony. Although it is clear that out-of-court statements offered to corroborate prior testimony are not hearsay, defendant argues that because the victim was not a competent witness, the fact that out-of-court statements corroborated her testimony should not justify their admission into evidence. Because the trial judge properly concluded the victim was competent, however, defendant's argument fails on this point.

In his third argued assignment of error, defendant contends the trial judge improperly denied his motions to dismiss and for "judgment n.o.v. or for a new trial." He claims the only evidence upon which a jury could have convicted him was the improperly admitted testimony by the six-year-old victim. Again, because the trial court correctly determined that the child was competent to testify, defendant's argument has no merit.

[3] Finally, defendant argues there was not sufficient evidence at trial to support the trial court's finding as an aggravating factor for sentencing purposes that he took advantage of a position of

trust and confidence to commit the offense charged. On the contrary, the record indicates the victim was a frequent visitor in defendant's home, that defendant gave her candy and let her play with his dog on numerous occasions, and that she and other children were given money by defendant for doing odd jobs around his house. This evidence was clearly sufficient to support the trial judge's conclusion that defendant took advantage of a position of trust and confidence.

Defendant had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. ELTON GULLIE

No. 8910SC383

(Filed 21 November 1989)

1. **Assault and Battery § 15 (NCI3d)— assault by pointing a gun—instructions—without legal justification omitted from statement of charge—no error**

The trial court did not err in a prosecution for assault by pointing a gun by omitting "without legal justification" from its statement to the jury of the charge against defendant and from its jury instructions. Although the courts have stated that the provisions of N.C.G.S. § 14-34 are subject to the qualification that the pointing of a gun must be intentional and without legal justification, the absence of legal justification is not an element of the offense to be proved by the State; rather, the presence of legal justification is a defense which must arise upon the evidence. Defendant here presented no evidence sufficient to invoke self-defense; his case was grounded entirely on his denial that he had a gun in his possession during the confrontation.

Am Jur 2d, Assault and Battery §§ 48, 69, 107.

2. Assault and Battery § 14 (NCI3d)— assault by pointing a gun—evidence sufficient

The trial court did not err in a prosecution for assault by pointing a gun by denying defendant's motion to dismiss for insufficient evidence.

Am Jur 2d, Assault and Battery §§ 48, 69, 107.

APPEAL by defendant from *Hudson, Orlando F., Judge.* Judgment entered 5 January 1989 in WAKE County Superior Court. Heard in the Court of Appeals 17 October 1989.

Defendant was charged by criminal summons with assault by pointing a gun in violation of G.S § 14-34. Following his conviction in District Court, defendant appealed for a trial *de novo* in Superior Court. At trial, the evidence tended to establish that Robert Defibaugh, the prosecuting witness, was a tenant of defendant. On 15 May 1988, a dispute arose over a security deposit. The prosecuting witness angrily approached defendant at defendant's residence. Defendant stood in the doorway while the prosecuting witness remained outside, some eight feet away. As words were exchanged, defendant came closer to the prosecuting witness, pulled a nickel-plated .22 caliber revolver from the right pocket of his jacket, pointed it at the prosecuting witness, and uttered a profane threat to shoot the prosecuting witness.

In his defense, defendant presented testimony that he had no gun in his possession during the incident. Defendant's motion to dismiss for insufficiency of evidence and request for a jury instruction on self-defense were both denied. The jury returned a verdict of guilty, and the court imposed a sentence of thirty days' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Barbara A. Shaw, for the State.

Dan Lynn for defendant-appellant.

WELLS, Judge.

[1] Four of the five assignments of error which defendant has brought forward, in fact, present but a single issue, namely, whether the court erred in omitting the language "without legal justification" from its statement to the jury of the charge against defendant

and its jury instructions. In the factual context of this case, the relevant legal justification is self-defense. We therefore consider these four assignments of error together.

Defendant was charged with violating G.S. § 14-34. That statute provides in pertinent part:

> If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault[.]

Our courts have stated that the provisions of G.S. § 14-34 are subject to the qualification that for a violation of the statute to occur, the pointing of a gun must be intentional and without legal justification. *See State v. Adams*, 2 N.C. App. 282, 163 S.E.2d 1 (1968), and *State v. Thornton*, 43 N.C. App. 564, 259 S.E.2d 381 (1979), both of which rely on *Lowe v. Dept. of Motor Vehicles*, 244 N.C. 353, 93 S.E.2d 448 (1956). We agree with this interpretation of this statute. We note, however, that these cases also clearly stand for the principle that the absence of legal justification is not an element of the offense to be established by the State; rather, the presence of legal justification is a defense which must arise upon the evidence.

The "legal justification" relied on by defendant in this case is self-defense. It is well established that to be entitled to an instruction on self-defense, a defendant must have presented evidence sufficient to invoke the benefit of that doctrine. *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) (and cases cited therein). The record, however, reveals that defendant presented no such evidence. Rather, defendant's case was entirely grounded upon his denial that he had a gun in his possession during the confrontation. This defense obviated the necessity for the court to instruct the jury on the issue of legal justification, i.e., self-defense. *Brewer, supra. See also State v. Harding*, 22 N.C. App. 66, 205 S.E.2d 544, *cert. denied*, 285 N.C. 665, 207 S.E.2d 759 (1974) ("By denying the shooting, defendant rendered it unnecessary for the court to instruct the jury on self-defense."). These four assignments of error are therefore overruled.

[2] By his remaining assignment of error, defendant challenges the court's denial of his motion to dismiss. A 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 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). 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.

No error.

Judges JOHNSON and ORR concur.

CHARLES W. STARR, JR., SHERRY F. STARR, CLETUS W. YOW, JR., MELISSA J. YOW, CAROL JEAN YOW, ALLAN L. CRAWFORD, SR., NANCY A. CRAWFORD, DAVID JAMES TURNER AND DORA HEWITT TURNER, PLAINTIFFS v. WALTER DAVID THOMPSON, JR.; ARCHIBALD WILLARD THOMPSON, INDIVIDUALLY AND AS GUARDIAN OF VIRGINIA ALICE THOMPSON, A MINOR CHILD; FRANCIS ST. ELMO THOMPSON, INDIVIDUALLY, AS EXECUTOR OF THE ESTATE OF RACHEL J. THOMPSON, DECEASED, AND AS GUARDIAN OF VIRGINIA ALICE THOMPSON, A MINOR CHILD; ROBERT EDWIN THOMPSON; VIRGINIA ALICE THOMPSON, INDIVIDUALLY, BY AND THROUGH HER GUARDIANS, FRANCIS ST. ELMO THOMPSON AND ARCHIBALD WILLARD THOMPSON, DEFENDANTS

No. 8918SC32

(Filed 21 November 1989)

Deeds § 20.3 (NCI3d)— modular home—mobile home within the meaning of restrictive covenants

The trial court properly granted summary judgment for plaintiffs in an action to require defendants to remove a structure from their lot in a subdivision on the grounds that the structure violated the subdivision restrictive covenants against

trailers or mobile homes where the structure in question was a factory-built dwelling house made up of two sections about eight feet wide and forty feet long; each section has a permanent built-in chassis equipped to accommodate four removable axles upon which motor vehiclelike wheels can be affixed at each end; when the sections were delivered to the lot, the axles and wheels were in place under the sections, each of which also had a connecting tongue that extended from the front and taillights on the back; after the sections were delivered to the lot, the axles, wheels and tongues were removed, the two sections connected, and placed on footings; and the sections cannot be distinguished from double-wide mobile home sections seen daily on the lots of mobile home dealers and rolling down the highways of the state. Whether a dwelling is a mobile home under a restrictive covenant depends upon its characteristics and not upon what it is called by municipal authorities or others or what government agency establishes the building standards.

Am Jur 2d, Covenants, Conditions, and Restrictions § 213.

APPEAL by defendants from *Crawley, Judge.* Order and judgment entered 9 September 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 August 1989.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah, Thomas W. Brawner and Ann I. Rucker, for plaintiff appellees.

Carruthers & Roth, by Richard L. Vanore and Charles J. Vinicombe, for defendant appellants.

PHILLIPS, Judge.

Plaintiffs and defendants own lots in the "Property of C. W. Yow" subdivision in Guilford County. Summary judgment was entered under Rule 56, N.C. Rules of Civil Procedure, directing the defendants, *inter alia*, to remove a structure on their lot that is deemed to be in violation of a subdivision restrictive covenant which states "[n]o trailers or mobile homes shall be allowed on the property."

The only question presented by defendants' appeal is whether the affidavits and other materials presented to the court establish

as a matter of law that the structure situated on defendants' lot is a "mobile home" within the meaning of the restrictive covenant. We hold that they do. For the materials show without contradiction that: The structure in question is a factory built dwelling house made up of two sections about 8 feet wide and 40 feet long; each section has a permanent, built-in chassis equipped to accommodate four removable axles upon which motor vehiclelike wheels can be affixed at each end; when the sections were delivered to the lot the axles and wheels were in place under the sections, each of which also had a connecting "tongue" that extended from the front and taillights on the back end. After the sections were delivered to the lot the axles, wheels and tongues were removed, the two sections were connected together, and placed on footings. As depicted by the photographs, affidavits and other materials, the sections cannot be distinguished from double-wide mobile home sections that are to be seen daily on the lots of mobile home dealers and rolling down the highways of the state.

In opposition to this showing defendants rely not upon affidavits or other materials concerning the mobility of the structure, but upon affidavits by a Deputy Commissioner of Insurance, a Greensboro building inspector, and others to the effect that: Under Greensboro's zoning ordinance a factory built "modular home" such as defendants' that complies with the North Carolina Uniform Residential Building Code under standards set by the North Carolina Commissioner of Insurance can be placed anywhere in the city and are not considered by the zoning authorities to be "mobile homes"; whereas "manufactured homes" built under lesser standards pursuant to the provisions of Article 9B of Chapter 143 of the General Statutes and HUD regulations can be placed only in certain zoning areas and are considered by the city zoning authorities and the affiants to be "mobile homes." The affidavits and the arguments based upon them are irrelevant to the case. For (1) we are not dealing with a zoning ordinance but a valid, enforceable subdivision restrictive covenant against "mobile homes," *Barber v. Dixon*, 62 N.C. App. 455, 302 S.E.2d 915, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 732 (1983); (2) whether a dwelling is a mobile home under such a covenant depends upon its characteristics, not upon what it is called by municipal zoning authorities or others or what government agency establishes the building standards; and (3) a factory built dwelling, such as the one involved, designed and constructed to travel on wheels from place to place is a "mobile

home" within the meaning of a covenant against such structures as a matter of law, even though the axles, wheels and tongues were removed after the structure was placed on the lot. *City of Asheboro v. Auman*, 26 N.C. App. 87, 214 S.E.2d 621, *cert. denied*, 288 N.C. 239, 217 S.E.2d 663 (1975).

Affirmed.

Judges WELLS and PARKER concur.

CALVIN C. VINSON, FOR HIMSELF AND AS EXECUTOR OF THE ESTATE OF ELVA ANN REED VINSON, PLAINTIFF v. KELLEY WALLACE, JR. AND PITT COUNTY MEMORIAL HOSPITAL, INC., DEFENDANTS

No. 896SC288

(Filed 21 November 1989)

Appeal and Error § 6.2 (NCI3d); Venue § 4 (NCI3d) — interlocutory appeal — venue — dismissed

An appeal was dismissed as interlocutory where plaintiff filed a personal injury-wrongful death action in Hertford County arising from a tummy tuck operation performed by defendant Wallace, a Beaufort County surgeon, in the Pitt County Memorial Hospital in Greenville; the hospital moved as a matter of right for the action against it to be removed to Pitt County; that motion was granted; the parties disagreed as to whether that order applied to the entire action or only the case against the hospital; the individual defendant filed a motion to transfer the entire action, which was denied; and that order was appealed to the Court of Appeals. The hospital was not an aggrieved party as the only motion it made was granted, and plaintiff had a right to maintain an action in Hertford County unless the venue was changed for some lawful reason. The law does not entitle defendant Wallace either to have the action tried in Pitt County, where he does not reside, or with plaintiff's action against the hospital, and the inconvenience of two trials is too insubstantial to justify frag-

mentary appeals. N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d); N.C.G.S. § 1-82.

Am Jur 2d, Appeal and Error §§ 89, 182-185, 861, 875.

APPEAL by defendants from *Small, Judge*. Order entered 25 January 1989 in Superior Court, HERTFORD County. Heard in the Court of Appeals 21 September 1989.

Perry W. Martin and Clifton & Singer, by Richard G. Singer, for plaintiff appellee.

Ward and Smith, by Thomas E. Harris, for defendant appellant Kelley Wallace, Jr.

No brief filed for defendant appellant Pitt County Memorial Hospital, Inc.

PHILLIPS, Judge.

This personal injury-wrongful death action arose out of a "tummy tuck" operation that defendant Wallace, a Beaufort County surgeon, performed on plaintiff's testator, Elva Ann Reed Vinson, in the Pitt County Memorial Hospital in Greenville. Before answering the complaint defendant hospital, as a county instrumentality, moved as a matter of right under G.S. 1-77 and *Coats v. Sampson County Memorial Hospital, Inc.*, 264 N.C. 332, 141 S.E.2d 440 (1965), that the action against it be removed to Pitt County where the events upon which it is based occurred. In his answer defendant Wallace stated that the proper venue of the action was Pitt County as noted in the motion of defendant hospital, but made no motion of his own. When the hospital's motion was heard Judge Griffin granted it by an order directing the Clerk to effectuate the transfer and he later orally instructed the Clerk to transfer only the portion of the case that related to Pitt County Memorial Hospital. The Clerk followed that instruction and during the months that followed counsel for the parties and the court corresponded and conversed several times about what the order meant and what they intended for it to mean, it being contended by plaintiff that it was understood and intended that only the case against the hospital would be transferred and by the individual defendant that the entire action would be sent. On 7 December 1987 defendant Wallace moved that the Clerk be compelled to transfer the case in its entirety in accord with the order and he filed another motion to the same

effect on 8 December 1988. On 25 January 1989, Judge Small denied the motion by a ten page order interpreting the removal order and the correspondence and conversations about it; one of its many findings was that when Judge Griffin entered the order no motion concerning the case against the individual defendant was before him. The appeal is from this order.

Who is appealing is not clear, however, as the notice of appeal is in the names of both defendants, but only the individual defendant filed assignments of error and submitted a brief. The discrepancies, not explained by the record, could be inadvertent, for the situations of the defendants are not at all similar, either in regard to the duties and violations alleged or the effects of the orders, and the same lawyer represents both. Under the circumstances we treat it as a joint appeal and dismiss it since it is unauthorized in any event; for the order is interlocutory and does not affect a substantial right of either defendant, G.S. 1-277(a); G.S. 7A-27(d); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984), or any other kind of right so far as the record indicates. Defendant hospital is not an aggrieved party since the only motion it made was granted; and while it has a right to have the claim against it tried in Pitt County it has no right to have the claim against Dr. Wallace tried there too. Unless or until the venue is changed for some lawful reason plaintiff, a resident of Hertford County, has a right to maintain his action against defendant Wallace in that county. G.S. 1-82. Under the circumstances the law does not entitle defendant Wallace either to have the action against him tried in Pitt County, where he does not reside, or with plaintiff's action against the hospital. And the only possible inconvenience that either defendant could suffer by participating in two trials, one as a party, the other as an interested observer or witness, is too insubstantial, even if not speculative, to justify the fragmentary appeal attempted.

Appeal dismissed.

Judges COZORT and LEWIS concur.

IN THE MATTER OF: DALE B.

No. 8928DC238

(Filed 21 November 1989)

Concealed Weapons § 1 (NCI3d)— carrying a concealed weapon— knife—ordinary pocketknife

The trial court erred by not dismissing a petition alleging that respondent was a delinquent juvenile for carrying a concealed weapon while off his own premises where the weapon was a knife about four and one-half inches in overall length when folded, clearly designed for carrying in a pocket or a purse. The knife in question was an ordinary pocketknife as defined by N.C.G.S. § 14-269(a).

Am Jur 2d, Weapons and Firearms §§ 2, 8.

APPEAL by respondent from order entered by *Harrell, Robert L., Judge*, on 15 December 1988 in BUNCOMBE County District Court. Heard in the Court of Appeals 21 September 1989.

In a juvenile petition respondent was alleged to be an undisciplined juvenile by reason of running away and truancy. In another petition, respondent was alleged to be a delinquent juvenile by reason of carrying a concealed weapon while off his own premises.

At the hearing on these petitions, respondent admitted truancy and running away, but denied carrying a concealed weapon. The trial court found against the defendant on both petitions and found respondent to be an undisciplined and a delinquent juvenile. The trial court ordered respondent to be placed on one year's supervised probation. Defendant has appealed from the finding of delinquency and from the order of probation.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Assistant Public Defender Faye A. Burner for respondent-appellant.

WELLS, Judge.

The statute upon which the order of delinquency is based is N.C. Gen. Stat. § 14-269(a), which provides:

> *Carrying Concealed Weapons.* (a) It shall be unlawful for any person, except when on his own premises, willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, pistol, gun or other deadly weapon of like kind. This section does not apply to an ordinary pocket knife carried in a closed position. As used in this section, "ordinary pocket knife" means a small knife, designed for carrying in a pocket or purse, which has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive or spring action.

Respondent does not contend that he was not carrying the knife concealed about his person while off his own premises. His sole contention is that the knife he was carrying is an "ordinary pocket knife" as defined by the statute. We agree.

The only aspect of the charge at issue before the trial court was the size of the knife. The trial court did not agree that the knife was a small knife. Respondent's knife was about four and one-half inches in overall length, when folded, clearly designed for carrying in a pocket or purse. We hold that because the knife in question was an "ordinary pocket knife" as defined by the statute, that charge should have been dismissed.

The order of delinquency is reversed. Since the order as to respondent's undisciplined status is not contested, it is affirmed, and the case is remanded for an appropriate disposition order based on that status.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and ORR concur.

HILTON B. FRASER v. L. GLENN LITTLEJOHN

No. 8926SC112

(Filed 5 December 1989)

1. **Constitutional Law § 26 (NCI3d)— valid foreign judgment— jurisdiction over nonresident defendant pursuant to full faith and credit clause**

The trial court had jurisdiction over defendant based on the full faith and credit theory where plaintiff obtained three valid money judgments against defendant in Florida in 1976, and defendant did not contest the Florida court's assertion of subject matter or personal jurisdiction in those actions, did not allege fraud concerning them, and did not object to the trial court's finding of fact that plaintiff's Florida judgments were valid.

Am Jur 2d, Constitutional Law § 863.

2. **Process § 14.3 (NCI3d)— nonresident defendant—sufficiency of contacts with North Carolina**

Defendant's continuous and systematic contacts with North Carolina between 1983 and 1988 satisfied the statutory and constitutional requirements necessary to find personal jurisdiction in this case where defendant came to North Carolina in 1983 and completed tax returns for customers of a tax service at its Charlotte offices for three years; he was the personal, financial and property manager of a Charlotte resident; he resided in her home on a continual basis from the spring of 1984 until her death in 1986; during 1984 he received in excess of $20,000 for managing the resident's North Carolina property; he prepared and used a letterhead stating his name and giving a North Carolina address; he purchased real estate in North Carolina and all correspondence with regard thereto, including tax billings, was sent to him at a Charlotte address; he was beneficiary of both real and personal property, valued in excess of $300,000, of the North Carolina resident's estate; and at the time this action was commenced defendant did not live in North Carolina but he still owned property in this state, was a named beneficiary under a North Carolina resident's will, and retained a North Carolina attorney to repre-

sent his interest in the estate. N.C.G.S. § 1-75.4(1)(d); N.C.G.S. § 1-75.8(5).

Am Jur 2d, Process § 45.

APPEAL by defendant from Order entered 31 August 1988 by *Judge Frank W. Snepp, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 October 1989.

In this action plaintiff Fraser seeks monetary relief from defendant Littlejohn, based upon North Carolina's enforcement of three valid out-of-state money judgments plaintiff won against defendant in Florida. Simultaneously with the filing of the complaint, appellee filed an Affidavit in Attachment Proceeding and issued a Notice of Levy and Garnishment Proceedings, thereby garnishing appellant's interest as a devisee and legatee of an estate of a North Carolina resident. Littlejohn was personally served with Summons, Verified Complaint, Affidavit of Attachment and Order of Attachment, but failed to answer the complaint. Appellee filed a motion for Entry of Default and Default Judgment, and the Assistant Clerk for Superior Court of Mecklenburg County entered a judgment for him of $108,081.83 on 11 March 1988. Littlejohn moved under N.C.G.S. § 1A-1, Rule 60(b)(4), to set aside the default judgment and to dismiss the complaint under N.C.G.S. § 1A-1, Rule 12(b)(2), on the grounds that the court lacked personal jurisdiction over him. Appellant also filed a Motion Seeking to Set Aside the Entry of Default under Rule 55, arguing the court should set aside the Default Judgment pursuant to N.C.G.S. § 1-75.11. These matters were heard before Judge Snepp, who entered an Order denying Littlejohn's motions on 13 September 1988.

The record indicates the following facts:

Three judgments were entered against appellant in favor of appellee by the Brevard County, Florida Circuit Court in 1976. The judgments arose surrounding transactions between the parties that occurred in the state of Florida in the early 1970's. Both parties were then residents of Florida. The appellee is still a resident of that state; the appellant now maintains his residence in Holly Hill, South Carolina.

Beginning in 1983, appellant spent considerable time in Charlotte, North Carolina assisting Mellinee J. Mattick in the management of her business and personal affairs. Ms. Mattick was

then president of Mel Jackson Tax Service and owned rental property in Charlotte. Littlejohn prepared tax returns at Ms. Mattick's business and managed her rental property.

After the 1984 tax season, Littlejohn moved into Ms. Mattick's residence on Mt. Holly Road in Charlotte and resided there until her death in 1986. In 1984, Littlejohn received in excess of $20,000 for managing Ms. Mattick's North Carolina property. During this period Littlejohn used a letterhead identifying himself as a financial consultant operating in Charlotte and South Carolina. In 1985, Littlejohn purchased real property in Mecklenburg County, North Carolina.

Ms. Mattick died on 17 June 1986, and left Littlejohn an interest in her estate consisting of both personal and real property located in North Carolina valued in excess of $300,000. Thereafter, Fraser learned that Littlejohn had property in North Carolina and initiated this action to enforce the Florida judgments.

Weinstein & Sturges, by L. Holmes Eleazer, Jr., Allan W. Singer and Thomas L. Odom, Jr., for plaintiff appellee.

Winfred R. Ervin, Jr. for defendant appellant.

ARNOLD, Judge.

Appellant asks us to find error in the Superior Court's denial of his motion to set aside the default judgment entered against him on the basis that the lower court lacked personal jurisdiction. The contentions in this case revolve around two theories under which jurisdiction might be asserted over the appellant: (1) the Full Faith and Credit Clause of the United States Constitution, by the enforcement of a valid *in personam* judgment of one state in the courts of another; and (2) by jurisdiction *in personam* acquired under N.C.G.S. § 1-75.4(1)(d) and N.C.G.S. § 1-75.8(5) based on appellant's systematic and continuous contacts with North Carolina. We find both theories adequate to provide jurisdiction and affirm the trial court's order.

1. Full Faith and Credit

[1] Two requirements must be met to assert jurisdiction over a defendant based on the full faith and credit theory. First, plaintiff must obtain a judgment in the out-of-state court against defendant, rendering him a "debtor" in the eyes of the North Carolina courts.

Second, the North Carolina courts must examine whether the first state's decree or judgment is entitled to full faith and credit in this state. *See Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

In *Holt* our Court discussed this theory of obtaining personal jurisdiction. We noted that in *Shaffer v. Heitner*, 433 U.S. 186, 210, 97 S.Ct. 2569, 2583, 53 L.Ed. 2d 683, 702 (1977), the United States Supreme Court stated:

> Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid in personam judgment of one State enforceable in all other States.

The Supreme Court added in a footnote:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Shaffer, 433 U.S. at 210, n. 36, 53 L.Ed. 2d at 702, 97 S.Ct. at 2583.

In *Holt*, this Court ruled the trial court lacked personal jurisdiction over defendant because defendant was only an "obligor," not a debtor, of plaintiff. We stated:

> To proceed under this principle [jurisdiction under the full faith and credit clause], we think it would be essential for plaintiff to first obtain a judgment in the Missouri courts that defendant is in arrears for a sum certain on the ordered payments. From that subsequent judgment, North Carolina courts could then take proper notice that defendant is a "debtor" of plaintiff and the action would lie under this theory.

Holt, at 347, 255 S.E.2d at 409.

We believe the facts in the present case come within the scenario outlined in *Shaffer* and *Holt*. Appellee's Judgment of Default here was based on jurisdiction obtained through the three valid money judgments secured against appellant in Florida in 1976. Whether or not North Carolina had jurisdiction to determine the existence

of the debt as an original matter is immaterial. Appellee must only show that he obtained a judgment against appellant in Florida.

Under the second step of this analysis, the Court must determine whether the Florida judgment is entitled to full faith and credit in North Carolina. *See Holt*, at 347, 255 S.E.2d at 409. The rule here requires North Carolina to enforce a judgment rendered in another state if the judgment is valid under the laws of that state. *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358 (1988); U.S. Const., Art. IV, Section 1.

A collateral attack may be waged against a foreign judgment only on the grounds that it was obtained without jurisdiction; that fraud was involved in the judgment's procurement; or that its enforcement would be against public policy. *Satterfield*, at 107, 367 S.E.2d at 360. None of these grounds was asserted here by Littlejohn against the Florida judgments. Appellant did not object to the trial court's finding of fact that appellee's Florida judgments were valid. Appellant has never contested the Florida court's assertion of subject matter or personal jurisdiction in those actions, nor has he alleged fraud concerning them. Public policy concerns, we believe, *encourage* us to enforce a creditor's claim obtained against a debtor in a sister state. Under this full faith and credit theory for determining personal jurisdiction, we find no error with the lower court's order dismissing appellant's motions.

2. *In Personam* Jurisdiction

[2] We also find the Court had personal jurisdiction over appellant under the second theory asserted. Appellant's continuous and systematic contacts with North Carolina between 1983 and 1988 satisfy the statutory and constitutional requirements necessary to find personal jurisdiction in this case. On the facts before us, this theory adequately permitted the trial court to assert personal jurisdiction over Littlejohn regardless of whether Fraser previously had obtained judgments against appellant in another state.

To determine whether a defendant is subject to *in personam* jurisdiction, two familiar requirements must be met. First, the Court must decide whether a North Carolina jurisdictional statute allows it to entertain the action against defendant. Second, the Court must determine whether the exercise of jurisdiction is consistent with due process. *Marion v. Long*, 72 N.C. App. 585, 325

S.E.2d 300, *appeal dismissed and rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985).

Appellee has asserted statutory jurisdiction over Littlejohn under N.C.G.S. § 1-75.4, the North Carolina "long-arm" statute and N.C.G.S. § 1-75.8(5), the *in rem* and *quasi in rem* statute. N.C.G.S. § 1-75.4(1)(d) provides in part that a court has personal jurisdiction in the following circumstance:

> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> * * * *
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C.G.S. § 1-75.8(5) provides that jurisdiction *in rem* or *quasi in rem* may be invoked "[i]n any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised."

Both of these sections are liberally construed by our courts to find personal jurisdiction over nonresident defendants to the full extent allowed by the due process standards of the Fourteenth Amendment. *Brookshire v. Brookshire*, 89 N.C. App. 48, 365 S.E.2d 307 (1988); *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 314 S.E.2d 124 (1984); *Marion*, 72 N.C. App. 585, 325 S.E.2d 300; *Kaplan School Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 289 S.E.2d 607, *rev. denied*, 306 N.C. 385, 294 S.E.2d 209 (1982); *see Cantebury v. Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *Holt*, 41 N.C. App. 344, 255 S.E.2d 407; *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

As in the case before us, even if a defendant is not present within the territory of the forum, constitutional due process requirements may still be met if defendant maintained certain "minimum contacts" with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); *Solar Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984).

The minimum contacts test has been extended to actions *in rem* as well as *in personam*. *Shaffer*, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S.Ct. 2569. Also, to be subject to personal jurisdiction, defendant must take some purposeful action within the forum state that invokes for defendant the benefits and protections of the forum state's laws. *Hanson v. Denkla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958), applied in *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974). This activity by defendant must be connected to the forum state in such a way that defendant could reasonably anticipate being brought into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980); *J. M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 324 S.E.2d 909, *rev. denied*, 313 N.C. 602, 330 S.E.2d 611 (1985).

Minimum contacts are not determined by applying a mechanical formula; rather, each case is judged on its particular facts considering the traditional notions of fair play and justice. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985). The factors to be considered are: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience. *Marion*, at 585, 325 S.E.2d at 302.

When the State exercises personal jurisdiction in a suit arising out of or related to defendant's contacts with the forum, it is said the State is exercising "specific jurisdiction" over the defendant. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L.Ed. 2d 404, 411 (1984). More importantly for this case, the State also may exercise "general jurisdiction" over defendant; that is, jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient "continuous and systematic" contacts between defendant and the forum state. *Id.* This distinction is important because in the *Helicopteros* case, the Supreme Court recognized that the threshold for satisfying minimum contacts for general jurisdiction is higher than in specific jurisdiction cases. In order to assert general jurisdiction there must be "substantial" forum-related minimum contacts on the part of the defendant. *See Helicopteros*, 466 U.S. 408, 80 L.Ed. 2d 404.

Applying the above stated principles of law to the facts before us, we conclude that the application of either N.C.G.S. § 1-75.4(1)(d) or N.C.G.S. § 1-75.8(5) to assert jurisdiction over the South Caro-

lina appellant or his North Carolina property does not offend traditional notions of fair play and substantial justice. The trial court found that Littlejohn had the following continuous and systematic contacts with North Carolina: (1) he completed tax returns for customers of Mel Jackson Tax Service at its Charlotte, North Carolina offices for three years; (2) he was the personal, financial, and property manager of Mellinee J. Mattick in Charlotte; (3) he resided in the home of Ms. Mattick in Charlotte on a continual basis from the spring of 1984 until her death in 1986; (4) during 1984, he received in excess of $20,000 for managing Ms. Mattick's North Carolina property; (5) he prepared and used letterhead reading "L. Glenn Littlejohn & Associates, Financial Consultants, 413 N. Tryon Street, Charlotte, North Carolina 28202 (704) 377-5209 and P. O. Drawer 1016, Holly Hills, South Carolina 29069 (803) 496-3531"; (6) he purchased real estate in Mecklenburg County, North Carolina, and the deed, subsequent tax billings, and other correspondence were sent to appellant at Ms. Mattick's residence in Charlotte; and (7) he is beneficiary of both real and personal property, valued in excess of $300,000 of Ms. Mattick's estate in North Carolina. We believe the evidence before us supports these findings of fact.

The nature and extent of Littlejohn's numerous contacts with North Carolina demonstrates an intent to conduct activities that are comparable to the contacts undertaken by normal citizens of this state. Appellant came to North Carolina in 1983 and began working here. He accepted compensation for his work and presumably paid North Carolina state taxes on the income he earned. Appellant purchased property in the state and paid property taxes in Mecklenburg County up through 1988. He conducted himself in Charlotte much as an ordinary citizen of this state, and thus has availed himself of the benefits of this state.

Appellant first contends that his contacts with the State of North Carolina between 1983 and 1986 were not continuous and systematic and did not qualify his actions as minimum contacts. Appellant argues that *Helicopteros*, 466 U.S. 408, 80 L.Ed. 2d 404, supports his position. *Helicopteros* was a wrongful death action brought in Texas against a Colombian corporation and others for an accident that took place in Peru when one of the defendant's helicopters crashed. Four Texas contacts were identified: (1) defendant's chief executive officer flew to Texas for contract negotiations; (2) defendant had purchased approximately eighty percent of its helicopter fleet over a period of years from a Texas-based

company; (3) defendant had sent pilots and management personnel to Texas for training; and (4) the checks paid for defendant's services were drawn on a Texas bank. The Supreme Court ruled that the contacts of the foreign corporation were not substantial enough to support an assertion by the State of personal jurisdiction. *Id.* at 411, 80 L.Ed. 2d at 409. We believe, however, that *Helicopteros* is easily distinguishable from the facts before us.

In *Helicopteros*, Justice Blackmun noted that the Colombian company had never performed helicopter operations in Texas or sold any product that reached Texas and never signed any contract in Texas. Neither had the foreign company ever owned real or personal property or maintained an office or establishment in Texas. *Helicopteros*, 466 U.S. at 411, 80 L.Ed. 2d at 409. Appellant Littlejohn, however, had all of these contacts with North Carolina.

Appellant also argues that while he may have had systematic and continuous contacts with North Carolina between 1983 and 1986, after Ms. Mattick's death his activities in the state essentially stopped, and such prior contacts cannot suffice to constitutionally permit the assertion of *in personam* jurisdiction over him for a cause of action served in 1988. N.C.G.S. § 1-75.4(1) allows jurisdiction against a defendant who is engaged in "substantial activity" within North Carolina "*when service of process is made upon such party*" (emphasis added).

The record before us is not clear concerning Littlejohn's activities in North Carolina from the June 1986 death of Ms. Mattick until this cause of action was commenced in February 1988. The affidavits included, however, indicate that after 1986 and before this action was filed, Littlejohn stopped working at Mel Jackson Tax Service in Charlotte, stopped overseeing Ms. Mattick's rental real estate property in Charlotte, and moved out of Ms. Mattick's residence in Charlotte, resuming his residency in South Carolina. Thus, at the time Fraser commenced his action, appellant's only contacts with North Carolina were his ownership of some real property in Mecklenburg County, North Carolina; his status as a named beneficiary of both real and personal property under Ms. Mattick's will; and his retention of a Charlotte attorney to represent his interest in the Mattick estate.

In *Balcon, Inc.*, 36 N.C. App. 322, 244 S.E.2d 164, this Court upheld a trial court's dismissal of an action brought by a Maryland corporation to recover a money judgment from a defendant, an

individual resident of Maryland whose only contact with North Carolina was his ownership of real property in the state. Plaintiff in *Balcon, Inc.* based its assertion of personal jurisdiction on N.C.G.S. § 1-75.8(4), which allowed jurisdiction when "[d]efendant has property within this State which has been attached or has a debtor within the State who has been garnished." In *Balcon, Inc.*, we held N.C.G.S. § 1-75.8(4) was unconstitutional because it did not meet the due process standards required by the *Shaffer* decision. *Balcon, Inc.*, 36 N.C. App. at 327, 244 S.E.2d at 167. Nevertheless, we also stated that N.C.G.S. § 1-75.8(5), under which Fraser brought this current action against appellant, "support[ed] such jurisdiction over the property within the state of a nonresident if due process standards are met." *Id.* In the case before us, those standards have been met.

The essential ingredient in determining whether minimum contacts exist is that there must be some act by which defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980). Also, whether the type of a defendant's activities conducted within the State are adequate depends upon the facts of the particular case. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).

We believe appellant's contacts with North Carolina prior to and after 1986 constituted purposeful activities, and are the type whereby he invoked the benefits and protection of North Carolina law. Littlejohn freely chose to come to North Carolina in 1983, work for Ms. Mattick for three years, live in her home, and purchase property here. After 1986, he reaped benefits that grew directly from those earlier contacts—primarily an interest in Ms. Mattick's estate. To defend that interest in North Carolina, Littlejohn hired an attorney.

Standing separately, appellant's activities in North Carolina after 1986 may not have been adequate to allow Fraser to establish personal jurisdiction over him for this action. It is clear that mere ownership of property in the forum state is insufficient to establish "minimum contacts" necessary to satisfy the requirement of due process. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980). Similarly, we do not believe an out-of-state legatee's or devisee's interest in an in-state resident's estate,

standing alone, is adequate to establish personal jurisdiction involving a matter totally unrelated to the estate interest. We must point out, however, that under N.C.G.S. § 31B-2(a), Littlejohn had the right to renounce his interest in Ms. Mattick's will. Had he chosen this option, establishing the requisite minimum contacts necessary to establish jurisdiction in this case would have been much more difficult.

Nevertheless, it is unnecessary to determine if appellant's post-1986 contacts individually are sufficient to support jurisdiction, or, if those contacts had been unrelated to the pre-1986 events, whether they suffice to support jurisdiction. We are required by the case law to consider the cumulative impact of all of defendant's contacts with the forum, not each contact separately. Littlejohn had three significant contacts with North Carolina when this suit was commenced, not one, as did the defendant in *Balcon.*

Similarly, we must consider the nature of the contacts, and in so doing, we find it impossible to view appellant's 1988 contacts as unrelated to his 1983 through 1986 activities in North Carolina. As we noted above, Littlejohn's activities in North Carolina prior to Ms. Mattick's death undoubtedly constituted contacts sufficient with North Carolina to constitutionally establish personal jurisdiction during that period. It is impossible to examine the 1988 contacts appellant had with this forum without recognizing the direct relationship between those contacts and the contacts defendant had with North Carolina prior to 1986. Viewed together over the period 1983 to 1988, we find the quantity and nature of contacts appellant had with North Carolina warrant the assertion of personal jurisdiction over him here.

We should also examine the "fairness" factors relevant in assessing jurisdiction: the convenience of the forum for the parties, the possibility of an alternative forum, and the "regulatory" interest of the forum state. *See International Shoe*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154; *Marion*, 72 N.C. App. 585, 325 S.E.2d 300.

While it may be inconvenient, it is not unduly burdensome to force appellant to defend this suit away from his home in South Carolina. North Carolina certainly is the most convenient forum as far as the location of witnesses and material evidence are concerned. Similarly, at this time North Carolina is the only possible forum for appellee to collect on the debts owed him. Appellant has no assets of value in South Carolina nor in any other state.

Finally, as we mentioned in our analysis under the full faith and credit clause, North Carolina has an interest in assisting out-of-state creditors who seek to collect from debtors who come within the reach of our courts. No state benefits when debtors are allowed to escape their financial obligations, and we refuse to assist appellant in his attempt at that effort here.

We have examined appellant's other assignments of error and found them to be without merit.

For the foregoing reasons, the trial court's order is

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

HILTON B. FRASER v. L. GLENN LITTLEJOHN

No. 8926SC113

(Filed 5 December 1989)

APPEAL by defendant from order entered 31 August 1988 by *Judge Frank W. Snepp, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 October 1989.

This action, filed in Mecklenburg County Superior Court on 6 April 1988, seeks monetary relief from appellant Littlejohn upon a promissory note dated 20 December 1974. Simultaneously with filing the Complaint, plaintiff filed an Affidavit in Attachment Proceeding and also issued a Notice of Levy and Garnishment Proceedings, thereby garnishing appellant's interest as beneficiary of an estate of a North Carolina resident. The basis for such attachment and garnishment being that appellant is a nonresident. Appellant was served with summons in his county of residence in South Carolina on 6 April 1988. On 19 May 1988, appellant moved to dismiss the complaint for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2). On 31 August 1988, the matter was heard before Judge Snepp, who entered an Order on 13 September 1988 denying appellant's motions. Appellant appealed.

Weinstein & Sturges, by L. Holmes Eleazer, Jr., Allan W. Singer and Thomas L. Odom, Jr., for plaintiff appellee.

Winfred R. Ervin, Jr., for defendant appellant.

ARNOLD, Judge.

The Complaint alleges appellant executed a promissory note on 20 December 1974, and that he is in default of his obligation pursuant to that note. The remaining facts important to this case are set out in the opinion, *Fraser v. Littlejohn*, 96 N.C. App. 377 (1989), heard today.

Our determination of this appeal is controlled by our decision in *Fraser v. Littlejohn* (No. 8926SC112). The order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. JUDGE JONES

No. 8812SC1284

(Filed 5 December 1989)

1. **Searches and Seizures § 12 (NCI3d)— stop of car on suspicion of impaired driver—reasonableness**

An officer's stop of the car in which defendant was a passenger to investigate the driver's impairment was lawful where the car was being driven on an interstate 20 mph below the speed limit, and the driver was weaving within his lane, since those actions were sufficient to raise a suspicion of an impaired driver in a reasonable and experienced officer's mind.

Am Jur 2d, Searches and Seizures §§ 16, 39, 40, 46, 53.

2. **Searches and Seizures § 12 (NCI3d)— suspicion of impaired driver—trooper's stop of vehicle—permissible scope of investigation not exceeded**

There was no merit to defendant's contention that a trooper exceeded the permissible scope of the initial stop of a vehicle

in which defendant was a passenger because the trooper's investigation extended beyond his suspicion of the driver's impairment, since the initial investigation was reasonably related and limited to his suspicions that the driver was impaired; his further investigation of the driver's identity was reasonable when he gave the trooper two different names; it was reasonable for the trooper to continue his investigation of the driver's identity by asking defendant questions concerning the driver; the driver gave the trooper a copy of the car lease agreement which contained defendant's name; and that the trooper's conversation with defendant passenger about the driver's identity resulted in defendant's giving his voluntary consent to a search of the vehicle did not support defendant's arguments that the trooper exceeded the permissible scope of his investigation.

Am Jur 2d, Searches and Seizures §§ 16, 39, 40, 46, 53.

3. **Searches and Seizures § 18 (NCI3d)— consent to search vehicle and suitcase—opening of package in suitcase—contents admissible**

Because defendant passenger gave the trooper who stopped his car for suspicion of impaired driving permission to search the entire contents of defendant's suitcase, and did not retract or limit the consent, the trooper had defendant's consent to open a package found in the suitcase, and the trial court did not err in allowing the drug contents of the package into evidence at trial.

Am Jur 2d, Searches and Seizures §§ 16, 39, 40, 46, 53.

4. **Narcotics § 4 (NCI3d)— possession of drug paraphernalia—sufficiency of evidence**

Circumstantial evidence was substantial and supported an inference that scales found in the trunk of defendant's car were "drug paraphernalia" sufficient for the trial court to submit the issue of possession of drug paraphernalia to the jury where it tended to show that the scales were found in defendant's trunk beside his suitcase which contained 54 grams of pure cocaine; a police officer qualified as an expert on drug investigations testified that the scales were used as a common weighing instrument for controlled substances; the large amount of cocaine seized would support an inference that scales would be needed to divide it into smaller amounts

for resale; the pureness of the cocaine would support an inference that the cocaine would require mixing with a diluting substance and reweighing before sale or use; it was improbable that this type of scales could be used to weigh produce or ammunition, as defendant claimed; and defendant attempted to flee the scene upon discovery of the cocaine, permitting the inference that defendant's guilt caused him to flee.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 16, 47, 47.5.

5. Narcotics § 4.5 (NCI3d)— three offenses—instructions on each offense proper

In a prosecution of defendant for trafficking in cocaine by possession, trafficking in cocaine by transportation, and possession of drug paraphernalia with intent to use, the trial court sufficiently informed the jury of their options in finding defendant guilty or not guilty of each offense, and no defect existed in the jury charge.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 16, 47, 47.5.

APPEAL by defendant from judgment and commitment entered 16 June 1988 by *Judge E. Lynn Johnson* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 23 August 1989.

Lacy H. Thornburg, Attorney General, by W. Dale Talbert, Assistant Attorney General, for the State.

James R. Parish for defendant-appellant.

GREENE, Judge.

Defendant appeals his criminal conviction by jury of trafficking in cocaine by possession, trafficking in cocaine by transportation, and possession of drug paraphernalia with intent to use. Defendant also pled guilty to resisting a law enforcement officer, but did not appeal this conviction or sentencing. The trial court sentenced defendant to seven years imprisonment and fined defendant $50,000.00.

Before trial, defendant moved to suppress all evidence uncovered in the Trooper's search of defendant's vehicle, claiming illegal search and seizure. After conducting a suppression hearing, the trial court entered a written order denying defendant's motion.

At the close of all evidence, defendant moved to dismiss the drug paraphernalia charge. The trial court denied defendant's motion.

In support of the trial court's order denying defendant's motion to suppress, it entered detailed findings of fact and conclusions of law. Defendant generally excepted to the trial court's denial of his motion without objecting to the trial court's findings of facts. Accordingly, the findings "are presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982).

In summary, these findings reveal the following: a North Carolina State Highway Patrol Trooper ("Trooper") was routinely patroling Interstate Highway 95 ("I-95") near Fayetteville at approximately noon on 30 September 1987, when he observed defendant's vehicle traveling in the opposite direction on I-95. While passing defendant's car traveling in the opposite direction he saw that it was traveling 'at a speed substantially slower than other vehicles normally travel on [I-95]'; he crossed the median to follow defendant's car and measured its speed at approximately 45 miles per hour [20 miles per hour below the posted speed limit]. The Trooper observed defendant's car weave from the white line next to the shoulder of the road to the center line of the highway within its lane of travel. The trial court found as facts that the Trooper had 16 years of experience with the force, that "Trooper . . . has made several thousand arrests for . . . driving while impaired; that low speed can mean a person who is highly intoxicated, is driving defensively, or that there is difficulty with the vehicle, or that the driver is sleepy," in the Trooper's opinion. After the Trooper stopped defendant's car, he asked for the driver's license of the driver. (Driver hereafter is "Whitefield.") Whitefield could not produce a driver's license but presented a car rental contract on which appeared the name of defendant. Whitefield claimed his name was "Slade." At that point, the Trooper called in by radio a license check of "Slade's" license to New York. New York records showed no such license. Whitefield told the Trooper that his name was Whitefield, not Slade. The Trooper then conversed with defendant because the car was leased in defendant's name and because Whitefield had lied about his name. The Trooper conversed with defendant and then asked defendant if his car was carrying "any guns, drugs or contraband," and defendant laughed in reply. The Trooper asked defendant if defendant minded if the Trooper looked in defendant's car, and defendant replied "No." The Trooper

prepared a consent to search form, handed it to defendant, who appeared to read and understand it, signed it and consented to the search of his car. The consent form provided that the Trooper could search defendant's car, luggage and the contents of the luggage. The Trooper discovered triple-beam weighing scales in a box in the trunk, which defendant explained that he used for his produce business. After a suitcase in the trunk was opened, the Trooper found a brown package in the middle of the suitcase, and the package contained white powder. According to the Trooper, defendant and Whitefield appeared "stunn[ed]." The Trooper ordered the men to lay down on the road and defendant was reluctant to do so. When the Trooper went to defendant's car to ask the remaining passenger to step out, defendant jumped up, ran to the trunk, grabbed the package and ran away from the car, throwing the package into bushes. The Trooper chased and captured defendant. The trial court further found and concluded:

13. That Trooper . . . has no personal knowledge or training in, 'drug profile,' (sic) matters.

14. That [the] Trooper did not [have] his gun drawn at the time the consent form was signed; that the signing of the consent was voluntary, knowingly, and intelligently made by the Defendant without coercion, duress or threats.

15. That the actions of [the] Trooper are consistent with his training and experience and his duty to enforce the motor vehicle laws of this state.

16. That the Defendant at no time, after the consent form was signed, objected to the actions of [the] Trooper.

17. That Alfonzo Whitefield was issued a citation for no operator's license.

CONCLUSIONS OF LAW

1. That none of the Defendant's rights, either Federal or State, have been violated.

2. That [the] Trooper['s] actions were based upon reasonable and articulable suspicion in fulfillment of his duties as a North Carolina Highway Patrolman.

3. That the Defendant's consent to search was voluntarily, knowingly and intelligently made and without coercion, duress or threats.

After the State and defendant presented evidence at trial, the trial court instructed the jury on each of the drug offenses, and defendant did not except to the instructions. After defendant's conviction on each of the offenses, the trial court proceeded to the sentencing phase of the trial.

The issues presented are whether: (I) the trial court should have excluded evidence seized in an investigatory stop of defendant's car because the stop was unreasonable; (II) the trial court should have excluded evidence seized after defendant consented to a search of his car, because the search exceeded the scope of defendant's consent; (III) the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia because the State failed to introduce sufficient circumstantial evidence to show that triple-beam weighing scales were "drug paraphernalia" under N.C.G.S. § 90-113.21(b); (IV) it was plain error for the trial court to fail to instruct the jury that it had the option of finding defendant guilty or innocent of each offense charged; and (V) the trial court erred in failing to arrest judgment upon one of two drug convictions because 'possession' is a lesser included offense of 'transporting' a drug.

I

Defendant argues that evidence which the Trooper obtained in searching his car was the result of an invalid stop of his car which violated his Fourth Amendment and North Carolina constitutional rights, for two reasons: (A) the Trooper lacked an 'articulable suspicion of wrongdoing' to stop defendant's car and (B) the Trooper's inquiry about other possible traffic offenses exceeded the reasonable scope of an investigation of a driving while impaired (DWI) offense.

A

[1] An officer's stop of a car to investigate a potential traffic offense does not require a complete showing of probable cause because of its limited intrusiveness, but as a limited seizure it is governed by the reasonableness standards of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed.2d 889, 903 (1968) ("*Terry*"). If the investigatory seizure is invalid, evidence resulting from the warrantless stop is inadmissible under the 'exclusionary rule' both according to the federal constitution and our state constitution. *Id.* at 12, 20 L.Ed.2d at 900. (Fourth Amendment of the

U. S. Constitution protects against unreasonable searches and seizures); *State v. Carter*, 322 N.C. 709, 712-13, 370 S.E.2d 553, 555 (1988) (N. C. Constitution article I, § 20 forbids unreasonable search and seizure).

A warrantless investigatory stop of a vehicle must be "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, 66 L.Ed.2d 621, 628 (1981) ("*Cortez*"). Our Court has stated this standard as:

> [C]onsistent with the Fourth and Fourteenth Amendments, a person or vehicle may be detained for further investigation by a law enforcement officer without a warrant and without probable cause to believe a crime has been committed if the officer has a reasonable suspicion, that can be articulated, that a crime is being committed. The detention must not be unreasonable in length and the investigation must be reasonable.

State v. Trapper, 48 N.C. App. 481, 486, 269 S.E.2d 680, 683, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450, *cert. denied*, 451 U.S. 997, 68 L.Ed.2d 856 (1981). *See also State v. Drewyore*, 95 N.C. App. 283, 288, 382 S.E.2d 825, 828 (1989).

In viewing the "totality of the circumstances" to question the reasonableness of the seizure, we weigh the Trooper's articulated reasons as " 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979) (citation omitted).

We determine that the trial court's findings of fact showed that despite the lack of an observed and verifiable traffic code violation by Whitefield, his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced Trooper's mind. *See White v. Oklahoma Dept. of Public Safety*, 606 P.2d 1131 (Okla. 1980) (car driven approximately 15-20 miles per hour under the speed limit and weaving within its lane of travel are grounds for a reasonable suspicion that the car was driven by an impaired driver despite the lack of an observed traffic offense).

Defendant complains that the true reason for the stop was the Trooper's 'hunch' that Whitefield and defendant matched a

drug courier profile and that the pretextual nature of the stop is illustrated by the Trooper's failure to actively investigate Whitefield's suspected impairment. Defendant's argument is not supported by the record.

"A police officer . . . is not constitutionally required to be certain that a crime has occurred when he makes a stop." *United States v. Moore*, 817 F.2d 1105, 1107 (4th Cir. 1987).

The trial court's findings of fact show that the Trooper investigated Whitefield's impairment by stopping the car and questioning Whitefield. That Whitefield was not charged thereafter with a DWI offense is not relevant to the Trooper's initial suspicions.

B

[2] Defendant next argues that the Trooper exceeded the permissible scope of the initial stop because the Trooper's investigation extended beyond his suspicion of Whitefield's impairment. Defendant's contention is tantamount to arguing that the Trooper's otherwise reasonable investigation becomes unreasonable if the Trooper investigates suspicious matters uncovered during the initial investigation. We disagree.

"[T]he stop and inquiry must be 'reasonably related in scope to the justification for the initiation.' " *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 45 L.Ed.2d 607, 617 (1975), quoting *Terry*, at 29, 20 L.Ed.2d at 910. If the investigation is not reasonably related to the reason for the stop, evidence uncovered is inadmissible, according to the 'exclusionary rule.' *Terry*, at 29, 20 L.Ed.2d at 910. "Typically, . . . the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L.Ed.2d 317, 334 (1984). "When an officer is unsure of the identity of a suspect, he *must* take reasonable steps to confirm the identity of the individual under suspicion." *State v. Lynch*, 94 N.C. App. 330, 333, 380 S.E.2d 397, 399 (1989) (emphasis added).

The findings show that the Trooper stopped defendant's vehicle on a suspicion of the offense of impaired driving, and questioned Whitefield about his identity. Whitefield gave the Trooper the fictitious name of 'Slade,' and then offered the Trooper the name 'Whitefield' for the license check. The Trooper cited Whitefield for failing to have a valid driver's license.

We determine that the Trooper's initial investigation was reasonably related and limited to his suspicions that Whitefield was impaired, and that his further investigation of Whitefield's identity was reasonable when Whitefield gave the Trooper two different names. We also determine that it was reasonable for the Trooper to continue his investigation of Whitefield's identity by asking defendant questions concerning Whitefield. Whitefield gave the Trooper a copy of the car lease agreement, which contained defendant's name. That the Trooper's conversation with defendant about Whitefield's identity resulted in defendant giving his voluntary consent to the search does not support defendant's arguments that the Trooper exceeded the permissible scope of his investigation.

In summary, we determine that the Trooper made a valid traffic stop during which the Trooper conducted an investigation reasonable in subject matter and in scope.

II

[3] Defendant also contends that the trial court erred in its refusal to suppress the drug contents of a package because defendant contends that a search of a wrapped, taped package in a suitcase in defendant's car trunk was unreasonable, beyond the scope of the consent that he gave the Trooper for a search of the car, his luggage and its contents.

Generally, the Fourth Amendment and article I, § 20 of the North Carolina Constitution require issuance of a warrant based on probable cause for searches. However, our courts recognize an exception to this rule when the search is based on the consent of the detainee. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L.Ed.2d 854, 858 (1973); *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966) ("*Belk*"). Defendant does not dispute the trial court's finding that defendant's consent to the search was voluntarily, knowingly and intelligently given, only that the Trooper exceeded the scope of defendant's consent.

The scope of the search can be no broader than the scope of the consent. *United States v. Ross*, 456 U.S. 798, 821, 72 L.Ed.2d 572, 591 (1982). Because defendant gave the Trooper permission to search the entire contents of defendant's suitcase, and did not retract or limit the consent, we determine that the Trooper had defendant's consent to open the package and the trial court did not err in allowing the contents of the package into evidence at

trial. *Belk*, at 323, 150 S.E.2d at 483 (defendant's failure to object to the scope of a search during the search precludes a later objection at a hearing to suppress evidence).

III

[4] Defendant argues that the trial court erred in refusing to dismiss the charge of possession of drug paraphernalia. N.C.G.S. § 90-113.22 (1981). Defendant submits that the State failed to introduce substantial evidence that the weighing scales met the definition of "drug paraphernalia" defined by N.C.G.S. § 90-113.21 (1981). We disagree.

"On a motion to dismiss, the evidence must be viewed in the light most favorable to the State 'with inconsistencies and contradictions . . . disregarded.' " *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 259 (1989) (citation omitted). If substantial evidence exists to support each essential element of the crime charged, the judge must submit the case to the jury. *Id.* "If more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury. . . . The rule is the same whether the evidence is circumstantial, direct or a combination of both." *State v. Jenkins*, 74 N.C. App. 295, 298, 328 S.E.2d 460, 462 (1985) (citations omitted). The weight of circumstantial evidence is for the jury. *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513, *cert. denied*, 384 U.S. 1020, 16 L.Ed.2d 1044 (1966).

It is apparent to us that N.C.G.S. § 90-113.21 provides for proof of 'drug paraphernalia' through both types of evidence, direct and circumstantial, in sections (a) and (b), respectively.

N.C.G.S. § 90-113.21(a)(5) specifically provides that if direct evidence that the items at issue are "[s]cales and balances for weighing or measuring controlled substances," they are 'drug paraphernalia.' The State introduced circumstantial evidence of the character of the scales as 'drug paraphernalia' as permitted by N.C.G.S. § 90-113.21(b): "The following [14 factors], along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia . . . ."

Our review of the evidence presented at trial shows no direct evidence that the scales were 'for weighing or measuring' the cocaine; neither the State nor defendant disputes that the scales were new and unused for any purpose. The State introduced circumstantial evidence, as section (b) permits. Viewing the evidence

in the light most favorable to the State, the State introduced circumstantial evidence tending to support statutory factors 3, 4, and 13: the Trooper found the scales in defendant's trunk beside his suitcase, showing: "(3) [t]he proximity of the object to a violation of the Controlled Substances Act"; and "(4) [t]he proximity of the object to a controlled substance." The State also qualified a police officer as an expert on drug investigations and introduced his testimony to show "(13) [e]xpert testimony concerning [the scale's] use" as a common weighing instrument for controlled substances.

In addition to the evidence offered by the State to show the enumerated statutory elements, the State offered 'other relevant evidence' as N.C.G.S. § 90-113.21(b) permits, including the testimony of a police officer experienced in drug offenses, showing: that the large amount of cocaine seized [54 grams] permits the inference that scales would be needed to divide up the cocaine into smaller amounts for resale; that the pureness of the cocaine supports an inference that the cocaine would require mixing with a diluting substance and reweighing before sale or use; and that it was improbable that this type of scales could be used to weigh produce or ammunition, as defendant claimed. Finally, the State offered evidence of the defendant's flight from the scene of the stop after the Trooper discovered the cocaine, which permits the inference that defendant's guilt caused him to flee. *State v. Epps*, 213 N.C. 709, 714, 197 S.E. 580, 583 (1938) (circumstance of suspect's flight immediately after discovery of contraband liquor in defendant's car is for jury's consideration in determining defendant's innocence or guilt).

We determine that this circumstantial evidence is substantial and supports an inference that the scales were 'drug paraphernalia' sufficient for the trial court to submit the issue to the jury.

IV

[5] Defendant next contends that the trial court committed plain error in its jury instruction by failing to instruct the jury that it must consider separately each offense with which defendant was charged. Defendant failed to object to the jury charge before the jury retired, and submits the issue to this court under the "plain error" standard of review, which is available when a defendant fails to comply with the Rules of Appellate Procedure. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). Defendant's contention is unsupported by the record.

It is elemental that in applying this standard, we first review the jury charge to determine whether an instructional defect occurred. *State v. Sams*, 317 N.C. 230, 241, 345 S.E.2d 179, 186 (1986).

The trial judge must instruct the jury that it has the option of "return[ing] a verdict of guilty of one offense and not guilty of [an]other offense" if defendant is charged with more than one offense. *State v. Rogers*, 9 N.C. App. 702, 704, 177 S.E.2d 301, 302, *app. on oth. grounds*, 12 N.C. App. 160, 182 S.E.2d 660, *cert. denied*, 279 N.C. 513, 183 S.E.2d 690 (1971).

Defendant contends that the jury charge was constitutionally defective because it was susceptible to being interpreted as instructions to group the offenses for the jury's determination of the defendant's guilt or innocence.

The trial judge gave this jury charge:

> . . . The Defendant, Judge Jones, is charged in a three-count Bill of Indictment with the offenses of trafficking in cocaine by possession, trafficking in cocaine by transportation, and possession with the intent to use drug paraphernalia.
>
> *To each of these separate charges*, the Defendant has entered a plea of not guilty.
>
> . . . .
>
> In respect to the *possible verdicts* as to Count Number One, the *options* for the jury are: first, *guilty* of trafficking in cocaine by possession of cocaine in an amount of at least twenty-eight grams but less than two hundred grams; or, *not guilty.*
>
> In respect to Count Number Two, are: *guilty* of trafficking in cocaine by transportation of cocaine in an amount of at least twenty-eight grams, but less than two hundred grams; or, *not guilty.*
>
> In respect to Count Number Three, your *options* are: first, *guilty* of possession with the intent to use drug paraphernalia; or, *not guilty.* [Emphasis added.]

The trial court sufficiently informed the jury of their 'options' in finding defendant guilty or not guilty of each offense, and we determine that no defect existed in the jury charge.

V

Defendant concedes in his brief that his contention that trafficking in cocaine by possession and trafficking in cocaine by transportation are not separate and distinct offenses is not the law in North Carolina. However, defendant submits that this rule is a violation of constitutional guarantees against double jeopardy because each trafficking offense does not require "proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 309 (1932).

> It is now well-established that convictions for the separate offenses of transporting and possessing a controlled substance are consistent with the intent of the legislature and do not violate the constitutional prohibition against double jeopardy.

State v. Bogle, 90 N.C. App. 277, 285, 368 S.E.2d 424, 430, *reversed on other grounds*, 324 N.C. 190, 376 S.E.2d 745 (1989).

We find no merit to defendant's contention.

No error.

Judges JOHNSON and EAGLES concur.

MILLARD F. McKEEL, PLAINTIFF v. ROBERT B. ARMSTRONG, DAVID J. CONROY, HARVEY L. HAYNES, GEORGE M. BILBREY, JR., H. D. CREWS, ARTHUR S. MORRIS, JR., JOHN O. McGUIRE, JOHN A. McLEOD, JR., P. RICHARD OLSON, ISADORE M. PIKE, LARY A. SCHULHOF, THOMAS F. KENNEDY, ARTUS M. MOSER, JR., ROBERT F. BURGIN, E. STANLEY WILLETT AND MEMORIAL MISSION HOSPITAL, DEFENDANTS

No. 8928SC234

(Filed 5 December 1989)

Physicians, Surgeons, and Allied Professions § 7 (NCI3d) — deprivation of neurosurgeon's privilege to practice at hospital — no malicious or fraudulent intent by defendants

In an action for actual and punitive damages for the deprivation of plaintiff neurosurgeon's privileges to practice his profession at defendant hospital, the trial court properly entered summary judgment for defendants where there was no evidence

of any kind that defendants, who were staff members of the hospital and either held administrative positions at the hospital or were members of the various committees involved in the investigation, discipline, and appeals process of this case, at any time and in any way acted with malicious and fraudulent intent toward plaintiff. N.C.G.S. § 131E-95.

Am Jur 2d, Hospitals and Asylums §§ 8-11.

APPEAL by plaintiff from Order entered 3 October 1988 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 20 September 1989.

This action for actual and punitive damages for the deprivation of the plaintiff neurosurgeon's privileges to practice his profession at the defendant hospital was instituted on 13 August 1987 in Superior Court, Buncombe County. After Answer and considerable discovery, defendants filed a Motion for Summary Judgment, which was allowed. From that Order, the plaintiff appealed.

The record before us contains the following allegations of fact:

In May of 1982, the director of nursing at Memorial Mission Hospital (MMH) referred two cases of the plaintiff's, Dr. McKeel, to the Medical Care Evaluation Committee (MCEC), an internal hospital committee with the responsibility to review and evaluate the quality of care given to patients at the facility. The two cases were brought to the attention of MCEC because of concerns over the care rendered those patients by Dr. McKeel. Dr. McKeel, who at the time had treated patients at MMH for over twenty-seven years, was reprimanded for his conduct in one of those cases because he did not respond appropriately to nursing calls made to him. Several months later two more of Dr. McKeel's cases were referred to the MCEC by the nursing department, again out of concerns about the neurosurgical care he provided. With four charts referred to it in the space of several months, the chairman of the MCEC, Dr. Bilbrey, decided to appoint an ad hoc committee of Drs. Schulhof, McLeod and Olson to review neurosurgical care of head trauma patients at MMH.

In a letter dated 10 September 1982, Dr. Bilbrey instructed the ad hoc committee to determine the local standard of care concerning head trauma patients and then evaluate whether the quality of care provided in the four McKeel cases was "consistent" with

that standard of care. This head trauma study began with an examination of twenty charts, but was increased by the committee to eighty-six cases to help ensure a fair and impartial evaluation process.

The same concern for fairness prompted the committee to use the "algorithm method" for reviewing the charts of hospital head trauma patients in order to determine the standard of care in the community. Under this evaluation method, parameters were established describing what steps should be taken in the treatment of a patient depending on the patient's condition. After the treatment parameters or criteria were developed, hospital personnel not on the study committee compared the actual treatment procedures followed by the doctors as recorded in the eighty-six charts against the criteria standards. Actual treatment procedures that varied from the criteria treatment norms were flagged by the investigators and those charts were set aside for further review by the study committee members to determine the reasons for the treatment deviations.

In developing the criteria for review of the hospital charts, the ad hoc committee members relied on their experience in quality assurance review, in prior peer review activity, and in their areas of specialty. They consulted other hospitals, referred to medical texts in neurosurgery and other fields, and utilized hospital quality assurance personnel. No charts of any physician were reviewed until the standards for review had been established and the algorithm developed.

On 21 June 1983 the results of this first study were reported to the MCEC. That committee considered the results and framed four recommendations to the Medical Administrative Committee (MAC). The MAC provided the plaintiff, and another doctor, whose treatment procedures also had come under scrutiny during the study and who also happened to be the plaintiff's partner, with a copy of the first study and with an opportunity to appear before the MAC to respond to the study results. Dr. McKeel responded and raised a number of questions concerning the study, most notably that one case he did not treat had been incorrectly assigned to him by the investigators, and that the four original cases in question occurred in 1982 while the rest of the investigation sample was drawn only from 1981 cases. In response to his objections the MAC did three things: it affirmed the criteria used in the study;

it deleted some statistical material concerning death-rate comparisons; and it expanded the study to include all serious head trauma cases at the hospital for the calendar year 1981. This last step sent the number of cases in the investigation pool up from eighty-six to 178.

The ad hoc study committee then conducted a supplemental investigation and reported to the MCEC in November 1983. The MCEC considered the report and, based upon the ad hoc committee's investigation of the 1981 cases and their review of the four original 1982 cases involving Dr. McKeel, made several recommendations for disciplinary action to the MAC concerning Dr. McKeel, including that:

> 1. his privileges for the care of head injury patients be withdrawn for six months;
>
> 2. at the end of six months, Dr. McKeel could reapply for privileges to care for patients at the hospital. However, as part of that application, the plaintiff must take twenty-five hours of instruction in the care of head injury patients; and
>
> 3. any case of inappropriate care concerning a head injury patient rendered by Dr. McKeel that occurred within two years of the disciplinary action would be subject to immediate review by the chief of staff, who was encouraged to terminate all privileges of the plaintiff to practice at MMH if the chief felt the treatment discrepancy was significant.

The MAC voted to accept the recommendations for disciplinary action made by the MCEC, and pursuant to that action the plaintiff's privileges concerning the treatment of head trauma patients at MMH were curtailed. Plaintiff appealed the decision to an Ad Hoc Hearing Committee, which affirmed the MAC's decision. Pursuant to the hospital's by-laws, plaintiff appealed to an Ad Hoc Appeal Committee, which unanimously affirmed the curtailment of privileges. This litigation followed.

Morris, Bell & Morris, by William C. Morris, Jr., for plaintiff appellant.

Roberts, Stevens & Cogburn, by Isaac N. Northup, Jr., for defendants Bilbrey, Moser, Crews, Morris, Schulhof and Willett; and Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon and Michelle P. Rippon, for defendants Armstrong, Conroy, Haynes, McGuire, Olson, Pike, Kennedy, McLeod, Burgin and Memorial Mission Hospital.

ARNOLD, Judge.

The defendants in this case were at the period of time in question staff members of MMH and either held administrative positions at the hospital or were members of the various committees involved in the investigation, discipline, and appeals process of this case. Defendant MMH is a non-profit, private hospital with a governing board that carries the ultimate responsibility for the proper quality of patient care at the facility. This responsibility is in part delegated to the medical staff. The medical staff, of which Dr. McKeel is a member, has adopted by-laws, rules and regulations, and upon being granted the privilege to treat patients at the hospital, each staff member is required to abide by these. The Medical Staff By-Laws provide for certain peer review in evaluating the quality of care given to hospital patients. Specifically, the MCEC has the responsibility to "review and evaluate the quality of care given to patients." Art. VII, Sect. 2, Para. 2(J). Staff By-Laws, MMH; *see also* Art. III, Sect. 7, Sup. A, Para. 1., Staff By-Laws, MMH.

In his deposition testimony, Dr. McKeel recognized that MMH has the duty to its patients to determine if the physicians on the staff followed the standard of care in the medical community. He admitted the peer review system at the hospital was, in part, designed for that purpose, and that it was appropriate, when fairly executed, for peer review to be used in instances where there was some indication a physician's practice was below the standards of practice.

Plaintiff, however, contends the peer review conducted by MMH in regard to his treatment of patients in 1981 and 1982 was designed solely to deprive him of his hospital privileges. Plaintiff relies on N.C.G.S. § 131E-95 to propel his lawsuit. That statute provides in pertinent part:

> Medical review committee.
>
> (a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.

Plaintiff here alleges that members of the various committees involved in this internal investigation at MMH acted with malicious and fraudulent intent towards him. We disagree.

Malice is defined as:

> The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

Black's Law Dictionary 862 (Rev. 5th Ed. 1979). The North Carolina Supreme Court states "malice in law" is "presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others." *Betts v. Jones*, 208 N.C. 410, 411, 181 S.E. 334, 335 (1935).

The essential elements of fraud were enumerated in *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953):

> (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that plaintiff reasonably relied upon the representation, and acted upon it; and (5) that plaintiff thereby suffered injury.

This case comes before us on an appeal of summary judgment granted on behalf of defendants. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." N.C.G.S. § 1A-1, Rule 56(c). The burden, of course, is on the moving party to establish the lack of a triable issue of fact. *Seay v. Allstate Ins. Co.*, 59 N.C. App. 220, 296 S.E.2d 30 (1982). In order to bear its burden, a defendant is required to present a forecast of the evidence which is available at trial and which shows that there is no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. *Jenkins v. Stewart & Everett Theaters, Inc.*, 41 N.C. App. 262,

254 S.E.2d 776, *disc. rev. denied*, 297 N.C. 698, 259 S.E.2d 295 (1979). An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim at trial. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). We hold defendants' presentation of the evidence demonstrates that no material issue of fact exists here, and we fail to see any facts presented by plaintiff to indicate he could sustain his claim if we allow it to proceed.

Plaintiff's main allegation is that the committee appointed by Dr. Bilbrey ignored its responsibilities as outlined in a letter from Dr. Bilbrey dated 10 September 1982. Instead of following Dr. Bilbrey's direction, Dr. McKeel contends the ad hoc study committee maliciously sought to deprive him of his right to practice his profession. This allegation has no merit. Dr. Bilbrey's letter states that the ad hoc committee had two goals: to examine the general standard of treatment of head trauma patients at MMH, and "to review the four charts listed above." The "four charts" mentioned in the letter are the charts referred to the MCEC by the nursing department concerning Dr. McKeel's treatment practices. Thus, the ad hoc committee had a specific charge to look at the four original cases that initially prompted Dr. Bilbrey to launch the investigation. Any appearance that the ad hoc committee focused more closely on Dr. McKeel's treatment of patients than on any other doctor's was not inappropriate because such an emphasis was within the charge of the committee.

Likewise, we fail to see any fraud or malice concerning the development or use of the algorithmic study the ad hoc committee used to determine if a hospital-wide problem existed in the treatment of head trauma patients. The record unequivocally reveals that the committee took a number of steps to ensure objectivity and fairness in their review process. This investigation took over two years to conduct and produced voluminous amounts of data. The final study, which formed only part of the basis for the disciplinary action against Dr. McKeel, examined every case involving a major head trauma injury treated at MMH in 1981. Every physician who treated head trauma injuries at the hospital that year was included in the investigation.

The first stage and major portion of the investigation was structured so the investigators who reviewed the 1981 cases did

not know which doctor had attended the case under examination. While the second stage of the review process involved arguably more subjective evaluations and the attending physician in each case was known to the investigator, a close examination of the record fails to disclose any evidence of fraud or malice on the part of the reviewers. After the committee conducted its initial study, plaintiff was allowed to respond to the results. In response to plaintiff's criticisms, the committee changed several aspects of the study and conducted a supplemental investigation.

Plaintiff argues that malice is implied because the ad hoc committee was chaired by Dr. McKeel's competitor in the community, Dr. Schulhof. The record, however, is devoid of any facts indicating Dr. Schulhof's appointment to the committee or his actions on the committee amounted to malice or were carried out in a fraudulent manner.

Plaintiff argues malice is implied because the study committee did not seek outside consultation during its investigation. Again we fail to see any facts to support this argument. Dr. Bilbrey's letter clearly indicated the committee *could* seek outside consultation if it chose to. The committee's choice to perform an in-house investigation is not evidence of fraud or malice.

Plaintiff also argues the investigation was fraudulent because Dr. Schulhof's cases, which were examined as part of the study of the 1981 head trauma case, were not reviewed separately. Dr. Bilbrey's letter to the ad hoc committee stated any chart of an ad hoc committee member that was investigated should be handled by the MCEC instead of by that ad hoc committee member. Plaintiff argues because Dr. Schulhof's charts were not reviewed by the MCEC, the investigation was fraudulent. We disagree. As was stated earlier, the first stage of the investigation was conducted so that it was impossible to know which doctor was involved in the case being investigated. At the second stage, Dr. Schulhof's cases were examined by the other two members of the ad hoc committee.

All the allegations raised by plaintiff point to areas of the internal investigation process where possible conflicts of interest could arise. As in almost any situation of this nature, opportunities existed here to compromise the investigation if the persons involved had been motivated by malicious intent. In this case, however, plaintiff has failed to produce any evidence of such intent.

Plaintiff's own statements reinforce our belief that no material facts are in dispute in this case. Plaintiff admitted that he had no evidence that defendants acted fraudulently or with malice. For example, the following exchange is from plaintiff's deposition testimony:

> MR. NORTHUP [defendants' attorney]: Do you have any evidence that Drs. Bilbrey, Crews, Morris, Schulhof, Moser or Willett acted fraudulently in the supplemental study or in the review of the four 1982 charts or in their participation in the actions which led to the curtailment of your privileges?
>
> DR. MCKEEL: I don't think I have any hard evidence that I could present.

Plaintiff further stated that his evidence of malice would be "impossible to produce," and that the evidence consisted of "[r]emarks by individuals." Plaintiff would not list as witnesses the persons who made these remarks nor reveal their names because "it would put the individual in an awkward position and probably not do me any good." As to the substance of the testimony from these witnesses, the following exchange occurred:

> MR. NORTHUP: Do you have any evidence from any of those witnesses that we reviewed earlier that my clients acted deliberately to interfere with an expressed or implied contract which you say you had with the hospital?
>
> DR. MCKEEL: No.

Plaintiff's failure to produce any evidence demonstrating fraudulent conduct or malicious behavior requires us to affirm the trial court order.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

GAIL WEST MEDLIN, GUARDIAN AD LITEM FOR PAMELA LYNN MEDLIN, PLAINTIFF v. VANN J. BASS, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; LUTHER BALDWIN, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; WARREN W. SMITH, FRANKLIN COUNTY BOARD OF EDUCATION; RUSSELL E. ALLEN, INDIVIDUALLY AND AS AGENT FOR FRANKLIN COUNTY BOARD OF EDUCATION; FRANKLIN COUNTY BOARD OF EDUCATION, DEFENDANTS

No. 889SC1079

(Filed 5 December 1989)

1. **Schools § 12.1 (NCI3d)— superintendent—no negligent investigation, hiring, and supervision of principal**

The trial court properly entered summary judgment for defendant superintendent of schools in plaintiff's action based on negligent investigation, hiring, and supervision of a principal where the evidence showed that the principal's employment application was investigated according to policy; there was no evidence that defendant knew about a ten year old allegation of sexual assault of a student which had been made against the principal in another school district; plaintiff did not present evidence that defendant could reasonably have found out about the incident by conducting a more thorough investigation; defendant completed the required yearly evaluations of the principal; and plaintiff presented no evidence that defendant knew of the alleged assaults of a female student in his school and failed to act.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 524, 633-636.

2. **Schools § 12.1 (NCI3d)— assistant superintendent—no negligent investigation, hiring, and supervision of principal**

The trial court properly entered summary judgment for defendant assistant superintendent of schools in plaintiff's action based on negligent investigation, hiring, and supervision of a principal where the undisputed evidence showed that defendant was not employed by the school system until 12 years after the principal was hired, and during the time defendant served as assistant superintendent, his duties did not include supervision of principals.

Am Jur 2d, Municipal, County, Schools, and State Tort Liability §§ 524, 633-636.

3. Schools § 13 (NCI3d)— truant officer—no negligence in investigation of child's truancy problems—no intentional infliction of emotional distress

The trial court properly granted summary judgment for defendant truant officer on plaintiff's claim of negligence in defendant's performance of his duty to investigate a child's truancy problems and on plaintiff's claim of intentional infliction of emotional distress, since there was no evidence that anyone at any time indicated to defendant that the child was missing school because of an alleged assault by her school principal; the infliction of emotional distress claim was based on defendant's instigating the filing of a juvenile petition against the child because of her truancy problems; plaintiff presented no evidence of any element of this tort; and there was no evidence that defendant knew of the alleged assault or that he intended to cause severe emotional distress to the child.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 524, 633-636.

4. Schools § 4.1 (NCI3d)— principal's assaults on student—acts not imputed to school board

The trial court properly entered summary judgment for defendant board of education based on the imputed acts of a school principal in assaulting a student where there was no claim of express authorization of the principal's alleged torts; there was no ratification of the principal's alleged acts; defendant had no prior notice of the principal's conduct and immediately sought his resignation upon learning of plaintiff's allegations; and there were no issues of material fact as to whether the principal was acting in the scope of his employment and in furtherance of defendant's business when the alleged assaults occurred.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 524, 633-636.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from Order entered 26 April 1988 in Superior Court, FRANKLIN County, by *Judge Jack B. Crawley.* Heard in the Court of Appeals 9 May 1989.

The trial court granted summary judgment in favor of defendants Luther Baldwin, Warren W. Smith, Russell E. Allen, and the Franklin County Board of Education. Plaintiff appeals.

Kirk, Gay, Kirk, Gwynn & Howell, by Andy W. Gay and Katherine McCraw, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by David P. Sousa and Theodore S. Danchi, for defendants-appellees Warren W. Smith, Russell E. Allen and Luther Baldwin.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten; and Davis, Sturges & Tomlinson, by Charles M. Davis, for defendant-appellee Franklin County Board of Education.

LEWIS, Judge.

By complaint and amended complaint, plaintiff sets forth several claims for relief. Plaintiff alleges that during the 1984-85 school year Vann J. Bass (Bass) was the principal of Bunn Elementary School in Franklin County and an employee of the Franklin County public schools. Warren W. Smith (Smith) was employed by the Franklin County Board of Education (Board of Education) as the superintendent of the Board of Education. The Board of Education employed Russell E. Allen (Allen) as its Assistant Superintendent and Luther Baldwin (Baldwin) as a truancy officer. The complaint also alleges the Board of Education has waived its liability for damages from the negligence of its employees by purchasing liability insurance. The complaint alleges that Bass twice assaulted Pamela Lynn Medlin, a nine-year-old, fourth grade student, during the first few days of the 1984-85 school year.

Plaintiff seeks to recover from Bass for assault and battery, false imprisonment, intentional infliction of emotional distress, negligent furnishing of services, negligent failure to report child abuse and breach of fiduciary duty. The complaint sets forth claims for relief against Smith and Allen for negligent investigation, hiring and supervising of Bass. Plaintiff seeks to recover for Baldwin's alleged intentional infliction of emotional distress and failure to properly investigate Pamela Medlin's school attendance problems. The complaint also alleges that all actions by Bass, Smith, Allen and Baldwin should be attributed to the Board of Education and asserts each claim for relief previously described against the Board of Education.

Plaintiff seeks in excess of $10,000.00 compensatory damages and punitive damages in excess of $10,000.00. Plaintiff also requests attorneys' fees and costs. On 26 April 1988, the trial court granted summary judgment in favor of Smith, Allen, Baldwin and the Board of Education. The claims against Bass remain.

Plaintiff appeals on the grounds that there were genuine issues of material fact which should not have been decided on a motion for summary judgment. Defendants Smith, Allen, Baldwin and the Board of Education assign error to the trial court's consideration of a certain supplemental affidavit. We have reviewed plaintiff's assignment of error and conclude summary judgment was properly granted as to these defendants. Having reached this conclusion, we do not address defendants' assignment of error.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). A defendant may be entitled to summary judgment if he can show "there is no genuine issue of material fact concerning an essential element of the claimant's claim for relief and that the claimant cannot prove the existence of that element." *Best v. Perry*, 41 N.C. App. 107, 109, 254 S.E.2d 281, 283 (1979). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

The evidence presented at the hearing on the motion for summary judgment showed that before working in Franklin County Bass had been employed as a teacher and principal in Rocky Mount, North Carolina, for approximately ten years. In June 1968, Bass sexually assaulted a male junior high school student. Bass testified that he was confronted by Rocky Mount school Superintendent O. C. Fields (Fields) about the incident and decided to resign. Bass does not recall discussing the assault with anyone other than Fields and the student's father, and Bass did not admit or deny the assault to Fields. The student testified that he and his father did not attempt to make the incident the focus of public attention. Following his resignation from the Rocky Mount schools, Bass moved to his mother's home in Franklin County and did not work until he applied with the Franklin County schools on 2 January 1969.

Bass testified that he applied to teach at the request of Franklin County principal W. H. Kelly (Kelly). The employment application asked for three references. Margaret Holmes (Holmes), Associate Superintendent of Franklin County schools in 1969, testified that in 1969 it was the policy in that county to contact two of the three references listed on the employment application, preferably references with the most job-related contact. Holmes contacted one of Bass' references, Millie Moore, by telephone and was told Bass left Rocky Mount for health reasons which would not affect his performance in Franklin County. On 7 February, Smith mailed reference sheets to Millie Moore and another of the references listed on Bass' application, Ella Moore. The completed reference sheets were not received by Franklin County schools until 11 and 13 February 1969.

On 7 January 1969, Smith informed Bass that the Board of Education had elected Bass to begin teaching at Bunn High School on 3 February 1969. On 19 May 1969, Bass applied for a principal position in Franklin County and was hired for this position in June. No reference sheets were requested when Bass was hired as principal because an investigation had been done a few months earlier in connection with his teaching application.

In late February or early March 1969, after Bass was hired as a teacher but before he became principal, Kelly asked Holmes to investigate a rumor that Bass was a homosexual. Holmes visited Fields, the Rocky Mount school superintendent and the third reference listed on Bass' employment application. Holmes testified that in response to specific questions, Fields stated he had no knowledge or record of Bass' homosexuality. Smith knew Holmes went to Rocky Mount to investigate the rumor and was informed of the substance of her investigation. Fields testified he does not remember Holmes asking about Bass' alleged homosexuality but he does recall talking with Smith personally about Bass' performance as a principal.

Bass resigned his principal position in Franklin County following a complaint to the Board of Education that he had assaulted Pamela. Previously Bass had discussed Pamela's attendance problems with her family but had never received any indication that Pamela's attendance problems were related to him personally.

[1] The claims against Smith as superintendent of schools and agent of the Board of Education are based on negligent investiga-

tion, hiring and supervision of Bass. Plaintiff contends that since the evidence shows Bass left his position in Rocky Mount after the first alleged assault incident, then Smith negligently investigated and hired Bass and summary judgment was not proper as to these claims. However, the evidence shows that Bass' employment application was investigated according to policy and there is no evidence that Smith was informed of or knew about the Rocky Mount incident when Bass was hired. Plaintiff did not present evidence that Smith knew of the Rocky Mount incident or that he could reasonably have found out about it by conducting a more thorough investigation. The evidence also shows that Smith properly supervised Bass. Smith completed the required yearly evaluations, and plaintiff presented no evidence that Smith knew of the alleged assaults on Pamela and failed to act. The trial court did not err in granting summary judgment as to those claims based on Smith's actions.

[2] The claims against Allen are also based on negligent investigation, hiring and supervision of Bass. The undisputed evidence shows that Allen was not employed by the Franklin County School System until 12 years after Bass was hired. Summary judgment on the claims for negligent hiring and investigation were proper. As to the claim for negligent supervision of Bass, Allen testified that during the period he served as Assistant Superintendent his duties did not include supervision of principals. Summary judgment on this claim was proper.

[3] Plaintiff alleges Baldwin was negligent in performing his duty to investigate Pamela's truancy problems. There is no evidence that anyone at any time indicated to Baldwin that Pamela was missing school because of the alleged assault by Bass. The evidence shows Baldwin performed his duty, and summary judgment was proper on this claim. Plaintiff also brought a claim against Baldwin for intentional infliction of emotional distress. The claim is based on Baldwin's actions of instigating the filing of a juvenile petition against Pamela because of her truancy problems. The elements of this tort are (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Plaintiff has not presented evidence of any element of this tort. There is no evidence Baldwin knew of the alleged assault or that he intended to cause severe emotional distress to Pamela. The evidence showed adherence to his job expectations and requirements. Summary judgment on this claim was proper.

The claims against the Board of Education are based on the imputed acts of Smith, Allen, Baldwin and Bass. As discussed above, summary judgment was properly granted on the claims against Smith, Allen and Baldwin, and there is no liability on the basis of actions of these employees.

[4] As to the claims based on Bass' alleged conduct, summary judgment was also proper. An employer can be held vicariously liable for the torts of its employees in three situations: (1) when the employer expressly authorizes the employee's act; (2) when the employee's act is committed in the scope of his employment and in furtherance of the employer's business; or (3) when the employer ratifies the employee's act. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In this case, there is no claim of express authorization of Bass' alleged torts. Also, there was no ratification of Bass' alleged acts; the Board of Education had no prior notice of Bass' conduct and immediately sought Bass' resignation upon learning of plaintiff's allegations. Finally, there are no issues of material fact as to whether Bass was acting in the scope of his employment and in furtherance of the Board of Education's business; Bass was not performing the business he was employed to do when the alleged assaults occurred. Summary judgment as to those claims against the school board was proper.

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion whether defendant Bass's alleged abuse of plaintiff occurred within the scope of his employment by the school board is a question of fact, not law, and the claim against the board on that ground was erroneously dismissed. Bass's scope of employment was not confined to doing good, as the majority implicitly holds. As principal his job was to operate the school and control the children while school was in session; and according to plaintiff's evidence, his abuse of her occurred during school hours in his office where she went pursuant to his directive. Thus, her materials indicate that Bass's abuse arose out of his job related

authority and circumstances that the law of this state and the school board operating under it created. For the board assigned her to that school and she was required to attend it and obey those placed over her, and in obeying his instructions to go to his office she was abused. Since the board endowed Bass with authority and control over the school and Bass exercised that authority to abuse plaintiff, it can be reasonably inferred, it seems to me, that the board's work of operating the school and controlling the children was very definitely involved in plaintiff's abuse. That the board did not authorize Bass's wrongful act is beside the point, as only criminals such as the Mafia hire people to do wrong; and those who conduct their business through others are as accountable for their employees' mishaps as they are entitled to profit from their beneficial acts. This decision ironically and unjustly would leave beyond the law's pale the rights of all children of this state who daily follow the law's mandate and submit themselves to the dominion of school, kindergarten and day care officials and suffer because of it. I do not believe the law requires any such thing.

I also am of the opinion that it was error to dismiss the claim against Superintendent Smith for negligently investigating the report of Bass's past sexual abuses. For defendant's materials indicate that though his reported activities and tendencies were most serious for one having control of small children, only a haphazard, inept, token investigation was conducted; indeed, instead of establishing as a matter of law that the investigation was accomplished with either diligence or due care, they support the inference, in my view, that it was negligently conducted.

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION v. HELEN A. POWERS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 8910SC34

(Filed 5 December 1989)

1. Taxation § 26.1 (NCI3d) — electric utility cooperative — franchise tax — exclusion of patronage capital

The superior court correctly granted summary judgment for defendant Secretary of Revenue in an action for a refund

of certain franchise taxes where plaintiff is an electric membership corporation; plaintiff sends bills to its customers for electricity furnished each month; plaintiff allocates part of each payment as patronage capital; patronage capital means total revenues received from monthly billings for electrical service rendered less related operating expenses arising from furnishing such electricity; patronage capital is determined after the close of the fiscal year; and a franchise tax is imposed on the total gross receipts of all corporations engaged in the business of furnishing electricity by N.C.G.S. § 105-116. Although plaintiff contended that patronage capital should not be included as gross receipts, by its very nature a gross receipt is determined at the time of receipt; therefore, events which may occur after consummation of the sale of electricity are not relevant to determining the gross receipt figures. Plaintiff admits that at the time of billing it cannot determine the amount it will ultimately allot to patronage capital, and the applicable statute has no provision for deducting definite but not accrued legal liabilities. The mere fact of a bookkeeping entry in taxpayer's records is insufficient to create a deduction from taxpayer's franchise tax base.

Am Jur 2d, State and Local Taxation §§ 270, 438.

2. Constitutional Law § 20.1 (NCI3d)— electric membership corporation—no deduction for patronage capital—no violation of equal protection

The denial of a franchise tax deduction for patronage capital to an electric membership corporation was not a violation of equal protection under the Fourteenth Amendment to the United States Constitution or Art. I, § 19, and Art. V, §§ 2 and 3 of the North Carolina Constitution in that investor owned utilities do not pay franchise taxes on funds generated by the sale of stocks or bonds. The issue is whether N.C.G.S. § 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor owned utilities; each must pay franchise taxes upon its gross receipts, neither can deduct amounts it may record as patronage capital, and neither pays franchise tax on stocks or bonds it may issue. The tax treatment of the sale of stocks and bonds is separate and distinct from that

of taxing the act of furnishing electricity and not linked by statute.

Am Jur 2d, Constitutional Law § 780; State and Local Taxation § 155.

APPEAL by plaintiff from order signed 26 August 1988 by *Judge Coy E. Brewer, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 30 August 1989.

Plaintiff-taxpayer, Four County Electric Membership Corporation ("Four County" or "Taxpayer"), seeks a refund of certain franchise taxes it has paid on the grounds that monies it received as patronage capital should not be included as "gross receipts" for purposes of G.S. sec. 105-116. This statute imposes a franchise tax on the "total gross receipts" of all corporations, profit and nonprofit, which are engaged in the business of furnishing electricity. Plaintiff raised this issue in a hearing before the Secretary of Revenue on 10 July 1986. The Secretary entered a final decision on 20 January 1987 in which she made findings of fact and concluded as a matter of law that there is "no deduction or exemption from the gross receipts tax levied in G.S. sec. 105-116 for patronage capital or operating credits." The Secretary therefore upheld the proposed assessment in question and denied plaintiff's claim for refund.

Plaintiff paid the amount assessed under protest and instituted this action in superior court against the Secretary for a refund pursuant to G.S. sec. 105-267. Upon cross-motions for summary judgment which were both supported by affidavits, exhibits, briefs and arguments of counsel, the trial court held that there was no genuine issue as to any material fact and that the defendant Secretary of Revenue was entitled to judgment as a matter of law. Plaintiff appealed the order to this Court in apt time.

Crisp, Davis, Schwentker, Page & Currin, by William T. Crisp, II and Cynthia M. Currin, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the defendant-appellee Secretary of Revenue.

JOHNSON, Judge.

Four County is a nonprofit electric cooperative corporation organized pursuant to Chapter 117 of the North Carolina General Statutes. It also meets the requirements for tax exempt status under section 501(c)(12) of the Internal Revenue Code.

Each month Four County sends bills to its customers (who are also considered to be members of the cooperative) for electricity furnished. From these amounts received, Four County, pursuant to its bylaws, allocates on its books and records part of each customer's payment as "patronage capital." Four County has stipulated that the term "patronage capital" means "total revenues received by Four County Electric Membership Corporation from monthly billings to its members for electrical service rendered less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment." The Taxpayer has also stipulated that patronage capital is determined after the close of its fiscal year, and that at the time of rendering bills, it cannot determine the amount of a bill which will go to patronage capital.

Four County's bylaws provide that the Board of Directors has, at its discretion, upon the death of a patron, the power to retire that patron's capital, "PROVIDED, however, that the financial condition of the Cooperative will not be impaired thereby." The Taxpayer addressed this issue in greater detail in its "General Policy No. 422," which states in part that the Cooperative does not

> commit itself to retire all or any portion of a deceased member's capital credits, except upon determination by the Board of Directors, in each and every case, that the financial condition of the Cooperative will not thereby be impaired . . . ; nor shall the inauguration of this Policy in any way presume its permanent continuance, the Board of Directors, pursuant to its powers and responsibilities by law and the Bylaws prescribed, retaining the prerogative to rescind it altogether or to amend it on the basis of generally applicable principles at any time.

As to general retirement of patronage capital, Four County states in its notice of Capital Credit Assignments to its patrons that "[t]he Cooperative is currently striving to make a general

retirement of Capital Credits on a 20-year rotation basis as long as it is economically sound to do so."

[1] Four County contends on appeal that it should be allowed to exclude from its "gross receipts" that amount from each patron's monthly payment which it credits on its books to patronage capital. Taxpayer makes a "subordinate alternative" argument that it should at least be allowed to exclude from gross receipts the amount of patronage capital it actually returns to patrons.

We observe at the outset that the franchise tax is not an income tax, but rather is a tax imposed on corporations for the privilege of engaging in business in this state. G.S. sec. 105-114. This tax varies according to the nature, extent and magnitude of the business transacted in this state by a corporation. *Telephone Co. v. Clayton, Comr. of Revenue*, 266 N.C. 687, 147 S.E.2d 195 (1966). Our Supreme Court has also stated that it "depends upon the amount of business transacted by the corporation." *Worth v. Railroad*, 89 N.C. 301, 306 (1883).

This Court and our Supreme Court have analyzed the meaning of the term "gross receipts" for purposes of franchise taxation of telephone companies as governed by G.S. sec. 105-120. *Telephone Co. v. Clayton, Comr. of Revenue, supra; In re Proposed Assessment of Carolina Telephone*, 81 N.C. App. 240, 344 S.E.2d 46, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 465 (1986). G.S. sec. 105-120 defines "gross receipts" for purposes of telephone company franchise taxes as "all rentals, other similar charges, and all tolls received from business." G.S. sec. 105-120(b). Unlike G.S. sec. 105-120, G.S. sec. 105-116, which governs franchise taxation of public service companies and is applicable to the instant case, does not contain descriptive language to aid in defining the term "gross receipts." It states simply that the taxpayer is to make a quarterly report stating, in part, the "total gross receipts . . . from such business." G.S. sec. 105-116(a)(1) and (2). G.S. sec. 105-116(b) does refer to certain gross receipts to be deducted from taxable total gross receipts. No mention is made of an offset for patronage capital. We also find no reference to such a deduction in the Chapter 117 of the General Statutes which governs electric membership corporations.

Taxpayer's business is that of providing electric service to its patron customers. The monies generated by the monthly charges billed for electric service constitute its "gross receipts" and they

are indicative of the amount of business transacted by Four County. The "patronage capital" which Taxpayer wishes to exclude from its gross receipts is generated from monthly charges to customers.

"Gross receipts" is defined as "the *total amount* of money . . . *received* from selling property or from performing services." Black's law Dictionary 633 (5th ed. 1979) (citation omitted) (emphasis added). Important to this definition is the concept that it is the character of funds at the time of receipt that matters. Disbursements made subsequent to this taxable event from the total amount received do not diminish the amount of gross receipts. *See New Cornelia Cooperative Mercantile Co. v. Arizona State Tax Com'n.*, 23 Ariz. App. 324, 533 P.2d 84 (1975); *Tyler Lumber Co. v. Logan*, 293 Minn. 1, 195 N.W.2d 818 (1972).

In the case before us, Four County admits that at the time of billing, it cannot determine the amount it will ultimately allot to patronage capital. It is noteworthy that the monthly bills sent out by Four County simply state a total amount due for "electric service." The determination of patronage capital is due in part to Taxpayer's analysis of events occurring later in its fiscal year. By its very nature, a gross receipt is determined at the time of receipt. Therefore, events which may occur after consummation of the sale of electricity are not relevant to determining the gross receipts figure. *Id.*

In concluding that amounts designated by Four County on its books as "patronage capital" are part of gross receipts, we are guided by the reasoning of our Supreme Court in *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 231 S.E.2d 656 (1977). In *Realty Corp.*, the Court rejected the argument of the taxpayer (who elected to use the installment method of accounting) that it should be allowed to deduct future potential state and federal income tax liability from its franchise tax base under G.S. sec. 105-122(b). In so doing, the Court set out principles which are relevant here. First, even though a taxpayer may be using correct accounting practices, the statute itself must control the accounting methods to be used for computing the franchise tax base. Second, the Court found that the taxes the taxpayer wished to deduct were not deductible since they were not "definite and accrued legal liabilities" as required by applicable G.S. sec. 105-122. In the instant case, the applicable statute has no provision for deducting "definite and accrued legal liabilities." We are therefore especially

reluctant to allow Four County to deduct patronage capital when it is not under any pre-existing legal duty to return any set amount of funds to its patrons at the time it receives monthly payments from them. Although it claims that patronage capital is credited to the patron's account "at the moment of receipt," Taxpayer has stipulated that at the time of rendering a bill, it cannot determine what percentage of the bill will ultimately go to patronage capital. It is also important that, as quoted above, Four County's own bylaws give it wide discretion in returning patronage capital. Therefore, pursuant to *Realty Corp.*, we must conclude that the mere fact of a bookkeeping entry in Taxpayer's records is insufficient under these facts to create a deduction from Taxpayer's franchise tax base.

We are also unpersuaded by two consolidated cases from Alabama which Four County cites to us, *Alabama v. Pea River Electric Cooperative*, 434 So.2d 785 (Ala. Civ. App. 1983), *cert. denied*, No. 82-693 (Ala. filed 1 July 1983). The Alabama Court appeared to be influenced by various past rulings of the Alabama Commissioner of Revenue which indicated that capital received by a cooperative in excess of its operating costs was not subject to the gross receipts tax. *Id.* We are unaware of revenue rulings to that effect in North Carolina. We also note that the *Pea River* decision was rejected by the Oregon Supreme Court in *Lane Electric Cooperative v. Department of Revenue*, 307 Or. 226, 765 P.2d 1237 (1988). That court, in finding the taxpayer's reliance on *Pea River* misplaced, stated in a footnote that "[t]he decision in [*Pea River*] apparently is based on established policy in Alabama. No such policy exists in Oregon." 307 Or. at 203, 765 P.2d at 1239, n.2. We also know of no such policy in North Carolina. Indeed, in North Carolina, the construction of a revenue act by the Secretary of Revenue, although not binding, will be given due consideration by the court. *Realty Corp., supra.* In the instant case the Secretary determined that patronage capital is not excludable from "gross receipts" and we must accord this determination due consideration. Second, the Alabama Court in *Pea River* also relied on a state statute which mandates that Alabama cooperatives *shall* distribute to members revenues in excess of amounts needed for operation and maintenance of the cooperative. North Carolina has no such statute and, in our view, Four County's bylaws afford it too much discretion to create a pre-existing legal obligation. *Boyce v. McMahan*,

285 N.C. 730, 208 S.E.2d 692 (1974); *MCB Limited v. McGowan*, 86 N.C. App. 607, 359 S.E.2d 50 (1987).

We turn now to Taxpayer's alternative argument that it should be allowed to deduct patronage capital actually repaid from its franchise tax base. Consistent with our previous analysis, we view this repayment as merely a disbursement from original gross receipts received from the sale of electricity which does not alter the amount of gross receipts. We therefore reject Taxpayer's alternative argument.

[2] Finally, we address Four County's contention that denying it a deduction for patronage capital while investor-owned utilities do not pay franchise taxes on funds generated by the sale of stocks or bonds is a violation of equal protection of the laws under the Fourteenth Amendment to the United States Constitution, of Article I, Section 19 of the North Carolina Constitution, and also a violation of Article V, Sections 2 and 3 of the North Carolina Constitution, which require that taxes be levied by "uniform rule."

In *Realty Corp., supra*, at 617, 231 S.E.2d at 662, our Supreme Court stated the following:

> " '[T]he requirements of "uniformity," "equal protection," and "due process," are, for all practical purposes, the same under both the State and Federal Constitutions.' " A tax is uniform when it imposes an equal tax burden upon all members of a particular class. *Hajoca Corp. v. Clayton, Comr. of Revenue*, [277 N.C. 560, 568, 178 S.E.2d 481, 486 (1971)]. As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the distinction will be upheld by the Court. (Citations omitted.)

We hold that the application of G.S. sec. 105-116 to Taxpayer does not violate its constitutional rights. We find Four County's comparison of the tax treatment of the sale of stocks and bonds by investor-owned utilities to be faulty. The issue is whether G.S. sec. 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities. Each must pay franchise taxes upon its gross receipts and neither can deduct amounts it may record as patronage capital. Also, neither pays franchise tax on stocks or bonds it may issue.

The tax treatment of the sale of stocks and bonds is separate and distinct from that of taxing the act of furnishing electricity and not linked by statute. Taxpayer's complaint is that it has formed itself under section 501(c)(12) of the federal Internal Revenue Code, and therefore is apparently restricted from selling stocks and bonds. This federal provision is, however, unrelated to our franchise tax statute.

We again find that principles of *Realty Corp., supra*, are instructive. The taxpayer in *Realty Corp.* alleged denial of equal protection because as a "cash basis" taxpayer it could not claim certain deductions available to an "accrual basis" taxpayer. In finding no equal protection violation, the Court observed that plaintiff had "voluntarily elected to place itself in the classification about which it now complains; to wit, a cash-basis taxpayer reporting its income under the installment method." 291 N.C. at 618, 231 S.E.2d at 662. Similarly, in the instant case, Four County has elected to operate as a federal tax-exempt entity which cannot issue stocks and bonds. As in *Realty Corp., supra*, this election does not, however, create a viable equal protection issue for Taxpayer.

Different treatment under the franchise statute of patronage capital and funds received from the sale of stocks and bonds is based on a rational reason. *Snyder v. Maxwell, Comr. of Revenue*, 217 N.C. 617, 9 S.E.2d 19 (1940). Unlike funds received from the sale of stocks and bonds, monies ultimately termed patronage capital by Four County are merely part of the gross receipts received for the sale of electricity when billings are rendered. Patronage capital ultimately owed to Taxpayer's members is at the time of receipt uncertain as to both amount and fact of liability. Differing treatment for such unrelated activities is certainly rational.

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. BILLY RICHARD HARRELL

No. 8917SC308

(Filed 5 December 1989)

1. **Automobiles and Other Vehicles § 126.1 (NCI3d)— driving while impaired—testimony of arresting officer—definition of operate and driving while impaired—no error**

The trial court did not err in a prosecution for driving while impaired by sustaining the State's objection to the arresting officer's testimony as to her opinion of the legal definition of "operate" and "drive while impaired."

Am Jur 2d, Automobiles and Highway Traffic §§ 300, 375, 377.

2. **Automobiles and Other Vehicles § 126.5 (NCI3d)— driving while impaired—statement by defendant to officer**

There was no prejudicial error in a prosecution for driving while impaired in allowing the arresting officer to testify as to a telephone conversation with defendant in which defendant admitted to driving the vehicle and to being an alcoholic. The arresting officer's hearsay testimony regarding driving the car was clearly a statement against interest and there were corroborating circumstances in defendant's earlier admission as well as his lone presence slumped behind the wheel of the car. There was no prejudice regarding his alcoholism statement in that the .21 breathalyzer reading and the officer's testimony about defendant's apparently drunken condition overwhelmingly proved defendant was under the influence. N.C.G.S. § 20-138.1, N.C.G.S. § 8C-1, Rule 804(b)(3).

Am Jur 2d, Automobiles and Highway Traffic §§ 300, 375, 377.

3. **Automobiles and Other Vehicles § 127.2 (NCI3d)— driving while impaired—evidence sufficient**

There was sufficient evidence of driving while impaired to submit the charge to the jury where defendant argued that the State failed to provide more than a scintilla of evidence that he was driving the vehicle or that he was driving it while intoxicated, but the fact that he was found behind the wheel of the vehicle without any other potential driver

in sight and his two admissions of having driven the vehicle were more than sufficient to place the issue of whether he was driving before the jury. The jury had substantial evidence from which to deduce that defendant was intoxicated at the time he was driving in that he told the officer that the accident occurred only twenty minutes before she arrived on the scene, in defendant's admission that he had been drinking for an hour and forty minutes prior to running off the highway, from his presence in a ditch, and from a breathalyzer test two hours after defendant drove revealing a .21 blood alcohol concentration. N.C.G.S. § 20-138.1(a)(2), § 20-138.1(a)(1), § 20-4.01(33a).

Am Jur 2d, Automobiles and Highway Traffic §§ 300, 375, 377.

4. **Automobiles and Other Vehicles § 141 (NCI3d)— willfully displaying expired license plate—evidence sufficient**

There was sufficient evidence to support defendant's conviction under N.C.G.S. § 20-111(2), which makes it illegal for any person willfully to display an expired license on a vehicle, in that it was readily apparent by visual observation that the license had expired and the officer related defendant's admission of not having the vehicle properly registered.

Am Jur 2d, Automobiles and Highway Traffic §§ 94, 95.

5. **Automobiles and Other Vehicles § 2.7 (NCI3d)— operating motor vehicle without financial responsibility—evidence insufficient**

The trial court erred by failing to dismiss the charge of operating a motor vehicle without financial responsibility in that the State failed to adequately prove that defendant owned the vehicle in question. N.C.G.S. § 20-313 expressly applies to vehicle owners and does not mention any other persons who might operate a vehicle.

Am Jur 2d, Automobile Insurance § 35.

ON writ of certiorari to review order entered by *Judge William Z. Wood.* Order entered 16 June 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 15 November 1989.

Lacy H. Thornburg, Attorney General, by Hal F. Askins, Associate Attorney General, for the State.

Ricky Bowman for defendant-appellant.

GREENE, Judge.

The defendant appeals his conviction of driving while impaired under N.C.G.S. § 20-138.1, willfully displaying expired license or registration plate on a vehicle under N.C.G.S. § 20-111(2), and having no financial responsibility in violation of N.C.G.S. § 20-313. For the offense of driving while impaired, the trial court sentenced the defendant to imprisonment of one year, and for the offenses of displaying an expired license plate and having no financial responsibility, the charges were consolidated for judgment, and the trial court sentenced defendant to two years imprisonment to run consecutively with the initial one year. However, the two-year sentence was suspended pending five years of supervised probation beginning at the end of defendant's initial year of imprisonment.

The State's evidence tended to show that on 16 November 1987, Highway Patrol Officer Gail Palmer responded to a call of an accident on Old U.S. 52 at approximately 2:55 p.m. At approximately 3:00 p.m. she arrived at the scene and found a vehicle off the right shoulder of the highway in the ditch. Seeing no one around the vehicle, she approached and observed the defendant Billy Richard Harrell "sleeping underneath the wheel of the vehicle with his head lying in the right front passenger seat." Upon awakening, the defendant told Officer Palmer that he had driven the car into the ditch to avoid a deer. The defendant stated that the accident occurred at about 2:40 p.m. that day.

While questioning the defendant in the patrol car, Officer Palmer observed that he appeared impaired. She noted a strong odor of alcohol, slurred speech, and red, bloodshot eyes. After Officer Palmer had arrested the defendant for driving under the influence and restrained him with handcuffs, he then changed his story, saying that he was not the driver of the car and that she had arrested a "ghost." Upon further investigation of the vehicle, Officer Palmer found six Budweiser beer cans in the front of the vehicle, and she noted that the vehicle's license tag had expired in 1985.

After Officer Palmer read the defendant his *Miranda* rights, defendant waived those rights, and he told her that he began

drinking Budweiser at approximately 1:00 p.m. that day, consuming two beers in Stokes County and one can in Surry County. He stated that he drank his last beer at the intersection of Highway 52 and Cooks School Road, approximately five miles from the location of the accident. When asked if he was under the influence of some substance, he said "If I said no I'd be a damn liar. If I said yes—." At that point, he paused and said "No."

Officer Palmer's investigation revealed that the vehicle actually belonged to a woman in Winston-Salem. However, when a wrecker attempted to tow away the vehicle, the defendant demanded that they not tow "his" car.

Officer Connie Watson testified that she administered a breath analysis test to the defendant that afternoon at approximately 4:40 p.m. The result of that test was a blood/alcohol concentration of 0.21.

Officer Palmer also testified that the defendant later telephoned her at the police station and told her that he had been driving the car that afternoon and that he was an alcoholic. She further testified that she heard him state, at an earlier court appearance, that he had neither insurance nor proper registration for the vehicle.

The defendant did not offer any evidence. At the close of the State's evidence, the defendant moved for dismissal of all charges because of lack of evidence, which motion was denied. Regarding the impaired driving charge, the judge submitted issues to the jury which were answered as follows:

> We, the jury, unanimously find the defendant, Billy Richard Harrell:
>
> 1. _X_ Guilty of impaired driving.
>
> OR
>
> 2. _____ Not guilty.
>
> If you found the defendant, Billy Richard Harrell, guilty of impaired driving, did you unanimously find him guilty because:
>
> A. _____ He was under the influence of an impairing substance.
>
> OR
>
> B. _____ He consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol

concentration of .10 or more grams of alcohol per 210 liters of breath.

OR

C. X Both of the above.

The issues presented are: I) whether the trial court erred in prohibiting the arresting officer from testifying as to the definitions of the terms "operate" and "driving while impaired"; II) whether the trial court erred in allowing into evidence hearsay testimony by the arresting officer relating to defendant's admissions of having driven the vehicle and being an alcoholic; and III) whether the trial court erred in denying the defendant's motion at the close of the State's evidence to dismiss the charges on the grounds that there was insufficient evidence to submit the case to the jury on the issues of (A) driving while impaired, (B) displaying a registration number plate on a vehicle knowing it to be expired, and (C) driving an automobile without financial responsibility.

I

[1] The defendant argues the trial court erred in sustaining the State's objection to the arresting officer's testimony as to her opinion of the legal definitions of "operate" and "drive while impaired." We disagree. The trial court, not witnesses, must define and explain the law to the jury. *See State v. McLean*, 74 N.C. App. 224, 227, 328 S.E.2d 451, 453 (1985), *appeal dismissed*, 316 N.C. 199, 341 S.E.2d 573 (1986); *see also State v. Griffin*, 288 N.C. 437, 442, 219 S.E.2d 48, 52 (1975), *vacated in part*, 428 U.S. 904, 49 L.Ed.2d 1210 (1976) (the trial court, and not an expert witness, must define legal terms such as "intent").

II

[2] The defendant also argues the trial court erred in allowing into evidence the arresting officer's testimony relating her telephone conversation with the defendant in which the defendant admitted (1) to have been driving the vehicle, and (2) to being an alcoholic. Regarding the first statement, we find the officer's hearsay testimony clearly related a statement against interest since an element of N.C.G.S. § 20-138.1 is that the defendant drive the vehicle. North Carolina Rule of Evidence 804(b)(3) allows admission of such evidence so long as "corroborating circumstances clearly indicate the trust-

worthiness of the statement." Here the facts of the defendant's earlier admission of driving as well as his lone presence slumped behind the wheel of a car corroborated the statement that he was driving the vehicle. *See also State v. Nichols*, 321 N.C. 616, 631, 365 S.E.2d 561, 570 (1988) (defendant's admissions are also that of a party opponent under Rule 801(d)(A)).

Regarding the hearsay testimony of his alcoholism statement, assuming that its admission into evidence might have been erroneous, we find the testimony was not unfairly prejudicial. To prove prejudicial error, an appellant must show to a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988). The defendant's statement of his alcoholism could only tend to prove that the defendant uses alcohol. The evidence relating to the crime, a .21 reading of a breathalyzer as well as Officer Palmer's testimony about the defendant's apparently drunken condition, overwhelmingly proved the defendant was under the influence of alcohol. Thus, no reasonable possibility exists that the absence of the alcoholism testimony would likely have changed the outcome of the trial. In short, the jury was not faced with a close issue as to whether the defendant was under the influence of alcohol.

III

[3] The defendant also argues the trial court erred in denying his motion to dismiss at the conclusion of the State's evidence because of the State's failure to provide sufficient evidence of all the elements of each crime charged. To submit the charge to the jury, the State must have presented "more than a scintilla of evidence" of each element. *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 428 (1980), *cert. denied*, 451 U.S. 970, 68 L.Ed.2d 349 (1981).

> [I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

301 N.C. at 597, 273 S.E.2d at 428 (quoting *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930)).

A

N.C.G.S. § 20-138.1 creates the misdemeanor offense of impaired driving, the elements of which are that the defendant (1) drove any vehicle, (2) on any highway, street or other public vehicular area, and (3) under the influence of an impairing substance, or (4) having an alcohol concentration of at least 0.10 "at any relevant time after the driving." N.C.G.S. § 20-138.1 (1983).

Officer Gail Palmer testified that at about 3:00 p.m. November 16, 1987, while responding to a call of an accident, she found a vehicle off the right shoulder of Old North Carolina 52 in the ditch. Observing no one around the vehicle, she approached it and saw therein the defendant "sitting underneath the wheel of the vehicle with his head lying in the right front passenger seat." The defendant, who was asleep, awakened and told her he had swerved off the road and into the ditch attempting to avoid a deer. He admitted to being the driver of the vehicle. The defendant stated the accident occurred at about 2:40 p.m. While questioning the defendant, the officer observed that he appeared impaired. She noticed a strong odor of alcohol, slurred speech, and red, bloodshot eyes, and thus she arrested the defendant for driving under the influence. After his arrest, the defendant changed his story and stated that he was not driving the car.

Upon further investigation of the vehicle, Officer Palmer discovered six Budweiser beers in the front of the car. Officer Palmer further related that the defendant told her he began drinking Budweiser at approximately 1:00 p.m. that day, and he admitted to consuming a couple beers in Stokes County and one in Surry County. He told her that he drank the last beer approximately five miles from where the officer found the defendant in the ditch. When Officer Palmer questioned the defendant as to whether he was under the influence while driving, defendant stated, "If I said no I'd be a damn liar. If I said yes—." He then said "No."

Officer Palmer testified that the defendant later telephoned her at the police station, again admitting that he was driving the vehicle on the day in question.

From the defendant's admissions, from the direct evidence and from the circumstantial evidence, we find that the trial court had more than a scintilla of evidence on all the elements of the crime of impaired driving, and thus it did not err in sending the

charge to the jury. *See State v. Carter*, 15 N.C. App. 391, 393, 190 S.E.2d 241, 242 (1972) (guilt to the charge of impaired driving may be proven in whole or in part by circumstantial evidence).

We note in passing that the verdict form submitted to the jury avoided any possible confusion as to whether some, but not all, of the jurors thought the defendant guilty of impaired driving because of N.C.G.S. § 20-138.1(a)(1) and some, but not all, because of N.C.G.S. § 20-138.1(a)(2). The verdict form required the jury to denominate whether they unanimously found defendant guilty because of N.C.G.S. § 20-138.1(a)(1) or N.C.G.S. § 20-138.1(a)(2).

The defendant does not question the strength of the evidence of his intoxication. Rather, he argues that the State failed to provide more than a scintilla of evidence that he was driving the vehicle or that he was driving it while intoxicated. The facts that he was found behind the wheel of the vehicle without any other potential driver in sight, and his two admissions of having driven the vehicle are more than sufficient to place the issue of whether he was driving the vehicle before the jury.

As to whether he was intoxicated at the time he was driving, we note that he told Officer Palmer that the accident occurred only twenty minutes before she arrived on the scene. In fact, by the defendant's own admission, he had been drinking for the hour and forty minutes prior to running off the highway and in fact had consumed the last beer only a few minutes prior to running off the road. We also take into account his presence in a ditch. From these circumstances, as well as from his own admissions, a jury had substantial evidence from which to deduce that the defendant was driving a vehicle while impaired in violation of N.C.G.S. § 20-138.1(a)(1).

In addition, the State provided sufficient proof of defendant's violation of N.C.G.S. § 20-138.1(a)(2). Approximately two hours after the defendant drove, the State's breathalyzer test revealed a 0.21 blood/alcohol concentration. We find this test was administered within a relevant time which is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving." N.C.G.S. § 20-4.01(33a). Since the defendant does not contend he consumed any alcohol after driving, we must assume, as evidently did the jury, that the alcohol measured during the breathalyzer test was consumed before or during the driving.

B

[4] We also find the evidence supported defendant's conviction of N.C.G.S. § 20-111(2) (1983) which makes it illegal for any person "to willfully display an expired license on a vehicle knowing the same to be expired." That the license had expired in 1985 was readily apparent by visual observation thereof, and thus the defendant was on notice of the violation. In addition, Officer Palmer related the defendant's admission of not having the vehicle properly registered.

C

[5] Lastly, the defendant argues that he should not have been convicted of operation of a motor vehicle without financial responsibility since N.C.G.S. § 20-313 (1983) applies only to vehicle *owners*. We agree. That statute expressly applies to vehicle owners, and it does not mention any other persons who might operate a vehicle. The State failed to adequately prove the defendant owned the vehicle in question. The only evidence tending to prove his ownership was the defendant's statement to a wrecker crew demanding that they not remove "his" car. Such an "admission" is certainly insufficient to prove ownership absent "substantial independent evidence tending to establish its trustworthiness . . . ." *State v. Trexler*, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986) (quoting *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985)). The State presented no such corroborating evidence. On the contrary, Officer Palmer testified that her investigation revealed that someone else owned the vehicle. Thus, we find the trial court erred in failing to dismiss the charge of defendant's violation of N.C.G.S. § 20-313.

Accordingly, we find no error in the convictions of driving while impaired and displaying an expired license plate, and we reverse the conviction for no insurance and remand for resentencing.

No error—driving while impaired and displaying expired license or registration plate on a vehicle.

Reversed—operation of a motor vehicle without financial responsibility.

Remanded.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

LAURIE O. SEGREST, ADMINISTRATOR OF THE ESTATE OF AMY DOLAN SEGREST, PLAINTIFF v. MICHAEL T. GILLETTE, KATHRYN N. GREENHOOT, SOUTHEAST ANESTHESIA ASSOCIATES, P.A., CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER, INC., AND CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, DEFENDANTS

No. 8926SC98

(Filed 5 December 1989)

1. **Physicians, Surgeons and Allied Professions § 15.1 (NCI3d)—wrongful death—medical malpractice—death certificate and testimony of medical examiner excluded—no error**

The trial court did not err in a wrongful death action arising from alleged medical malpractice by excluding the death certificate and the testimony of the medical examiner where the medical examiner testified on voir dire that he did not conduct any part of the autopsy on the deceased and was not in a position to give an opinion on the cause of death.

Am Jur 2d, Death §§ 462, 546.

2. **Physicians, Surgeons and Allied Professions § 15 (NCI3d)—lab slip—erroneously admitted without limiting instruction—prejudicial error**

There was prejudicial error in a wrongful death action arising from alleged medical malpractice where the trial court admitted a lab slip without a limiting instruction. Several hours before the deceased's death, one of her doctors requested an Epstein-Barr virus test, which had to be performed at another hospital; none of the material available at the time of trial specified which Epstein-Barr test was requested or performed; the deceased died in early January 1983; a doctor affiliated with defendant asked a lab technician to obtain further information on the test results some time after November 1985; the lab technician called the hospital that performed the test and wrote out the lab slip that became known as the "IgM slip"; and that slip specified that Presbyterian Hospital had

performed an IgM test and that the results were positive. The IgM slip did not satisfy the requirements of N.C.G.S. § 8C-1, Rule 803(6), in that this slip was not made at or near the time of the test itself; the slip could serve as the basis of expert opinion testimony under N.C.G.S. § 8C-1, Rule 703, but the court erred in admitting the slip without an instruction limiting its use to providing the basis for the experts' opinions.

Am Jur 2d, Hospitals and Asylums § 43.

3. **Appeal and Error § 24.1 (NCI3d)— wrongful death—medical malpractice—cross-assignment of error—not an alternate basis for verdict**

In a wrongful death action arising from alleged medical malpractice, the Court of Appeals did not consider a cross-assignment of error to the trial court's refusal to instruct the jury about allegedly improper statements by plaintiff's counsel in closing arguments where the refusal to give the requested instruction did not deprive the defendants of an alternate basis in law for the verdict in their favor. N.C. Rules of Appellate Procedure, Rule 10(d).

Am Jur 2d, Physicians, Surgeons, and Other Healers § 363.

4. **Bills of Discovery § 6 (NCI3d); Rules of Civil Procedure § 37 (NCI3d)— wrongful death action—failure to timely answer interrogatory—sanctions—no abuse of discretion**

The trial court did not abuse its discretion in a wrongful death action arising from alleged medical malpractice by limiting the number of expert witnesses defendants could use at trial where plaintiff served an interrogatory upon all defendants seeking information about the expert witnesses defendants expected to testify just over two months before the deadline set by the trial court for completion of discovery; defendants failed to answer within the thirty days provided by N.C.G.S. § 1A-1, Rule 33; plaintiffs moved pursuant to N.C.G.S. § 1A-1, Rule 37, for sanctions; defendants then responded to the interrogatory; and the trial judge granted plaintiff's motion for sanctions. Defendants did not argue that their failure to reply was involuntary or beyond their control and offered no explanation for their failure to respond.

Am Jur 2d, Depositions and Discovery §§ 70, 209, 357; Physicians, Surgeons, and Other Healers § 357.

APPEAL by plaintiff from judgment entered 29 March 1988 by *Judge James U. Downs* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 18 September 1989.

This is a wrongful death action based upon alleged medical malpractice brought by the administrator of Amy Segrest's estate against Southeast Anesthesia Associates, P.A., two of its member anesthesiologists, Michael T. Gillette and Kathryn N. Greenhoot, and Charlotte Memorial Hospital and Medical Center, Inc. and Charlotte Mecklenburg Hospital Authority. On 22 December 1982, Amy Segrest, age seven, was admitted to Charlotte Memorial Hospital for treatment of a fourth degree burn on her ankle resulting from a mishap on a moped. Over the course of the next three weeks, several surgeons performed five surgical procedures on Amy. The anesthesia administered for the first four procedures included Halothane, while Ethrane was administered for the fifth. Evidence at trial showed that over the course of her hospital stay, Amy experienced the following symptoms: vomiting, increased blood pressure and temperature, mouth ulcers, decreased appetite, a yellow tint to her skin, and dark urine. In addition to the plastic surgeons operating on her ankle and the anesthesiologists administering the anesthesia for those surgeries, Amy was attended by several physicians from Eastover Pediatric Clinic, including a specialist in infectious diseases. These other physicians were consulted regarding her symptoms. Following the fifth operation, Amy's condition deteriorated. Her doctors conducted various tests, including a test for Epstein-Barr virus (mononucleosis) in an attempt to determine the cause of her illness. Amy died at the hospital on 24 January 1983. Additional pertinent facts are set out in the opinion.

Plaintiff instituted this action against defendants on 23 January 1985. The case was tried to a jury in Mecklenburg County Superior Court and the jury returned a verdict in favor of the defendants. From a judgment entered in accordance with that verdict, plaintiff appeals and defendants Gillette, Greenhoot and Southeast Anesthesia Associates, P.A., set out cross-assignments of error.

Law Offices of Grover C. McCain, by Grover C. McCain, Jr. and William R. Hamilton, for plaintiff appellant.

Golding, Meekins, Holden, Cosper & Stiles, by V. Elaine Cohoon and John G. Golding, for defendant appellees Gillette, Greenhoot and Southeast Anesthesia, P.A.; and R. Cartwright Carmichael, Jr. for defendant appellees Charlotte Memorial Hospital and Medical Center and Charlotte-Mecklenburg Hospital Authority.

ARNOLD, Judge.

Plaintiff does not assign error to any issues relevant to defendants Charlotte Memorial Hospital and Charlotte-Mecklenburg Hospital Authority's alleged negligence. The judgment of the trial court that Amy Segrest's death was not caused by negligence of these defendants is affirmed. The remainder of this opinion will address issues relevant to the alleged negligence of defendants Gillette, Greenhoot and Southeast Anesthesia Associates, P.A. (hereinafter Gillette, et al.).

[1] Plaintiff first contends the trial court erred by excluding Amy Segrest's death certificate from evidence. The death certificate contained, in pertinent part, the following statements:

Death Caused By:

(a) Immediate Cause: Acute Liver Failure with Massive Necrosis

(b) Due to, or as a Consequence of: History of Halothane Anesthesia

Dr. Hobart Wood, the medical examiner who signed the death certificate, testified on voir dire that he did not conduct any part of the autopsy on Amy Segrest and was not in a position to give an opinion on the cause of her death. Given Dr. Wood's own admission that he could not give an opinion as to Amy Segrest's cause of death, the trial court did not err in excluding the death certificate from evidence.

Plaintiff next contends the trial court erred by excluding the testimony of Dr. Wood, the medical examiner, concerning the cause of Amy Segrest's death. The reasons for excluding the death certificate apply equally to Dr. Wood's testimony. The ruling excluding the trial testimony was correct.

[2] Plaintiff, in his next assignment of error, contends the trial court erred by admitting into evidence a Miscellaneous Lab Slip that came to be known during the trial as the "IgM slip," as well as expert opinions based upon that slip. We agree with plaintiff that the IgM slip itself was inadmissible hearsay and should have been excluded as substantive evidence of the facts contained therein. However, the IgM slip was admissible for the limited purpose of showing the facts upon which the expert opinions as to Amy Segrest's cause of death were based.

Testimony at trial showed the following: During the period just before Amy Segrest's death, her doctors conducted various tests in an attempt to determine the cause of her deteriorating condition. On 24 January 1983, several hours before her death, one of her doctors requested a test for the Epstein-Barr virus. The test was performed at Presbyterian Hospital, the only Charlotte Hospital equipped to perform the Epstein-Barr test. At the relevant time, there were two different Epstein-Barr virus tests available: an IgG test, which showed past exposure to the virus, and an IgM test, which showed a current acute infection with the virus. Presbyterian Hospital had the capability to perform both the IgG and IgM tests, although the IgM test had only become available at Presbyterian in early January 1983. The lab slip from Presbyterian indicated her Epstein-Barr test result was "positive 1:160." None of the documents available at the time of trial (hospital chart, lab slips, Charlotte Memorial Hospital log book) specified which Epstein-Barr test was requested or actually conducted.

Sometime after November 1985, Dr. Hershey, who was affiliated with defendant Southeast Anesthesia Associates, asked Ms. Marilee Martin, a Charlotte Memorial lab technician, to obtain further information on the Epstein-Barr test results. Ms. Martin's practice was to call the hospital that performed a particular test to obtain the information requested by a doctor. As a result of her inquiry to Presbyterian Hospital, Ms. Martin wrote out the Miscellaneous Lab Slip that came to be known as the "IgM slip." That slip specified that, of the two available Epstein-Barr tests, Presbyterian had performed an IgM test. The admissibility of this "IgM slip," as well as expert opinions based upon it, is the subject of plaintiff's assignment of error.

Hospital records are admissible under an exception to the rule against hearsay if the records meet the requirements of G.S. § 8C, Rule 803(6), which in pertinent part provides:

> (6) Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the

> testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

See Sims v. Insurance Co., 257 N.C. 32, 35, 125 S.E.2d 326, 328-9 (1962). The IgM slip does not satisfy the requirements of Rule 803(6). Specifically, the test for Epstein-Barr virus was conducted on 24 or 25 January 1983. Although defendants' witnesses could not place precisely when the slip was written, Dr. Hershey, President of Southeast Anesthesia Associates, P.A., testified that he requested the information on Amy Segrest's Epstein-Barr test results sometime after November 1985, at least two years and nine months after Amy Segrest's death. The IgM slip was not, therefore, made "at or near the time" of the test itself and does not possess the guarantees of trustworthiness sufficient to justify its admission into evidence.

Although the IgM slip was not admissible as substantive evidence of the information it contained, the IgM slip could serve as the basis of expert opinion testimony. N.C.G.S. § 8C, Rule 703 in pertinent part provides:

> The facts or data in a particular case upon which an expert bases an opinion . . . may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions . . . upon the subject, the facts or data need not be admissible in evidence.

An expert may testify to the facts or data that form the basis of his opinion,

> not . . . to indicate the ultimate truth [of those facts], but as one of the bases for reaching his conclusion, according to accepted medical practice. The court should therefore exercise care in the manner in which such testimony is elicited, so that the jury may understand that the [facts forming the basis of the expert opinion do] not constitute factual evidence, unless corroborated by other competent evidence.

State v. Wade, 296 N.C. 454, 463-4, 251 S.E.2d 407, 412 (1979) (quoting *State v. Griffin*, 99 Ariz. 43, 49, 406 P.2d 397, 401 (1965)).

Two defendants, Doctors Greenhoot and Gillette, and Dr. Pollard, an associate of Greenhoot and Gillette, each testified as to their

opinion on Amy Segrest's cause of death. Each testified that her death was, in their opinion, caused by active Epstein-Barr virus. Each supported their opinion with the IgM slip, which showed a positive diagnosis of active Epstein-Barr virus. Even though the IgM slip was inadmissible hearsay, it was admissible to show the basis of expert opinion testimony.

The court erred in admitting the IgM slip without an instruction limiting its use to providing the basis for the experts' opinions. Since the IgM slip was a crucial piece of evidence supporting defendant's contention that Epstein-Barr virus, not Halothane anesthesia, was the cause of Amy Segrest's death, its admission as substantive evidence in violation of the rule against hearsay constitutes prejudicial error and justifies a new trial.

Since we are awarding plaintiff a new trial, we need not address plaintiff's remaining assignments of error.

[3] Defendants, Gillette, Greenhoot and Southeast Anesthesia Associates, P.A., raise two cross-assignments of error. In the first, defendants Gillette, et al., contend the trial court erred in refusing to instruct the jury about allegedly improper statements made by plaintiff's counsel in closing arguments. Rule 10 of the N.C. Rules of Appellate Procedure in pertinent part provides:

> (d) Exceptions and Cross-Assignments of Error by Appellee. Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment. . . .

Appellate Rule 10(d) protects "appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based." *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982). The judge's refusal to give the requested instruction did not deprive the defendants Gillette, et al., of an alternative basis in law for the verdict in their favor. Hence, this issue is not properly before us and we will not decide it.

[4] In their second cross-assignment of error, defendants Gillette, et al., argue the trial court erred in sanctioning their failure to make discovery by limiting them to one expert witness. Just over two months before the deadline set by the trial court for com-

pletion of discovery, plaintiff served an interrogatory upon all defendants seeking information about the expert opinion witnesses that defendants expected to testify—subject matter of testimony, substance of facts and opinions and summary of grounds for each opinion. When defendants failed to answer within the thirty days allowed by Rule 33, plaintiff moved pursuant to Rule 37 for sanctions for defendants' failure to answer the interrogatory. Plaintiff's motion for sanctions was made approximately four and a half months after service of interrogatories on defendants, over three months after the deadline set for completion of discovery, and just over two months before the case was set for trial. Following plaintiff's motion for sanctions, defendants Gillette, et al., responded to plaintiff's interrogatory by identifying the expert witnesses they expected to use at trial and the subject matter and grounds of the expert testimony. The judge granted plaintiff's motion for sanctions. The order prohibited defendants Gillette, et al., from presenting testimony from five doctors listed as expert witnesses and allowed the testimony of a single expert witness (apart from the named doctor-defendants who also testified in the case).

Rule 37 of the N.C. Rules of Civil Procedure in pertinent part provides:

> (d) . . . If a party . . . fails . . . (ii) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion . . . may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

Among the allowable sanctions is "an order . . . prohibiting him from introducing designated matters in evidence." N.C.R. Civ. Proc. 37(b)(2)b.

The imposition of sanctions under Rule 37(d) is in the sound discretion of the trial judge. *Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978). *See also* W. Shuford, *N.C. Civil Practice and Procedure*, § 37-14 (3rd ed. 1988). Defendants Gillette, et al., were properly served with plaintiff's interrogatory about expert testimony, a crucial aspect of this medical malpractice case. The fact that plaintiff's interrogatories were ultimately answered, however late, does not prevent the court from imposing sanctions under Rule 37(d) on plaintiff's motion. *See Hayes v. Browne*, 76 N.C. App. 98, 331 S.E.2d 763 (1985), *cert. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986). Defendants Gillette, et al.,

did not respond or object to the interrogatory until after the plaintiff moved for sanctions, long after the thirty days allowed for response under Rule 33. Defendants Gillette, et al., do not argue that their failure to reply was involuntary or beyond their control and offer no explanation for their failure to respond. Under these circumstances, we find no abuse of discretion in the judge's order limiting the number of expert witnesses defendants Gillette, et al., could use at trial.

No error as to defendants Charlotte Memorial Hospital and Medical Center, Inc. and Charlotte-Mecklenburg Hospital Authority.

Reversed and remanded for a new trial as to defendants Gillette, Greenhoot and Southeast Anesthesia Associates, P.A.

Chief Judge HEDRICK and Judge BECTON concur.

EDWARD ALAN BOLICK v. SUNBIRD AIRLINES, INC. AND MOUNTAIN AIRLINES, INC.

No. 8921SC80

(Filed 5 December 1989)

1. **Aviation § 3.1 (NCI3d)— plane crash—exclusion of NTSB Factual Report—hearsay evidence inadmissible**

In an action to recover for injuries sustained in a plane crash the trial court did not err in excluding from evidence the NTSB Factual Report, since the report contained statements by pilots, witnesses, and other non-officials who were not present to testify at trial, and the court properly exercised its discretion in excluding the hearsay portions of the report. N.C.G.S. § 8C-1, Rule 803(8)(c).

Am Jur 2d, Aviation § 145.

2. **Aviation § 3.1 (NCI3d)— plane crash—pilot's alleged violation of F.A.A. regulation—no instruction on negligence per se required**

In an action to recover for injuries sustained in a plane crash which occurred when the pilot missed the touchdown zone

of the runway and did not execute a missed approach procedure, the trial court did not err in failing to instruct the jury on negligence *per se* for the flight crew's alleged violation of C.F.R. § 91.116(c), which provides that "no pilot may operate an aircraft . . . below the authorized [decision height] unless . . . that descent rate will allow touchdown to occur within the touchdown zone of the runway of intended landing," since a failure specifically to comply with the requirements of § 91.116 does not constitute negligence *per se* in light of § 91.2 which allows deviation from a regulation because the pilot in command has final authority over the aircraft, or when confronted with an emergency situation. N.C.G.S. § 63-20.

Am Jur 2d, Aviation § 84.

3. **Aviation § 3.1 (NCI3d)— plane crash—severe rainstorm prior to landing—instruction on sudden emergency proper**

In an action to recover for injuries sustained in a plane crash when a pilot overshot the runway and did not abort the landing, the trial court did not err in instructing the jury on the doctrine of sudden emergency where the evidence tended to show that the pilot was unaware of the severity of a rainstorm until just prior to landing and that moments before touchdown she faced a "wall of water."

Am Jur 2d, Aviation § 108.

Judge PHILLIPS dissents.

APPEAL by plaintiff from judgment entered 19 August 1988 by *Judge James A. Beaty, Jr.* in the FORSYTH County Superior Court. Heard in the Court of Appeals 11 July 1989.

This is a negligence action arising out of a 27 May 1984 plane crash at the Hickory Municipal Airport. Plaintiff was a passenger aboard Sunbird Flight 808 traveling from Charlotte to Hickory. The plane was a 10 seat Cessna 402C aircraft owned by defendants and piloted by defendants' employee, Captain Sherry Harper. En route from Charlotte to Hickory, Captain Harper encountered a rainstorm. Testimony at trial revealed that upon approaching the runway, they encountered a sudden worsening of the storm and that a "wall of water" confronted them just moments before touchdown. Captain Harper chose not to abort the landing and as a result touched down beyond the "touchdown zone" which is the first 3,000 feet of runway. The aircraft hydroplaned and ran off the end of the runway and down a forty foot embankment.

Plaintiff sustained serious physical injury. At trial, the jury found that plaintiff's injury was not the result of defendant's negligence. Plaintiff appeals and we find no error.

Smiley and Mineo, by Robert A. Mineo, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by William F. Womble, Jr., Donald F. Lively, and Mary J. Davis, for defendants-appellees.

LEWIS, Judge.

Plaintiff brings forth three assignments of error. First, he contends that the lower court committed error in excluding from evidence the National Transportation Safety Board's (NTSB) Factual Report. Second, he contends that the court erred in not instructing the jury on negligence *per se* when evidence showed that the flight crew violated Federal Aviation Administration Regulations (FARs). Third, plaintiff alleges the court erred in instructing the jury on the doctrine of "sudden emergency."

[1] During the course of the trial below, plaintiff sought to admit the factual report or investigator's report section of the NTSB report. The judge denied introduction of the report itself but did allow "specific portions of it to be used as contain factual information obtained by Walter Stiner [NTSB investigator] himself based upon the factual documents from interviews of witnesses who have testified in open court or through their depositions to the extent certain documents from the NTSB report were used by them." Plaintiff contends that the entire factual report is admissible under 49 U.S.C. Section 1441(e) and Rule 803(8)(c) of the North Carolina Rules of Evidence.

49 U.S.C. Section 1441(e) governs the use at trial of NTSB reports and states:

> No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Federal cases which have looked at this provision have distinguished between the factual portion of the NTSB report and the portion which embraces a determination of probable cause, and have reached a consensus that Section 1441(e) only excludes that part of the

report which expresses the agency view as to probable cause. The factual portions are admissible. *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982); *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969); *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 631-32 (3rd Cir. 1963), *cert. denied*, 375 U.S. 895 (1963).

The fact that this evidence is not barred by Section 1441(e) is not conclusive of the question, however, because it does not consider the admissibility of the testimony under the rules of evidence. *Id.* G.S. 1B, Chap. 8C-1, Rule 803(8)(c) allows the admission of "records, reports, statements or data compilations . . . setting forth (c) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate a lack of trustworthiness." However, any hearsay contained in the report must also fall under one of the hearsay exceptions. *See* G.S. 1B, Chap. 8C-1, Rule 805. In *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3rd Cir. 1977), the court upheld the trial court's exclusion of the NTSB report to the extent it consisted of statements of pilots or other witnesses because they equal inadmissible hearsay:

> To the extent that the NTSB reports offered by McShain consist of the statements of pilots or other witnesses regarding the accidents, they constitute inadmissible hearsay evidence. The Advisory Committee's Notes make clear that Federal Rule of Evidence 803(8) exempts from the hearsay rule only reports by officials; and of course, the pilots and other witnesses are not officials for this purpose. Moreover, the memoranda submitted to the government by its investigators often contained statements from witnesses which would make such memoranda encompass double hearsay.

Accord, Colvin v. United States, 479 F.2d 998 (9th Cir. 1973) (Rule 803(8) excluded statement of an eyewitness to a traffic accident contained in the accident report prepared under the Federal Tort Claims Act); *Ramrattan v. Burger King Corp.*, 656 F.Supp. 522, 529 (D.Md. 1987) (defendant's motion to exclude portions of police report referring to statements by bystanders granted because witnesses' statements were not "factual findings resulting from an investigation within the meaning of Rule 803(8).").

State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986) is distinguishable. In *Acklin*, the Supreme Court ruled that the trial court prejudicially erred in excluding SBI lab reports under Rule 803(8)(c). However, the State in that case did not contest the admissibility of the reports, but instead argued that any error committed by the trial court was not prejudicial. *Id.* at 682, 346 S.E.2d at 484. Furthermore, the SBI report was comprised of reports prepared by state officials who were present to testify at trial.

In this case the NTSB reports contained statements by pilots, witnesses and other non-officials who were not present to testify at trial. The trial court properly exercised its discretion in excluding the hearsay portions of the NTSB report. To the extent portions were admissible independent of the report, those portions were admitted. We find no error.

[2] Plaintiff alleges Captain Harper failed to comply with 14 C.F.R. Section 91.116 which details the approach to be flown on an instrument flight landing and explains the missed approach procedures a pilot may execute in appropriate circumstances. 14 C.F.R. Section 91.116(c) provides:

> No pilot may operate an aircraft . . . below the authorized [decision height] unless . . . that descent rate will allow touchdown to occur within the touchdown zone of the runway of intended landing.

The touchdown zone is defined as the first 3,000 feet of the runway. Plaintiff claims Captain Harper's failure to land in the touchdown zone and her decision not to execute a missed approach constitutes negligence *per se* and assigns as error the failure of the trial court to instruct the jury on negligence *per se* for the flight crew's alleged violation of C.F.R. Section 91.116(c).

The FARs are administrative regulations established by the Federal Aviation Administration and have the force and effect of law; persons and operations to whom they apply must abide by them. 49 U.S.C. Section 1348 (1988). The North Carolina General Assembly has incorporated the FARs as applicable to intrastate flight by virtue of G.S. Section 63-20. Captain Harper and First Officer Van Hoy admitted that the FARs applied to the conduct of Sunbird flight 808.

The FARs constitute a general code of conduct that, by its terms, places discretion in the hands of the pilot in command of

an aircraft. Part 91 of the FARs simply provides specific requirements applicable to the technical aviation field but vest final authority in the pilot in command. 14 C.F.R. Section 91.3, applicable to every regulation included in Part 91, specifically provides that the pilot in command is the final authority as to the operation of the aircraft and reserves to the pilot in command the authority to "deviate from any rule . . . to the extent required to meet an emergency." Thus, the FARs in Part 91 do not impose a specific duty on pilots in command from which no deviation is possible, but rather a general code of conduct subject to the final authority of the pilot.

Plaintiff's evidence that Captain Harper did not land the aircraft in the first third of the runway, the touchdown zone, and that she did not attempt a missed approach procedure, is some evidence of whether she met the standard of conduct required of her. A failure specifically to comply with either of those requirements of Section 91.116 does not constitute negligence *per se* in light of Section 91.3 which allows deviation from a regulation because the pilot in command has final authority over the aircraft, or when confronted with an emergency situation. We find that the trial court did not err in refusing to instruct the jury on the issue of negligence *per se*.

[3] Finally, plaintiff urges us to reverse on the ground that the trial court erred in instructing the jury on the doctrine of "sudden emergency." We find no error.

The doctrine of "sudden emergency" is only a convenient name for the means by which courts explain to the jury the effect certain external forces have on whether a duty of care has been breached. It is not a means of reducing the standard of care: "Sudden emergency is not a legal defense which may operate to bar an action; it is only one factor to consider in making the reasonable person determination." *Helms v. Church's Fried Chicken, Inc.*, 81 N.C. App. 427, 432, 344 S.E.2d 349, 352 (1986) (*citing* Restatement (Second) of Torts Section 296 (1965)).

It is the duty of the court to instruct the jury upon the law with regard to every substantial feature of the case. *Moseley & Moseley Builders, Inc. v. Landin, Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988). The instructions must be based on evidence "which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the

claim or defense asserted." *In Re Will of Cooley*, 66 N.C. App. 411, 417, 311 S.E.2d 613, 616 (1984); *Cockrell v. Cromartie Transport Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978). The existence of an emergency situation during Captain Harper's approach is certainly a substantial feature of this case and an essential element of the defense. The evidence, in the light most favorable to the defense, supports the giving of an instruction on the sudden emergency doctrine.

Defendant produced testimony at trial that Captain Harper was unaware of the severity of the storm until just prior to landing and that moments before touchdown she faced a "wall of water." In *Lawing v. Landis*, 256 N.C. 677, 124 S.E.2d 877 (1962), the evidence disclosed that the highway on which defendant was travelling was suddenly enveloped in a dense fog. The defendant collided with plaintiff's vehicle in this fog. *Id.* at 679, 124 S.E.2d at 879. The court held that the occurrence of fog warranted an instruction on "sudden emergency." Like the defendant in *Lawing*, Captain Harper experienced the "unexpected operation of a material force," Restatement (Second) of Torts Section 296, Comment (a) (1965), which supported the trial court's instruction. *See also Mascuilli v. Tucker*, 82 N.C. App. 200, 207, 346 S.E.2d 305, 309 (1986) (evidence of sudden downpour or change in driving conditions is consistent with sudden emergency contemplated by the rule). Accordingly, we find no error.

No error.

Judge COZORT concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I agree that under the circumstances it was not reversible error to refuse to admit into evidence the National Transportation Board Factual Report and that basis existed for charging on the sudden emergency doctrine. But in my opinion it was reversible error not to apply the theory of negligence *per se* to the pilot's violation of 49 C.F.R. Sec. 91.116 of the federal aviation regulations. Obeying the regulation, the purpose of which is to protect the lives of those who travel the airways, was not discretionary with

the pilot and that no criminal penalty is authorized for its breach is immaterial.

WILLIE GUY WILLIS, TRUSTEE, JOHN PAGE, THEODORE PAGE, JUDITH WILLIS v. LINDA BAUGUS MANN, WILLIAM BAUGUS, MICHAEL BAUGUS, PAMELA BAUGUS GASKILL, MOIRA GOODWIN McINTOSH, H. FRANK McINTOSH, VERA PAKE WILLIS, DALLAS P. WILLIS, THELMA ELLEN SIMPSON, FANNIE GREY WILLIS, WILLIAM HOWARD WILLIS, LOTTIE PAKE MEDEN, AUGUST MEDEN, JR., INA BELL GAVIN, RICHARD HARVEY GAVIN, SHEILA DYE JACKSON, GILBERT H. JACKSON, BESSIE EVELYN WASSON, RUSSELL WASSON, CHARLES LESTER PAKE, SR., ELEANOR PAKE, ERMA PAKE QUINN, LEON HUGHES QUINN, EILEEN PAKE JONES, DAVID E. JONES, JANICE PAKE FULCHER, MATTHEW FULCHER, FRANKLIN PAKE, ETHYL FULCHER PAKE, WILLIAM DENNELL PAKE, DOROTHY M. PAKE, SARAH SELLERS MATTHEWS, ROBERT JEFFERSON MATTHEWS, EVELYN SELLERS FOUNTAIN, ROBERT FOUNTAIN, JESSIE LEE SELLERS HILLER, WILLIAM H. HILLER, ROBERT A. SELLERS, MAUDE WEST SELLERS, RAYMOND SELLERS, MARGARET LUCAS SELLERS, UNKNOWN HEIRS AND DEVISEES OF RAYMOND WILLIS, BENJAMIN TYLER, JOHN SMITH, MARTIN R. SMITH AND HATTIE SMITH HARRIS AND OTHER UNKNOWN HEIRS

No. 883SC1331

(Filed 5 December 1989)

1. **Adverse Possession § 7 (NCI3d) — actual ouster of tenant in common by another tenant — sufficiency of evidence**

Evidence was sufficient to demonstrate an actual ouster of plaintiffs where it tended to show that defendants prevented one plaintiff from cutting timber on the property being claimed by defendants; when one defendant placed a mobile home on his lot, one plaintiff told him the home was being erected on "disputed land"; and the institution of a Torrens proceeding by plaintiffs' predecessor in title unequivocally indicated that plaintiffs had actual notice that defendants were claiming the property to the exclusion of plaintiffs and their predecessors.

Am Jur 2d, Adverse Possession §§ 225-228, 230; Registration of Land Titles § 12.

2. Adverse Possession § 19 (NCI3d)— institution of Torrens proceeding—continuity of color of title not broken

The mere institution of a Torrens proceeding did not break the continuity of defendants' color of title, and the trial judge correctly ruled that defendants ripened an adverse claim to property by seven years' possession where the effect of plaintiffs' voluntary dismissal of the Torrens proceeding was to toll the limitations period on defendants' adverse claim for the subsequent twelve months, and when plaintiffs failed to bring a new action within that period, the limitations period continued to run from the point at which it had been tolled.

Am Jur 2d, Adverse Possession §§ 225-228, 230; Registration of Land Titles § 12.

3. Adverse Possession § 4 (NCI3d)— lappage

When a junior grant laps on a superior title, title to the junior grant will mature if there is an adverse and exclusive possession of the lappage.

Am Jur 2d, Adverse Possession §§ 225-228, 230; Registration of Land Titles § 12.

APPEAL by plaintiffs from judgment entered 29 May 1987 in CARTERET County Superior Court by *Judge David E. Reid, Jr.* Heard in the Court of Appeals 22 August 1989.

Donald G. Lawrence and Bobby J. Stricklin for plaintiff-appellants.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by Claud R. Wheatly, III, for defendant-appellees.

BECTON, Judge.

Plaintiffs instituted this action to quiet title to certain land in Carteret County. Following a bench trial, the judge entered judgment in favor of defendants, finding they had adversely possessed the property under color of title for seven years. Plaintiffs appeal, and we affirm.

I

On 28 February 1739, 320 acres of land in Carteret County were conveyed to John Jarrett. The property was partitioned

into four tracts in 1857; the first three of these are the subject of the present dispute. The tracts run, essentially, east and west and will be designated "the tracts" in this opinion. In 1963, defendants exchanged deeds, dividing much of the property into three lots. Defendants recorded their deeds in 1964. The lots run north and south and will be called "the lots" herein. The intersecting points of the tracts and the lots have created nine overlapping areas.

In 1969, plaintiffs' predecessor in title filed a Torrens action, claiming title as sole owner to the three tracts. In 1981, plaintiffs took a voluntary dismissal, without prejudice, of the action and did not bring a new action within one year. Plaintiffs filed the present action in 1985.

At trial, plaintiffs introduced evidence of common ancestry in title between plaintiffs and defendants. The judge found that plaintiffs had connected themselves to the 1739 grant and found plaintiffs to be owners of the three tracts created by the 1857 partition. Additionally, the judge found that, beginning in 1963, defendants went into possession of the property delineated in their deeds and 1) marked boundaries, 2) subdivided lot 3 on two occasions, 3) rechopped old lines, 4) placed a mobile home on lot 3, resurveyed the lot, and chopped certain lines, 5) prevented plaintiff Willie Guy Willis and his predecessor in title from cutting timber on the property, 6) established corners and placed markers on their individual property lines and, on two occasions, strung wire along their boundaries, 7) paid taxes on the property, and 8) defended the Torrens proceeding instituted by plaintiffs' predecessor in title. The judge concluded that, although plaintiffs had properly surveyed and located their property and had established a superior chain of title, defendants had ripened an adverse claim to their lots under seven years' color of title, N.C. Gen. Stat. Sec. 1-38 (1983). The judge "specifically reject[ed] any claim of adverse possession by Defendants pursuant to the twenty year adverse possession statute [N.C. Gen. Stat. Sec. 1-40 (1983)]." Plaintiffs appealed.

II

This litigation has yielded a voluminous record and issues involving tenancy in common, lappage, possessory acts, statutes of limitation, and evidentiary matters. In our view, however, resolution of this case turns upon whether the judge properly ruled that defendants acquired exclusive rights to the land on the basis

of adverse possession under color of title. We hold that the judge correctly found that they did.

A

Plaintiffs first assign error to the judge's application of a color-of-title theory to defendants' possession of the land encompassed by tract two. Plaintiffs contend that their evidence established a tenancy in common among plaintiffs and defendants as to that tract, and that the judge should have applied the twenty-year possessory period as a result. We disagree.

The judge's findings are equivocal as to whether he believed plaintiffs and defendants were tenants in common as to tract two. Plaintiffs presented the testimony of a genealogist tending to show that when the land was partitioned in 1857, the owners of tract two were the common ancestors to all parties. The judge's findings as to the ownership of tract two, moreover, suggest he found a tenancy in common with respect to that land. We will assume, therefore, that a tenancy in common existed with regard to that property.

There is, in this case, no evidence and no claim by plaintiffs that defendants exchanged their deeds in bad faith. *Cf. State v. Taylor*, 60 N.C. App. 673, 678, 300 S.E.2d 42, 46, *disc. rev. denied and appeal dismissed*, 308 N.C. 547, 303 S.E.2d 823 (1983) (defendants were aware, when they exchanged deeds, that neither had title to deeded property). Defendants' deeds, therefore, were color of title.

Between tenants in common, possession by one tenant for a period of less than twenty years cannot be adverse to the others, as the possession of one tenant in common is, in law, the possession of all of them. *See McCann v. Travis*, 63 N.C. App. 447, 451, 305 S.E.2d 197, 200 (1983) (quoting *Young v. Young*, 43 N.C. App. 419, 427, 259 S.E.2d 348, 352 (1979)); *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E.2d 174, 186 (1964). A tenant in common has the right to possession of the property and is presumed to hold under true title. *Young*, 43 N.C. App. at 427, 259 S.E.2d at 352 (citing *Winstead v. Woolard*, 223 N.C. 814, 28 S.E.2d 507 (1944)). The twenty-year period does not apply, however, when one tenant in common ousts another. *See Morehead*, 262 N.C. at 343, 137 S.E.2d at 186; *Dobbins v. Dobbins*, 141 N.C. 210, 214, 53 S.E. 870, 871 (1906); *accord McCann*, 63 N.C. App. at 452, 305 S.E.2d at 200.

The issue before us, then, is whether, as defendants assert, plaintiffs were at any time ousted from possession of tract two.

Actual ouster involves "an entry or possession of one tenant in common that enables a cotenant to bring ejectment against him." *McCann*, 63 N.C. App. at 452, 305 S.E.2d at 200. The entry or possession must be a clear, positive, and unequivocal act equivalent to an open denial of [the cotenant's] right and to putting him out of the seizin. *Id.* (quoting *Dobbins*, 141 N.C. at 214, 53 S.E. at 871). Related to the doctrine of actual ouster is that of presumptive ouster, whereby the law, following a tenant's uninterrupted exclusive possession of the land for twenty years, will presume an ouster at the beginning of the statutory period. *See Page v. Branch*, 97 N.C. 97, 102, 1 S.E. 625, 628 (1887). Because the judge found that defendants' acts of possession from 1963 onward were not sufficient to establish adverse possession under the twenty-year statute, the doctrine of presumptive ouster cannot apply. Of necessity, the judge would have to have found that an actual ouster by defendants occurred, or else, as plaintiffs properly contend, the judgment, as regards tract two, cannot stand.

[1] Adequate evidence exists in this case to support a finding of an actual ouster of plaintiffs. The judge did not explicitly address the question of ouster; his failure to do so, however, is not fatal to the judgment. *Cf. Reese v. Carson*, 3 N.C. App. 99, 104, 164 S.E.2d 99, 102 (1968) (if correct result reached by trial judge, judgment should not be disturbed on appeal even if some reasons assigned for judgment not correct). The judge found, and the record supports his finding, that defendants prevented plaintiff Willis from cutting timber on the property being claimed by defendants. When, in 1976, defendant Henry Fountain placed a mobile home on his lot, Mr. Willis told him the home was being erected on "disputed land." Significantly, in 1969, plaintiffs' predecessor in title brought a Torrens proceeding. We agree with defendants that the institution of this action unequivocally indicates that plaintiffs had actual notice that defendants were claiming the property to the exclusion of plaintiffs and their predecessors. We hold that the evidence in this case demonstrates an actual ouster of plaintiffs. Once plaintiffs were ousted, defendants could ripen title under the seven years' color of title statute. *See Breeden v. McLauren*, 98 N.C. 307, 310, 4 S.E. 136, 138 (1887).

B

In a related assignment of error, plaintiffs challenge the acts of possession by defendants, contending that those acts are insufficient to establish an adverse holding. We have recited the findings made by the trial judge on this issue, and we summarily affirm his conclusion that the elements of possession in this case were sufficient to show defendants' possession of the land for more than seven years. We overrule this assignment of error.

C

[2] Plaintiffs have assigned error to the judge's ruling that the continuity of defendants' claim was not interrupted when plaintiffs voluntarily dismissed the Torrens proceeding in 1981 and did not reinstitute the action within one year of that dismissal. Plaintiffs contend that the period between the filing of the action (1969) and of the dismissal (1981) broke defendants' continuity of possession, and that the seven-year period for color of title would have started to run anew in 1981. We do not agree.

N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 41(a)(1) permits a party who takes a voluntary dismissal without prejudice to bring a new action within one year of the dismissal. The applicable statute of limitations is tolled for the year following the dismissal. *See Parrish v. Uzzell*, 41 N.C. App. 479, 484, 255 S.E.2d 219, 222 (1979). The effect of plaintiffs' voluntary dismissal of the Torrens proceeding, therefore, was to toll the limitations period on defendants' adverse claim for the subsequent twelve months. When plaintiffs failed to bring a new action within that period, however, the limitations period continued to run from the point at which it had been tolled. Contrary to plaintiffs' assertions, the mere institution of the Torrens proceeding did not break the continuity of defendants' color of title, and the trial judge correctly ruled that defendants ripened an adverse claim to the lots by seven years' possession. We overrule plaintiffs' assignment of error.

III

[3] Plaintiffs argue that the trial judge erred by failing to apply the rules of lappage in this case. The rules of lappage direct that when the title deeds of two rival claimants to land lap upon each other, and neither claimant is in actual possession of any of the land covered by the deeds, the claimant with the better title is deemed in possession of the lappage. *Price v. Tomrich Corp.*, 275

N.C. 385, 392-93, 167 S.E.2d 766, 771 (1955). If one of the claimants is seated on the lappage and the other is not, however, possession is in the claimant so seated. *Id.* at 393, 167 S.E.2d at 771. Plaintiffs argue that the only defendant seated on the lappage is defendant Fountain, who placed his mobile home upon a separately deeded lot. Plaintiffs thus argue that Mr. Fountain's possession is limited to that area.

We have held, however, that defendants ousted plaintiffs and ripened their claim to the lots under seven years' color of title. When a junior grant laps on a superior title, title to the junior grant will mature if there is an adverse and exclusive possession of the lappage. *See id.* Such is the case here, and, accordingly, we overrule this assignment of error.

IV

We hold that defendants established title by adversely possessing the land under seven years' color of title, and the judgment of the trial judge is

Affirmed.

Judges EAGLES and COZORT concur.

MATTHEW HOWARD YORK, BY AND THROUGH HIS GENERAL GUARDIAN, SHIRLEY C. YORK v. NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY; RICHARD R. GUIDETTI, M.D. AND PIEDMONT ANESTHESIA ASSOCIATES, P.A.

No. 8817SC1422

(Filed 5 December 1989)

Judgments § 36.1 (NCI3d)— medical malpractice—birth injuries—action by individual parents—action for infant's injuries—not res judicata

An action to recover for birth injuries by a minor through his guardian, his mother, was not barred by res judicata or collateral estoppel in that an earlier action by the mother ended with the verdict of no negligence on the part of defendants. Collateral estoppel only applies if the prior action

involved the same parties or those in privity with them as well as the same issues, and one who conducts a suit as a guardian or next friend for an infant is not a party of record. The parents were the plaintiffs in the prior action and the minor is the plaintiff in this case; he is not a party to his mother's claims in the prior action nor was he in privity with her. The exception for a person who is not a party to an action but who effectively controls the litigation does not apply because the minor had no control over or opportunity to control the prior action in which his mother was a plaintiff.

Am Jur 2d, Infants § 215; Physicians, Surgeons, and Other Healers § 307.

APPEAL by plaintiff from *Mills, F. Fetzer, Judge*. Summary judgment entered in SURRY County Superior Court in favor of defendants, Richard R. Guidetti, M.D. and Piedmont Anesthesia Associates, P.A. on 4 August 1988. Partial summary judgment entered in favor of defendant Northern Hospital District of Surry County on 13 September 1988. On 28 November 1988 plaintiff and defendant Hospital entered into a settlement agreement and release and plaintiff filed a voluntary dismissal with prejudice as to defendant Hospital. Heard in the Court of Appeals 24 August 1989.

Plaintiff appeals from a grant of summary judgment in favor of defendants. Defendants cross-assign as error the trial court's failure to grant their motion to dismiss plaintiff's appeal based on plaintiff's alleged violation of N.C. Rule of Appellate Procedure 3(a).

This case arises from birth injuries sustained by the minor plaintiff, Matthew Howard York, on 30 June 1981. Matthew York suffered permanent and irreversible brain damage as a result of these injuries. Matthew York's mother, Shirley York, also sustained personal injuries during the course of his delivery. On 22 May 1984 Mrs. York was appointed general guardian for her son. In June 1987, Shirley York and Donald Matthew York, plaintiff's father, in their individual capacities, filed separate actions against defendants in this case. Shirley York sought recovery for her own personal injury, for the recovery of medical expenses incurred on behalf of her child, and for the loss of the child's services until he reached his majority. Donald York sought recovery for medical expenses incurred on behalf of his minor child, for the loss of the child's

services until he reached his majority and for loss of consortium arising as a result of his wife's injuries. These actions were consolidated for trial and on 27 March 1987 the jury returned a verdict of no negligence on the part of any of the defendants. The presiding judge, the Honorable Julius A. Rousseau, Jr., entered final judgment on the jury's verdict on 5 May 1987. Mr. and Mrs. York appealed to this Court which found no error with respect to the claims against defendants Guidetti or Piedmont, nor with respect to claims against defendant Hospital for damages arising out of the personal injuries sustained by Mrs. York. A new trial was granted on Mr. and Mrs. York's claims against defendant Hospital for loss of services and medical expenses of their son. *York v. Northern Hosp. Dist.*, 88 N.C. App. 183, 362 S.E.2d 859 (1987). Mr. and Mrs. York next filed a petition for discretionary review, which was denied by the North Carolina Supreme Court. *York v. Northern Hosp. Dist.*, 322 N.C. 116, 367 S.E.2d 922 (1988).

The present case was filed on 21 May 1987. The minor plaintiff seeks to recover for his injuries including medical expenses, lost wages and pain and suffering. After our Supreme Court denied Mr. and Mrs. York's petition for discretionary review in the prior action, Dr. Guidetti and Piedmont filed their motion for summary judgment. Following a hearing held on 18 July 1988, the trial court granted defendants' motion for summary judgment based on *res judicata* or collateral estoppel. From this order entered 4 August 1988 plaintiff appeals.

Daniel J. Park for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings and John D. Madden, for defendant-appellees.

WELLS, Judge.

Summary judgment should be granted when there is no genuine issue of material fact requiring a trial and one party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983). These defendants are entitled to summary judgment if the pleadings and other materials before the court show that the judgment in the prior action between Mr. and Mrs. York and the defendants is binding on the issue of defendants' liability in this case.

Plaintiff contends the judgment in the first action is not binding on the issue of defendants' liability in the second action. We agree.

"*Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the *same cause of action.*" *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 804 (1973) (emphasis added). *See also Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986) (discussing application of res judicata and collateral estoppel). When a court of competent jurisdiction has entered a final judgment on the merits in an action, *res judicata* bars subsequent litigation of the same claim by the original parties or their privies. *King*, 284 N.C. at 355, 200 S.E.2d at 804-5 and cases cited therein. *Res judicata* bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action. *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 367 S.E.2d 335, *disc. rev. denied*, 323 N.C. 173, 373 S.E.2d 108 (1988). *Res judicata* is inapplicable in this case because the present action seeks to recover for Matthew York's personal injuries, [his] medical expenses after reaching eighteen, and [his] lost wages and pain and suffering. The claims in the prior action were for Shirley York's personal injuries, loss of services of her minor child, and medical expenses incurred on behalf of her minor child, and for Donald York's loss of consortium, loss of services of his minor child, and medical expenses incurred on behalf of his minor child. While these claims arise from the same occurrence, they nevertheless constitute separate causes of action.

Collateral estoppel, a companion principal to *res judicata*, bars parties and those in privity with them from retrying *issues* that were fully litigated in a prior action. *Id.* at 92, 367 S.E.2d at 336; *King*, 284 N.C. at 356, 200 S.E.2d at 805. (Emphasis added.) Collateral estoppel bars only those issues actually decided and necessary to the prior verdict. *King*, 284 N.C. at 356, 200 S.E.2d at 805; *Goins*, 90 N.C. App. at 93, 367 S.E.2d at 337. Collateral estoppel is applicable to unrelated claims or causes of action as long as the prior action involved the same parties as well as the same issues. *Goins*, 90 N.C. App. at 92-3, 367 S.E.2d at 337.

Our courts have historically recognized that when a minor child is injured by the negligence of another, two causes of action arise: (1) An action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority; and (2) an action by the parent for (a) loss of the services and earnings of the child during minority and (b) expenses incurred for necessary medical treatment for the

child's injuries. *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E.2d 27 (1965) (citations omitted); 3 *R. Lee, North Carolina Family Law*, § 241 (4th ed. 1981).

The question presented in this case is whether plaintiff is barred from relitigating in this action the issue of defendants' negligence as the basis of recovery for his own injury and damages. Since collateral estoppel only applies if the prior action involved the same parties or those in privity with them, as well as the same issues, the question of whether plaintiff Matthew York is estopped from relitigating the issue of defendants' negligence depends on whether the identity of parties element has been met. Specifically, we focus on whether the identity of parties element of collateral estoppel is met when one serving in a representative capacity for an infant brings suit after an adverse decision on the same issue was rendered in a suit brought against the same defendants in one's individual capacity.

Our Supreme Court has held that one who conducts a suit as guardian or next friend for an infant is not a party of record, but that the infant himself is the real plaintiff. *Rabil v. Farris*, 213 N.C. 414, 196 S.E. 321 (1938) (citations omitted). Likewise, the court has said that a father appointed to serve as next friend for his son was an officer appointed by the court to protect his son's interest and was not a party in the legal sense. *Krachanake v. Manufacturing Co.*, 175 N.C. 435, 95 S.E. 851 (1918).

Shirley and Donald York were the plaintiffs in the prior action; Matthew York is the plaintiff in this case. He was not a party to his mother's claims in the prior action nor was he in privity with her. The fact that Mrs. York now represents the interests of her son in her capacity as guardian does not alter Matthew York's status as the real plaintiff in this action.

An exception to the general requirement of identity of parties exists when a person who is not a party to the action effectively controls the litigation. When the control exception applies, one found to have "controlled" the prior action is barred from subsequent litigation concerning the same issue or claim. Defendants contend that Shirley York should be estopped from bringing this suit on behalf of Matthew York based on this control exception. They cite *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957), in support of their position.

In *Thompson* a father was appointed his minor son's *guardian ad litem* in order to defend him in a negligence action. The son was involved in a collision while driving the family car. The father was later estopped from bringing a claim in his individual capacity based on the control exception. The court in *Thompson* stressed that the father's position as *guardian ad litem* did not remove the factual existence of a principal agent relationship based on the family purpose doctrine and *respondeat superior*.

This case is readily distinguishable from *Thompson*. In *Thompson* the father, who appeared in his representative capacity in the first action and in his individual capacity in the second action, controlled both actions. In this case, the real plaintiff, the minor Matthew Howard York, had no control over, or opportunity to control, the prior action in which his mother was a plaintiff.

The Restatement addresses the inapplicability of the control exception to a person serving in a representative capacity: "A person who undertakes to control litigation on behalf of another is affected only in the capacity in which he does so. . . . [A] person controlling an action in his individual capacity is not bound when in later litigation he appears in his capacity as a representative for another." *Restatement (Second) of Judgments*, § 39 comment e (1982). Other jurisdictions are in accord with this position. *See generally Gorski v. Deering*, 465 N.E.2d 759 (1984) (identity of parties element of collateral estoppel is not met where a litigant sues as an individual in one action and in a representative capacity in another); *Whitehead v. General Telephone Co. of Ohio*, 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969) (collateral estoppel does not bar a minor's action, by parent as next friend, for personal injuries following parents' unsuccessful action on same claim when child and parents were not in privity, child was not a real party to former suit and child had no control over that litigation); *Smittle v. Eberle*, 353 P.2d 121 (1960) (a parent who, as next friend of his minor child, brings a personal injury action is not regarded as a party or privy and is not estopped from bringing a subsequent action for consequential damages resulting from the child's injuries).

We agree with plaintiff that the control exception, without more, does not apply to one who serves in a representative capacity for an infant. If there had been another person acting as guardian for Matthew York, the control issue would not arise on these facts. *See, e.g., Thompson v. Hamrick*, 23 N.C. App. 550, 209 S.E.2d

305 (1974) (the fact that minor plaintiff's father was a party in a prior action with defendant was irrelevant to minor's right to prosecute, through his *guardian ad litem*, his separate cause of action). We therefore agree with plaintiff that the coincidence of his mother's previous litigation is not a sufficient basis for foreclosing this infant's opportunity to have his day in court.

By cross-assignment of error, defendants contend that their motion to dismiss this appeal was improperly denied by the trial court. They have filed no separate motion to dismiss in this Court. We have carefully considered this question, and based on the record in this case, we agree with the trial court that plaintiff's appeal was not subject to dismissal.

For the reasons stated, the order of summary judgment is

Reversed.

Judges PHILLIPS and PARKER concur.

JAMES PERRY HENDRICKS v. JULIA ANN HENDRICKS

No. 8930DC450

(Filed 5 December 1989)

1. **Divorce and Alimony § 30 (NCI3d)— equitable distribution— award of marital home to defendant—sufficiency of evidence**

Evidence was sufficient to support the trial court's award of the marital home to defendant where it tended to show that defendant had custody of her two sons; the sons lived in the home for most of their lives, remained there while the parties were separated, and attended schools very nearby; and defendant's income was significantly less than plaintiff's income.

Am Jur 2d, Divorce and Separation §§ 903, 923, 1025.

2. **Divorce and Alimony § 30 (NCI3d)— equitable distribution— failure to credit plaintiff with paying mortgage—error**

The trial court in an equitable distribution proceeding erred in failing to credit plaintiff with paying the entire

mortgage debt on the marital home after the parties' separation.

Am Jur 2d, Divorce and Separation § 893.

3. **Divorce and Alimony § 30 (NCI3d)— equitable distribution— gross fair market value of marital properties—improper value— plaintiff not prejudiced**

The trial court in an equitable distribution proceeding erred by including the gross fair market value of certain marital properties which had an outstanding Mastercard balance and then failing to credit plaintiff for the debt, since the division of marital property is to be accomplished by using the net value of the property, i.e., its market value less the amount of any encumbrance serving to offset or reduce market value; however, since plaintiff was awarded all of the items charged on the credit card in the property division award, such error was not prejudicial.

Am Jur 2d, Divorce and Separation § 937.

APPEAL by plaintiff from judgment entered 7 August 1988 by *Judge John J. Snow, Jr.* in HAYWOOD County District Court. Heard in the Court of Appeals 7 November 1989.

Plaintiff and defendant were married on 15 July 1972. The parties had two sons by their marriage: David Adam Hendricks, born 24 July 1975, and Nicholas Eugene Hendricks, born 14 November 1979.

The parties separated 25 August 1986 and on 11 September 1987, plaintiff filed a complaint seeking an absolute divorce, equitable distribution of the marital property, and incorporation of the parties' separation agreement into the judgment. Defendant filed an answer and counterclaim on 15 October 1987 seeking the same relief. Judgment of absolute divorce was granted at the 28 July 1988 Haywood County District Court Session and an equitable distribution hearing was immediately held thereafter. After hearing the oral testimony of the parties and receiving various exhibits, the trial court entered its equitable distribution judgment. It is from this judgment that plaintiff appeals.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers and Robert J. Lopez, attorneys for plaintiff-appellant.

Roberts, Stevens & Cogburn, P.A., by Max O. Cogburn, for defendant-appellee.

LEWIS, Judge.

It should be noted at the outset that the division of marital property is a matter within the sound discretion of the trial court, and its judgment should not be disturbed on review unless it is shown that the decision made was a clear abuse of discretion. *Johnson v. Johnson*, 78 N.C. App. 787, 790, 338 S.E.2d 567, 569 (1986). G.S. 50-20 requires an equitable division of the marital property.

Plaintiff has made eleven assignments of error all relating to the trial court's determination that an unequal division of the marital property was equitable. Under G.S. 50-20(c), an equal division is mandatory absent a determination that it would not be equitable. *Bradley v. Bradley*, 78 N.C. App. 150, 151, 336 S.E.2d 658, 659 (1985). The burden is upon the party seeking an unequal division of the marital property to prove by a preponderance of the evidence that an equal division would not be equitable. *Patton v. Patton*, 78 N.C. App. 247, 256, 337 S.E.2d 607, 613 (1985), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986). G.S. 50-20(c) enumerates twelve factors the court must consider when dividing the marital property. A single factor is sufficient, if supported by the evidence, to uphold an unequal distribution. *Andrews v. Andrews*, 79 N.C. App. 228, 235, 338 S.E.2d 809, 814, *cert. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

I

[1] Plaintiff first argues that there is insufficient evidence to support the trial court's Findings of Fact numbers 3-5 that the defendant should occupy the marital home and own its effects. The court below listed the following findings of fact as determinative of its decision to award the marital home and its furnishings to the defendant:

> 3. During the separation of the parties the two (2) minor children of the parties lived in this marital home and because this marital home was deemed to be important to the welfare and security of the children, the Court allowed the children

to remain in the home during the period of separation, moving the Plaintiff in for a period and then moving the Defendant in for a period but allowing the children to remain in the home.

4. The marital home of the parties is located near the school which the younger child attends and it is in the best interests of the children to reside in that marital home.

5. Defendant has custody of the two (2) minor children of the parties and Defendant needs to occupy and own the marital residence and to use and own its household effects, to provide a home for the minor children of the parties.

6. While there is evidence that there were marital debts owed by the parties at the date of their separation (a matter which this Court will deal with in this Judgment), the evidence before the Court tends to show that the major portion of those debts has now been paid.

7. Plaintiff is employed at Champion Papers, Inc. in Canton, North Carolina, where he earns $15.44 per hour. In 1986 he earned $40,000.00 from his employment at Champion Papers, Inc. but now Defendant has reduced the number of hours he works, a reduction which he has himself caused to be made, and his annual earnings at Champion Papers, Inc. are $32,115.20. In addition, Plaintiff is a member of the National Guard and from this membership he receives $165.00 each month plus $700.00 for summer camp for a total of $2,680.00 each year. Plaintiff has been employed by Champion Papers, Inc. for approximately fourteen (14) years and his employment appears to be stable and established.

8. Defendant has recently been employed by the Health Department of Haywood County. During the marriage of the parties and prior to their separation, Defendant attended Western Carolina University where she obtained her Nursing Degree. Although Plaintiff contends that he paid tuition, transportation, and provided books for a portion of this period, Defendant's father paid some tuition and provided some further assistance and it appears to the Court that the Defendant cared for her family and provided for the children while she attended this schooling.

9. From her employment at Haywood County Health Department, Defendant presently earns Twenty Thousand

Eight Hundred ($20,800.00) Dollars each year which is paid in equal bi-weekly payments.

10. While Plaintiff is paying some child support to Defendant pursuant to Order of the Court in another action, Defendant is supporting herself, has voluntarily relinquished any right to receive any support from Plaintiff and is contributing to the support of the two (2) children of the parties.

11. Though both parties appear to be in good physical and mental health, this marriage had a duration of more than 14 years prior to the separation of the parties, and during that period Defendant cared for the home, provided for the children, and continues to care for the children in the home.

We find that the trial court's findings are supported by the evidence and are sufficient to support the court's award of the marital home to the defendant. In *Patterson v. Patterson*, 81 N.C. App. 255, 343 S.E.2d 595 (1986), we found that the trial court's award of the marital residence to the defendant was justified based upon the trial court's findings that defendant had sole custody of the child. "[T]his factor alone justifies the unequal distribution of marital property. . . ." 81 N.C. App. 260, 343 S.E.2d at 599. Like *Patterson*, the defendant has custody of her two sons. Furthermore, testimony at the equitable distribution hearing showed that the sons lived in the home for most of their lives, remained there while the parties were separated, and attended schools very nearby. These factors alone justify the award of the marital residence to the defendant. Additionally, G.S. 50-20(c)(4) allows the trial court to consider the need of the *parent* with custody of the child or children to occupy the marital residence. The trial court made findings that the defendant's income was significantly less than the plaintiff's income. This disparity supports an award of the marital home to the defendant because the defendant would have greater difficulty finding and affording comparable housing for herself and the children. Disparity of the income of the parties could itself justify a disproportionate award. G.S. 50-20(c)(1).

Plaintiff's assignments of error as to findings of fact numbers 1, 10 and 12 are without merit. He contends that these findings are unsupported by the evidence and are irrelevant. We disagree. G.S. 50-20(c) directs the trial court to consider (c)(1), the income and liabilities of each party (finding of fact number 7) and (c)(5), the plaintiff's expectation of non-vested pension benefits (finding

of fact number 12). Finding of fact number 10 merely states that each party contributes to the support of the minor children and that defendant relinquishes any right to alimony. The court's finding is consistent with G.S. 50-20(f), which provides that equitable distribution shall be awarded "without regard to alimony for either party. . . ."

The factors considered by the trial court discussed above all support the trial court's finding that an unequal division of the marital property is equitable. So long as the trial court has not abused its discretion, it is not our job to re-evaluate the evidence and make our own distribution on appeal. The trial court could have weighed the evidence differently and awarded the defendant wife no more than an equal share of the property. However, we find sufficient evidence to support the distribution awarded by the court; therefore, there is no abuse of discretion. *See White v. White*, 312 N.C. 770, 778, 324 S.E.2d 829, 833 (1985).

Because we find that an unequal division of the marital property is equitable, we do not address plaintiff's other assignments of error other than to find that they too are without merit.

II

[2] Plaintiff further argues that the trial court committed prejudicial error in failing to credit the plaintiff with paying the entire mortgage debt on the marital property. The mortgage debt on the date of separation was $5,750.00. The court found that during the separation of the parties, the plaintiff paid the balance of the debt. The trial court also found that the plaintiff and the defendant shared custody of the children by alternating their presence in the marital home. Based upon these findings, the court ruled that the plaintiff was entitled to a set-off of only half of the balance of the mortgage debt paid during the parties' separation. We agree with the plaintiff.

In *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987), this Court held that mortgage payments made after separation entirely consisting of the separate property of the payor defendant should be credited to him at least to the extent that the payments decreased the principal owed on the marital home. *Id.* at 491, 355 S.E.2d 523. Based upon this holding, we find that the trial court erred in failing to credit the plaintiff with the entire $5,750.00 balance paid by the plaintiff.

[3] Finally, the plaintiff contests the trial court's finding that he should pay the entire balance due on the parties' Mastercard. The court found that the only remaining debt of the parties at the time of the separation proceeding was their $948.46 Mastercard bill. The trial court found that because the primary charges on the credit card were items the plaintiff was receiving in the equitable distribution proceeding, he should be responsible for payment of the entire bill. Plaintiff argues that the court erred in its equitable distribution judgment by including the gross fair-market value of those marital properties which had an outstanding Mastercard balance and then failing to credit him for the debt. We agree. The division of marital property is to be accomplished by using the net value of the property, i.e., its market value less the amount of any encumbrance serving to offset or reduce market value. *See* G.S. 50-20(c); *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985). However, since the plaintiff was awarded all of the items charged on the credit card in the property division award, we hold that this error was not prejudicial.

In conclusion, we affirm the equitable distribution of the marital property but find that the trial court erred in failing to credit the plaintiff with the full $5,750.00 payment of the mortgage debt. Consistent with this opinion, the judgment appealed from is vacated and remanded.

Affirmed in part, vacated in part and remanded.

Judges JOHNSON and COZORT concur.

IN THE MATTER OF: APPEAL OF COASTAL RESOURCES COMMISSION DECISION AGAINST NORTH TOPSAIL WATER AND SEWER, INC.

No. 894SC193

(Filed 5 December 1989)

Waters and Watercourses § 7 (NCI3d) — unlawful filling of estuarine waters — notification to landowner — willful violation of Coastal Area Management Act

The trial court erred in concluding that there was insufficient evidence to support the Coastal Resources Commission

findings that petitioner's unlawful filling of estuarine waters with sediment laden water for nineteen days after notification that petitioner was in violation of the Coastal Area Management Act constituted a willful violation of the Act, since petitioner received six certified letters notifying him of his violation and telling him measures which must be taken to rectify the problem, but petitioner continued to take no action or ineffective action for nineteen days.

Am Jur 2d, Pollution Control §§ 129, 211; Waters § 3.

APPEAL by respondent from judgment entered 15 September 1988 by *Judge David E. Reid* in ONSLOW County Superior Court. Heard in the Court of Appeals 14 September 1989.

This is a civil action in which respondent, North Carolina Coastal Resources Commission, sought reversal of a judicial decision which partially vacated an assessment of civil penalties against petitioner, North Topsail Water and Sewer, Inc., in the amount of $19,000.00.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for respondent-appellant, North Carolina Coastal Resources Commission.

Lanier & Fountain, by Gordon E. Robinson, Jr., for petitioner-appellee.

JOHNSON, Judge.

In 1982, Marlow F. Bostic, president of North Topsail Water and Sewer, Inc. (petitioner), applied to the North Carolina Division of Environmental Management (DEM) for a permit to construct a spray irrigation wastewater treatment facility on a tract of land east of Highway 210 and adjacent to two tributaries of Mill Creek in Onslow County.

Mill Creek and its tributaries are seaward of the dividing line between inland and coastal waters and therefore constitute "estuarine waters" for purposes of the Coastal Area Management Act (CAMA). CAMA permits are required for any "development," as defined in G.S. sec. 113A-103, in estuarine waters or within 75 feet of estuarine waters. The permit application submitted by petitioner to DEM did not show any development activity in the northwest tributary or within 75 feet of the tributary—the area

subject to CAMA jurisdiction. DEM issued petitioner a permit for the treatment facility on 11 May 1982.

In 1983, petitioner began clearing, grading and filling on the three hundred acre site. In preparing the site, petitioner excavated four drainage ditches although no drainage ditches had been depicted on the development plan submitted by petitioner to DEM for review.

In late fall or early winter of 1983, petitioner also excavated the bed of the northwest tributary with a backhoe. No excavation in the tributary had been depicted on the development plan submitted by petitioner to the DEM and petitioner did not obtain a CAMA permit prior to undertaking the excavation.

On 19 December 1983, Division of Coastal Management (DCM) officials discovered the excavation in the northwest tributary. At that time, DCM officials found evidence of disturbance in the creek bed and uncontained spoil piles of five to six feet in height along the banks. DCM also found petitioner's four drainage ditches and observed that three of the four were carrying sediment-laden water from petitioner's project site directly into the northwest tributary.

DCM staff returned to the site on 25 January, 31 January, and 13 February 1984; DCM determined that the tributary and its shoreline was within CAMA permitting jurisdiction. On 13 February, DCM staked a location for construction of an earthen dam in the northwest tributary to slow its flow and reduce the amount of sediment introduced into the primary nursery areas.

By Notice of Violation dated 24 February 1984, DCM directed petitioner to install an earthen dam in the northwest tributary at the location staked by DCM officials no later than noon on 8 March 1984. The letter further advised petitioner that failure to install the dam by noon on 8 March 1984 would result in a continuing violation and that each day petitioner failed to comply would be considered a separate violation.

On the afternoon of 8 March 1984, DCM officials found that no dam had been installed and no steps had been taken preparatory to damming the area. Muddy water continued to flow into the northwest tributary from petitioner's drainage ditches.

On 9 March 1984, DCM found that the tributary still had not been dammed. Based upon the 9 March 1984 inspection, DCM sent a Notice of Continuing Violation to petitioner. The letter advised

him that each day the filling of estuarine waters continued because of failure to dam the tributary would be considered a separate violation subject to a $2,500.00 per day penalty.

A site inspection on 13 March 1984 revealed that a partial dam had been installed, but was not working properly. DCM sent a second Notice of Continuing Violation dated 13 March 1984 to petitioner. This letter described the necessary steps to bring the tributary into compliance.

Inspection by DCM officials on 27 March 1984 revealed that no additional work had been done on the dam and that muddy water had continued to flow into the lower section of the northwest tributary. On 28 March 1984, DCM found that corrective work had begun on the dam. When DCM officials returned to the site on 29 March 1984 the dam was effectively diverting the sediment-laden water of the northwest tributary into an adjacent wooded swamp and preventing its introduction into primary nursery areas. At that point, petitioner had come into compliance with DCM's restoration order of 24 February 1984.

DCM assessed three civil penalties against petitioner. The first penalty in the amount of $2,500.00 was assessed for the excavation and alteration of the northwest tributary without a CAMA permit. The second penalty of $2,500.00 resulted from petitioner's filling of approximately 25,500 square feet of primary nursery with sand and silt.

The third penalty assessed against petitioner, the issue presented on appeal, was a penalty for filling primary nursery areas each of the nineteen days that sediment-laden water continued to enter the primary nursery area after noon on 8 March 1984. The civil penalty of $19,000.00 reflected DCM's determination that petitioner acted willfully. This determination was upheld under the North Carolina Coastal Resources Commission's (Commission) Use Standards.

Respondent's sole contention on appeal is that the trial court erred in concluding that there was insufficient evidence, in view of the entire record, to support the Commission's findings that the unlawful filling of estuarine waters for nineteen days, after the specified deadline, constituted a willful violation of CAMA. We agree.

The scope of an appellate review of a trial court's order affirming or reversing a final agency's decision is governed by G.S. sec. 150B-52. This Court must determine whether the trial court committed any errors of law. These errors of law, if present, could be the result of an improper application of the standard of review as articulated in G.S. sec. 150B-51. *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983).

If an "agency's findings, inferences, conclusions or decisions are unsupported by substantial evidence . . . in view of the entire record as submitted," the reviewing court may "reverse or modify the agency's decision." G.S. sec. 150B-51(5). The statute, as interpreted by the N.C. Supreme Court, maintains the whole record test as the standard of a judicial review for issues arising under the dictates of the Administrative Procedure Act. *In the Matter of the Appeal of K-Mart Corp.*, 319 N.C. 378, 380, 354 S.E.2d 468, 469 (1987).

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Goodwin v. Goldsboro Board of Education, 67 N.C. App. 243, 245, 312 S.E.2d 892, 893-94, *cert. denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).

We must look at the trial court's decision in light of this standard of review. It is important to note, however, that "[t]he 'whole record' test is not a tool of judicial intrusion; instead it merely gives [this] court the capability [of] determin[ing] whether [the] administrative decision has a rational basis in the evidence." *Id.*

Under the applicable section of CAMA, the Commission is authorized to "consider each day the action or inaction continues

after notice is given of the violation as a separate violation [and] a separate penalty may be assessed for each such separate violation," where the action or inaction is willful. G.S. sec. 113A-126(d)(2).

In the case *sub judice*, petitioner was instructed, by Notice of Violation, to construct an earthen dam by noon on 8 March 1984. This notice was dated 24 February 1984. An inspection of the site on 8 March 1984 by DCM officials revealed that no dam had been constructed and no steps had been taken to damming the area. On the following afternoon, DCM officials once again inspected the area and found that the tributary still had not been dammed. A Notice of Continuing Violation, advising the petitioner that each day filling the estuarine water continued because of a failure to dam the tributary would be considered a separate violation subject to a penalty of up to $2,500.00 per day.

On 13 March 1984, another site inspection was conducted and yielded the construction of a partial dam, but it was not functioning properly. A second Notice of Continuing Violation was sent to petitioner and provided a description of the necessary steps to bring the area into compliance.

An inspection by DCM officials on 27 March 1984 revealed no additional work had been done on the dam and that muddy water had continued to flow into the lower section of the northwest tributary.

On 28 March 1984, DCM officials found that corrective work had begun on the dam. When DCM officials returned to the site on 29 March 1984, the dam was finally in compliance with DCM's restoration order of 24 February 1984.

DCM assessed petitioner with a civil penalty of $1,000.00 per day for each of the nineteen days that sediment-laden water continued to enter the primary nursery area after noon on 8 March 1984. The $1,000.00 per day fine manifested a doubling of the base penalty of $500.00 per day as mandated by the Commission's civil penalty schedule. The doubling of the base penalty resulted from the DCM's determination that petitioner acted willfully.

We believe the record contains ample evidence to support the Commission's findings and conclusions that the petitioner's continued inactions were willful. We note that the petitioner received a certified letter notifying him that the tributary was in violation as early as 6 February 1984.

Although petitioner acknowledges the physical receipt of six such letters, he also avows to not having read any of them.

This Court finds substantial evidence in the record to support the Commission's determination that petitioner's pattern of intentional resistance amounted to willful noncompliance. The trial court's application of the "whole record test" was improperly applied.

Accordingly, for the aforementioned reasons, the judgment of the trial court vacating the assessment of civil penalties is reversed and the matter is remanded for reinstatement of the Coastal Resources Commission's order in full.

Reversed and remanded.

Judges EAGLES and GREENE concur.

K & K DEVELOPMENT CORPORATION, PLAINTIFF v. COLUMBIA BANKING FEDERAL SAVINGS AND LOAN ASSOCIATION, AMC BUILDERS, INC., CAROLINA BUILDERS CORPORATION, LARRY E. ROBBINS, HAROLD E. RUSSELL, JR., AND MICHAEL L. SWARINGEN, DEFENDANTS

No. 8910SC283

(Filed 5 December 1989)

1. **Appeal and Error § 6.2 (NCI3d) — interlocutory order — attorney fees awarded — substantial right affected — order appealable**

Though the appeal was from an interlocutory order because it did not dispose of the cause of action as to all the parties, it nevertheless affected a substantial right and was appealable because the trial court's entry of summary judgment against plaintiff included an award of attorney's fees.

Am Jur 2d, Appeal and Error §§ 47, 49.

2. **Laborers' and Materialmen's Liens § 9 (NCI3d) — work performed to enforce protective covenants — no priority over earlier deed of trust**

There was no merit to plaintiff's contention that, because the work giving rise to its asserted lien was performed in order to enforce protective covenants, it was entitled to a judgment or lien which had priority over defendant's deed of

trust lien which was recorded over a year before plaintiff first furnished labor or materials.

Am Jur 2d, Mechanics' Lien § 268.

3. **Attorneys at Law § 7.5 (NCI3d) — action not completely void of justiciable issue — award of attorney's fees improper**

Plaintiff's claim to a lien having priority over defendant's lien was not an action completely void of a justiciable issue, and plaintiff made a good faith, albeit unsuccessful, attempt to extend N.C. law as it applies to the enforcement of covenants and conditions; therefore, the trial court erred in awarding defendants attorney's fees pursuant to N.C.G.S. § 6-21.5.

Am Jur 2d, Costs § 72.

4. **Appeal and Error § 13 (NCI3d) — appeal not frivolous — motion for sanctions denied**

Plaintiff's appeal from summary judgment denying its right to a lien having priority over defendant's lien was not frivolous, and defendants' motion for sanctions against plaintiff pursuant to Rule 34 of the N.C. Rules of Appellate Procedure was denied.

Am Jur 2d, Appeal and Error § 1024.

APPEAL by plaintiff from *Bailey, James H. Pou, Judge*. Order entered 12 December 1988 in WAKE County Superior Court. Heard in the Court of Appeals 12 October 1989.

Plaintiff appeals from an order granting summary judgment and attorney's fees in favor of defendants Larry E. Robbins, trustee, and Columbia Banking Federal Savings and Loan Association.

Plaintiff is the developer of Carrington Woods subdivision in Knightdale, North Carolina. On 20 May 1986 plaintiff sold Lot 56 in this subdivision to defendants AMC Builders, Inc. and Michael L. Swaringen. Defendant AMC Builders, Inc. executed a deed of trust to defendant Robbins as trustee for defendant Columbia Banking Federal Savings and Loan Association (hereinafter Columbia). This deed of trust was recorded 27 May 1986 in Wake County. A second deed of trust was executed by defendant AMC Builders, Inc. to defendant Harold E. Russell, Jr. as trustee for defendant Carolina Builders Corporation. The second deed of trust was recorded 23 February 1988. Lot 56 is subject to protective covenants which in pertinent part provide:

ARTICLE XII

APPEARANCE. Each Owner shall keep his building site free of tall grass, undergrowth, dead trees, trash and rubbish and property maintained so as to present a pleasing appearance. In the event an owner does not properly maintain his building site as above provided, in the opinion of the Architectural committee, then Declarant may have the required work done and the costs thus incurred shall be paid by the Owner.

The Architectural Committee referred to in Article XII of the protective covenants determined that defendants Michael L. Swaringen and AMC Builders did not properly maintain Lot 56, which had become a building site. On 5 June 1987, pursuant to the Architectural Committee's decision, plaintiff's lawyer wrote to defendant Swaringen informing him that defendants Swaringen and AMC Builders were in violation of Article XII and that plaintiff had been contacted by the State Sedimentation Control Agency regarding possible fines and penalties. The letter further stated that if the problems were not corrected, plaintiff intended to exercise its rights under the protective covenants to remedy the problems and charge the costs to those defendants. Plaintiff began such work on 8 June 1987, and completed work on 14 March 1988. Plaintiff made demand upon defendants Swaringen and AMC Builders for payment of $4,746.67, the sum expended in bringing the lot into compliance with the terms of the protective covenants. Defendants Swaringen and AMC Builders have not made any payment to plaintiff.

On 14 March 1988 plaintiff filed a "Claim of Lien" in the Office of the Clerk of Superior Court of Wake County pursuant to Article 2 of Chapter 44A of the North Carolina General Statutes. On 13 June 1988 plaintiff instituted an action to enforce this lien, and to establish its priority over other liens and rights in the property.

When default was made in the payment of the indebtedness owed defendant Columbia and secured by the first deed of trust, defendant Robbins, trustee, foreclosed on that deed of trust. The property was sold to defendant Columbia on 29 July 1988 and a trustee's deed was executed to defendant Columbia pursuant to applicable foreclosure laws on 11 August 1988.

Plaintiff filed a notice of *lis pendens* pursuant to N.C. Gen. Stat. § 1-116 (1983) on 6 October 1988. On 14 October 1988 defend-

ants Robbins, trustee, and Columbia moved for summary judgment on the issue of priority between their deed of trust and plaintiff's lien. On 17 November 1988 these defendants also filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 (1986). From the trial court's grant of both motions, plaintiff appeals.

Brenton D. Adams and Grier J. Hurley for plaintiff-appellant.

Wyrick, Robbins, Yates & Ponton, by Eric A. Vernon, for defendants-appellees Larry E. Robbins and Columbia Banking Federal Savings and Loan Association.

WELLS, Judge.

[1] As a preliminary matter we note that this is an appeal from an interlocutory order because the trial court's order did not dispose of the cause of action as to all of the parties. *See* N.C. Gen. Stat. § 1A-1, Rule 54(a) and (b) of the N.C. Rules of Civil Procedure. Both N.C. Gen. Stat. § 1-277(a) (1983) and N.C. Gen. Stat. § 7A-27(d) (1986) provide for the appeal of any order—final or interlocutory—which affects a substantial right of a party. *Whitehurst v. Corey*, 88 N.C. App. 746, 364 S.E.2d 728 (1988). In this case the trial court's entry of summary judgment against plaintiff included an award of attorney's fees and therefore affected a substantial right. Consequently, we treat the order as immediately appealable pursuant to G.S. § 1-277(a) and G.S. § 7A-27(d) and proceed to address the merits of the case.

[2] Plaintiff first contends that summary judgment was improvidently granted. Summary judgment is appropriate when there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). Plaintiff contends that summary judgment was inappropriate because a genuine issue of material fact remains as to whether plaintiff was entitled to a judgment or lien against Lot 56 which has priority over the mortgage held by Columbia. Plaintiff argues that because the work giving rise to its asserted lien was performed in order to enforce Section XII of the protective covenants, it is entitled to a judgment or lien which has priority over defendant Columbia's deed of trust lien. Plaintiff is unable to cite specific authority for its position and instead relies on the general law of conveyancing in this State, especially the well-established tenet that a grantee or purchaser who accepts a deed containing valid covenants is bound for the performance of such

covenants. *Beech Mountain Property Owners v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980), *citing Cummings v. Dosam, Inc.*, 273 N.C. 28, 159 S.E.2d 513 (1968). While we agree that Columbia (and any subsequent purchaser of Lot 56) would be bound by the restrictive covenants on the property, *see J. Webster, Real Estate Law in North Carolina*, §§ 386-87 (3d ed. 1988), we nevertheless cannot agree that this rule of conveyancing governs the resolution of this case.

At the time plaintiff's lien arose, the only connection between Columbia and Lot 56 was the deed of trust recorded 27 May 1986. When a deed of trust or a mortgage of real property is duly recorded it gives the mortgagee priority over competing claims that may later arise. *See* N.C. Gen. Stat. § 47-20 (1984). An exception to this general rule occurs when a subsequently recorded mechanics', laborers' or materialmen's lien relates back to a date prior to the recordation of the deed of trust or mortgage. Pursuant to N.C. Gen. Stat. § 44A-10 (1984), a properly recorded lien relates back to the first furnishing of labor or material at the site of the improvement. It is undisputed that plaintiff first furnished labor or materials at Lot 56 on 8 June 1987. This was over a year after defendant Columbia's deed of trust was recorded. Plaintiff does not have priority over defendant Columbia in this case and these defendants were entitled to judgment as a matter of law. The trial court's grant of summary judgment was therefore proper.

[3] Plaintiff's next four assignments of error challenge the award of attorney's fees to defendants pursuant to N.C. Gen. Stat. § 6-21.5 (1986). Plaintiff first argues that the complaint raised justiciable issues of law and fact.

G.S. § 6-21.5 allows the trial court to "award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The complete absence of a justiciable issue is the only basis for the award of attorney's fees under this section. *Bryant v. Short*, 84 N.C. App. 285, 352 S.E.2d 245, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 2 (1987). The statute further provides that a motion for summary judgment is not in itself sufficient to justify an award of attorney's fees, although it may be evidence in support of such an award. Whenever a party advances a claim or defense supported by a good faith argument for an extension, modification,

or reversal of law, attorney's fees may not be required under this statute.

In *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555, *disc. rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986) (*citing Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)), the court explained that the presence or absence of justiciable issues in pleadings is a question of law. The sufficiency of plaintiff's pleadings to raise a justiciable issue is therefore reviewable by this Court. *Id.* at 325, 344 S.E.2d at 565.

A justiciable issue has been defined as an issue that is "real and present as opposed to imagined or fanciful." *In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988) (*citing Sprouse, supra*). In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. *Id.* at 682-3, 373 S.E.2d at 325. (Citation omitted.)

Our review of plaintiff's claim as it applies to these defendants does not conclusively reveal the complete absence of a justiciable issue at this stage of the proceedings. Furthermore, plaintiff has made a good faith, albeit unsuccessful, attempt to extend North Carolina law as it applies to the enforcement of covenants and conditions. We therefore reverse the award of attorney's fees. We need not address plaintiff's remaining assignments of error as to this issue.

[4] Finally, defendants filed a motion in this Court for sanctions against plaintiff pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure (amended 8 December 1988 and effective July 1989). Rule 34 authorizes an appellate court to impose sanctions against an attorney or party or both when the court determines that an appeal or any proceeding in an appeal was frivolous. For Rule 34 purposes an appeal is frivolous if:

(a) . . .

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

Defendant argues that this appeal is frivolous for the reasons given in subsections (a)(1) and (2). Based on our review of the record we reject these arguments and deny the motion for sanctions pursuant to Rule 34.

Affirmed as to the grant of summary judgment.

Reversed as to the order awarding attorney's fees.

Motion for sanctions in this Court denied.

Judges JOHNSON and ORR concur.

ROBERT GEORGE LOPEZ, PLAINTIFF v. JERRY WARNER SNOWDEN AND THE CITY OF ASHEVILLE, DEFENDANTS

No. 8928SC465

(Filed 5 December 1989)

Automobiles and Other Vehicles § 57.4 (NCI3d) — intersection collision with fire truck — summary judgment improper

In an action to recover for injuries sustained in a collision with a fire truck the trial court erred in entering summary judgment for defendants where there were issues of fact as to whether defendant driver had his siren on; whether it could be heard for the statutorily prescribed distance; whether plaintiff could have heard it as he approached the intersection where the accident occurred; whether defendant driver's decision to go around the cars blocking the intersection by means of the mandatory right turn lane instead of choosing the unoccupied lanes to the left of the stopped cars may have been misleading to other motorists, unnecessarily restricting defendant's view of the intersection, and restricting plaintiff's view of the fire engine; whether it was negligence for defend-

ant to accelerate to the speed of 15-20 m.p.h. before the fire engine had completely cleared the intersection without first determining that the intersection was clear and that all traffic had stopped; and whether plaintiff was contributorily negligent.

Am Jur 2d, Automobiles and Highway Traffic §§ 418, 835-837, 975.

APPEAL by plaintiff from an order entered 30 January 1989 in BUNCOMBE County Superior Court by *Judge Charles C. Lamm, Jr.* Heard in the Court of Appeals 7 November 1989.

On 23 June 1987 at approximately 9:00 p.m., plaintiff's Volkswagen and an Asheville Fire Department fire truck driven by defendant Jerry Snowden collided. The accident occurred at an intersection which is controlled by a three-light traffic signal. Defendant's fire engine had been dispatched in response to an alarm and was operating a rotating beacon light plus flashing lights on the front and rear. Defendant Snowden and his captain testified upon deposition that the engine's siren was on. Two witnesses to the incident testified that they heard the siren whereas three witnesses testified that they did not hear it. When the fire engine approached the intersection, the lanes were blocked by vehicles which had been stopped by a red light. Snowden moved the fire truck to the right of those vehicles into a mandatory right turn lane and slowed or stopped. This outside, or curb lane, curves sharply to the right and is controlled by a yield sign. Snowden then increased the speed of the fire truck and proceeded through the intersection. Plaintiff approached the intersection from the fire truck's right and had the green light. Plaintiff's Volkswagen struck the right front of the fire truck and subsequently collided with another automobile. The fire truck was two-thirds through the intersection at the point of impact. Plaintiff sustained severe personal injuries. Plaintiff instituted this action and defendants moved for summary judgment. The trial judge entered summary judgment on behalf of both defendants. Plaintiff appeals.

Moore, Lindsay & True, by Stephen P. Lindsay, for plaintiff-appellant.

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

LEWIS, Judge.

The North Carolina Rules of Civil Procedure provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. Section 1A-1, N.C.R.Civ.P. 56(c). All evidence before the court must be construed in the light most favorable to the nonmoving party. The slightest doubt as to the facts entitles the nonmoving party to a trial. *Miller v. Snipes*, 12 N.C. App. 342, 344-45, 183 S.E.2d 270, 272, *cert. denied*, 279 N.C. 619, 184 S.E.2d 883 (1971). Summary judgment is usually not appropriate in negligence cases where the standard of the prudent man must be applied. *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). It is only in the exceptional negligence case that summary judgment should be invoked. *Id.*

> This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries.

Id.

The provisions of North Carolina General Statutes Section 20-156(b) control in determining the standard for examining this accident.

> The driver of a vehicle upon the highway shall yield the right-of-way to . . . fire department vehicles . . . when the operators of said vehicles are giving a warning signal by appropriate light and by . . . siren . . . audible under normal conditions from a distance not less than 1,000 feet. When appropriate warning signals are being given, as provided in this subsection, an emergency vehicle may proceed through an intersection . . . when the emergency vehicle is facing . . . a traffic light which is emitting . . . a beam of steady . . . red light. This provision shall not operate to relieve the driver of a . . . fire

> department vehicle . . . from the duty to drive with due regard for the safety of all persons using the highway. . . .

Plaintiff contends that defendant negligently failed in his duty to operate the fire engine with due regard for plaintiff's safety in three respects.

I: SIREN

There is conflicting evidence concerning the question of whether or not defendant Snowden did, in fact, have his siren on, whether it could be heard for the statutorily prescribed distance, and whether plaintiff could have heard it as he proceeded up the exit ramp towards the intersection. Although two witnesses testified that they heard the sirens, three witnesses who were also stopped at the intersection at the time of the accident stated that they did *not* hear a siren. One witness, Robert Atkins, testified that he had his windows rolled up and that he was playing his radio "pretty loud" listening to a rendition of Led Zepplin of "Stairway to Heaven." There were, however, two other witnesses, Scott Gardner and Phillip Lewis Roberts, under no listening disability, who stated that even though they could see the fire truck, they did not hear a siren. *McEwen Funeral Service, Inc. v. Charlotte City Coach Lines, Inc.*, 248 N.C. 146, 151, 102 S.E.2d 816, 820-21 (1958), holds that no duty rests on an operator of a motor vehicle making normal use of a highway to yield right-of-way to another vehicle on an emergency mission until an appropriate warning has been directed to him and he has a reasonable opportunity to yield his right-of-way. Conflicting testimony such as that found in this case raises a jury question and indicates that summary judgment is not a proper disposition of these questions.

II: ELECTION OF LANES

Defendant Snowden's decision to go around the cars blocking the intersection by means of the mandatory right turn lane instead of choosing the unoccupied lanes to the left of the stopped cars may have been misleading to other motorists, unnecessarily restricting the defendant's view of the intersection, and restricting plaintiff's view of the fire engine. When defendant Snowden came to the intersection, he was blocked by traffic in all three northbound lanes. Instead of moving out to his left into the unoccupied southbound lanes where oncoming traffic was stopped at the stoplight and could see him, and from which point he would have had a

wider view of the intersection, he chose instead to go to the right of the stopped cars. He moved into the mandatory right turn lane, causing a vehicle to back up to let him through and he then squeezed between a traffic island and the traffic lane in order to enter the intersection. Ordinarily, traffic entering that intersection at a right angle to the direction of the fire truck could ignore traffic in the mandatory right turn lane since vehicles in that lane would proceed away from the intersection and would pose no threat to traffic entering the intersection. Defendant Snowden's election of lanes could have misled plaintiff who would not have anticipated that a vehicle would enter the intersection from a mandatory right turn lane. Plaintiff's view of the fire engine was also limited because of defendant's election of lanes since there were vehicles higher than plaintiff's occupying the inside lane located between plaintiff and the fire truck.

III: SPEED

Defendant Snowden increased the speed of the fire engine once he entered the intersection to approximately 15-20 miles per hour at the time of the collision. At that speed, it is possible that defendant could not have stopped even had he maintained proper lookout for plaintiff. Plaintiff contends that it was negligence for defendant to accelerate to the speed of 15-20 miles per hour before the fire engine had completely cleared the intersection, pointing out defendant's alleged failure first to determine that the intersection was clear and that all traffic had stopped before defendant proceeded through the intersection against the red light. There are questions of fact upon which reasonable persons could differ; therefore, summary judgment is not appropriate.

Defendants allege that "even if, assuming *arguendo*, that the evidence does suggest some negligence upon the part of Defendant, the evidence further reveals Plaintiff to be contributorily negligent as a matter of law." The applicable law concerning the appropriate weight given to issues of contributory negligence in summary judgment actions was discussed in *Langley v. R.J. Reynolds Tobacco Company*, 92 N.C. App. 327, 330, 374 S.E.2d 443, 446 (1988), *disc. rev. denied*, 324 N.C. 433, 379 S.E.2d 241 (1989).

> Issues of contributory negligence, like those of ordinary negligence, are rarely appropriate for summary judgment. Summary judgment will only be granted where plaintiff's own

evidence so clearly discloses contributory negligence that no other reasonable conclusion could be reached. (Citations omitted.)

Plaintiff's forecast of the evidence is that plaintiff proceeded from the exit ramp towards the intersection in his small, noisy Volkswagen beetle; that his view of the intersection was obstructed, first by a hill, then by vehicles higher than his which were occupying the inside lane; that he, like others in the vicinity of the intersection, did not hear any siren; and that plaintiff neither saw nor heard the fire engine coming. When viewed in the light most favorable to the plaintiff, the available evidence is insufficient to either support or compel a conclusion that plaintiff was contributorily negligent as a matter of law. *See Meadows v. Lawrence*, 75 N.C. App. 86, 88, 330 S.E.2d 47, 49 (1985), *aff'd per curiam*, 315 N.C. 383, 337 S.E.2d 851 (1986).

The summary judgment entered on behalf of defendants is reversed and remanded.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

D. P. BRUTON, PLAINTIFF v. SEA CAPTAIN PROPERTIES, INC., RALPH SERRAPEDE AND WIFE, KATHLEEN SERRAPEDE, C. THOMAS QUALEY AND WIFE, CHRISTINE A. QUALEY, FRED NAHAS AND WIFE, VIRGINIA NAHAS, AND JAMES R. NANCE, JR., TRUSTEE, DEFENDANTS

No. 8913SC540

(Filed 5 December 1989)

Rules of Civil Procedure § 60.1 (NCI3d)— motion to set aside judgment—excusable neglect alleged—motion not timely

The trial court properly denied defendants' N.C.G.S. § 1A-1, Rule 60(b) motion to set aside judgment against them where defendants were residents of Pennsylvania and requested their Pennsylvania attorney to obtain N.C. counsel to represent them in this state; defendants relied upon representations by their Pennsylvania attorney that their interests were being taken care of; in fact no one was "minding the shop" in N. C. and a judgment of nearly $500,000 was entered against them; de-

fendants contended that they should be excused for failing to take further measures to keep informed about the status of their case; but defendants waited 29 months after entry of judgment and thus failed to comply with the express requirement of Rule 60 that their motion be made not more than one year after entry of the judgment.

Am Jur 2d, Judgments §§ 699, 704, 718.

APPEAL by defendants Fred Nahas and wife Virginia Nahas, C. Thomas Qualey individually and as Ancillary Administrator of the Estate of Christine A. Qualey from order entered 17 February 1989 in BRUNSWICK County Superior Court by *Judge Henry V. Barnette, Jr.* Heard in the Court of Appeals 8 November 1989.

On 5 December 1984 plaintiff filed suit against the defendant-appellants and others for foreclosure of a deed of trust, deficiency of principal on the underlying note and for the appointment of a receiver. The note was in the principal amount of $493,462.68. The deed of trust covered certain properties, including a motel located in Southport, North Carolina and condominium units located in Oak Island Beach Villas Condominiums.

Defendants are citizens and residents of the state of Pennsylvania and had used the services of a Pennsylvania lawyer not licensed to practice in North Carolina. After the defendants were served with process, they asked their attorney to secure North Carolina counsel to defend their interests in this action. North Carolina counsel was obtained, and on 27 February 1985 the parties filed an Answer which included general denials but admitted execution of the note and deed of trust by defendants. This answer was later withdrawn. On 30 September 1985, their North Carolina attorney withdrew from the case. No other North Carolina counsel was retained on behalf of the defendants.

The matter came on for trial by the Court without a jury at the 28 April 1986 session of Brunswick County Civil Superior Court. Judgment was entered 23 May 1986.

On 18 September 1987, sixteen months after judgment was entered against them, appellants Fred Nahas and wife, Virginia Nahas, moved the court to set the judgment aside pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. On 10 October 1988, twenty-nine months after judgment was entered

against them, appellants C. Thomas Qualey individually and as the executor of the estate of his deceased wife, Christine A. Qualey, also moved to set aside the judgment. The motions were heard by the Honorable Henry V. Barnette, Jr. at the 13 February 1989 Session of Brunswick County Civil Superior Court. Judge Barnette denied the motions and defendants appealed. We affirm.

Hafer Day & Wilson, P.A., by R. W. Day and Betty S. Waller, for plaintiff-appellee.

Frink, Foy, Gainey & Yount, P.A., by Henry G. Foy, for appellants Nahas; Fairley, Jess & Isenberg, by William F. Fairley, for appellants Qualey.

LEWIS, Judge.

The sole question on appeal is whether Judge Barnette abused his discretion when he denied appellants' Rule 60(b) motion to set aside the judgment. *Vaglio v. Town and Campus Intern. Inc.*, 71 N.C. App. 250, 256, 322 S.E.2d 3, 7 (1984). G.S. 1A-1, Rule 60 provides:

> (b) . . . 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:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . .
>
> (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 the judgment, order, or proceeding was entered or taken.

G.S. Section 1A-1, Rule 60.

Appellants have argued that their motions should have been granted because they relied upon the representations of their Pennsylvania counsel that their case was being properly managed and

that their interests were being protected in North Carolina. In point of fact, no one was "minding the shop" in North Carolina, including the appellants, and a judgment of nearly $500,000.00 was entered against them in this action. Defendants argue that because their Pennsylvania attorney had competently procured North Carolina counsel in the past, and had made representations to them in this case that "everything was taken care of" and "not to worry," they should be excused for failing to take further measures to keep informed about the status of their case. They ask us to set aside the judgment entered against them. We decline.

One of the conditions precedent that must be proven before a court will consider a Rule 60(b) motion is timeliness. The motion must be made "within a reasonable time, and for reasons (1), (2) and (3) *not more than one year* after the judgment . . . was entered or taken." G.S. 1A-1, Rule 60(b). In the present case, appellants are arguing that the incompetent representation by their Pennsylvania counsel justifies their failure to seek North Carolina counsel or to otherwise appear on their own behalf. At its very best, this argument would bring their motions under Rule 60(b)(1) "excusable neglect." The Rule expressly requires motions under Rule 60(b)(1) to be made not more than one year after entry of the judgment. Here the parties waited well over one year after entry of the judgment and therefore are not timely in bringing their motions.

Appellants make a "totality of the circumstances" type argument that, taking all factors into consideration, the facts amount to "extraordinary circumstances" which justify relief under 60(b)(6). We disagree.

Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses. We have repeatedly held that a movant may not be allowed to circumvent the requirements for clauses (b)(1) through (b)(5) by "designating their motion as one made under Rule 60(b)(6), which grants relief from a judgment or order for 'any other reason justifying relief from the operation of the judgment.' " *Akzona, Inc. v. American Credit Indem. Co.*, 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984). This Court, in *Akzona*, expressly refused to allow defendants to present discussion of Rule 60(b)(6) because their motion actually was based on newly discovered evidence which brought it "within the scope of Rule 60(b)(2), and not within the scope of Rule 60(b)(6), which

speaks of any *other* reason, i.e., any reason other than those contained in Rule 60(b)(1)-(5). Thus, this motion was not properly brought under Rule 60(b)(6). . . ." *Id.* (Emphasis original.)

Appellants' arguments are based upon circumstances which would allow relief, if at all, under Rule 60(b)(1) and not 60(b)(6). Since they did not bring their motions within one year of entry of judgment, their motions were not timely filed and denial was proper. Accordingly, we

Affirm.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES GRIMES

No. 8925SC119

(Filed 5 December 1989)

1. **Criminal Law § 66.16 (NCI3d)— pretrial photographic identification—independent origin of in-court identification**

Evidence was sufficient to support the trial court's findings that a rape victim's in-court identification of defendant was based solely upon her observation of defendant at the time of the crime and was not tainted by any pretrial identification procedure which was so impermissibly suggestive as to lead to a mistaken identification.

Am Jur 2d, Evidence § 371.8.

2. **Rape and Allied Offenses § 5 (NCI3d)— first degree rape—sufficiency of evidence of intercourse and use of weapon**

The trial court did not err in denying defendant's motion to dismiss first degree rape charges where the victim testified that defendant had sexual intercourse with her on the couch in her living room and later in the bedroom; this testimony was sufficient to allow the jury to draw the reasonable inference that defendant had vaginal intercourse with the victim; the evidence was clear that the intercourse was by force and against the will of the victim; and the victim's testimony that defendant threatened her with an open knife which she saw

was sufficient to establish that defendant employed or displayed a dangerous or deadly weapon.

Am Jur 2d, Rape §§ 3-5, 88-92.

3. **Rape and Allied Offenses § 2 (NCI3d) — two rapes — sufficiency of evidence — "consolidation" not required**

The trial court did not err in refusing to "consolidate" rape charges against defendant where the evidence showed two distinct acts of intercourse, both accomplished by force and over the repeated resistance of the victim, and this was sufficient to support separate charges and convictions.

Am Jur 2d, Rape §§ 3-5, 88-92.

4. **Rape and Allied Offenses § 6.1 (NCI3d) — first degree rape charged — instructions on lesser offense of second degree rape not required**

The trial court did not err in failing to submit to the jury the lesser included offense of second degree rape where the State's evidence established all the constituent elements of first degree rape, and any doubt as to whether defendant employed or used a dangerous or deadly weapon was for the jury to resolve.

Am Jur 2d, Rape § 110.

5. **Kidnapping § 2 (NCI3d) — conviction for first degree rape and first degree kidnapping improper — error cured**

A defendant cannot be convicted of both first degree rape and first degree kidnapping when the rape is used to prove an element of the kidnapping charge; however, the trial court in this case corrected this error by arresting judgment on the first degree kidnapping conviction and properly entering judgment and sentencing defendant for second degree kidnapping.

Am Jur 2d, Abduction and Kidnapping §§ 9, 34.

APPEAL by defendant from *Griffin, Kenneth A., Judge.* Judgment entered 12 July 1988 in CATAWBA County Superior Court. Heard in the Court of Appeals 31 August 1989.

Defendant was charged with two counts of first-degree rape and with one count of first-degree kidnapping.

At trial the State's evidence tended to show the following: On 24 October 1987, Carrie Lee Elliott, then age 69, was at home alone when she heard a knock on her door. When she opened the door, a man, later identified by her as defendant, forced his way into her living room. The man pushed Ms. Elliott onto the couch, beat her with his hands, threatened her with a knife, and forced her to have sexual intercourse with him. A short time later, the man suggested they go into the bedroom. When Ms. Elliott refused, the man beat her again and proceeded to drag her into the bedroom where he again forced her to have sexual intercourse. After the man left, Ms. Elliott called some family members who contacted the police. She was later treated for her injuries at a local hospital.

Defendant presented a number of alibi and character witnesses. Defendant testified in his own behalf, denying that he was present at Ms. Elliott's residence on 24 October 1987, and giving alibi testimony.

The jury convicted defendant on all counts. At sentencing, the trial court arrested judgment on the first-degree kidnapping conviction and sentenced defendant for second-degree kidnapping. Defendant received a life sentence for the rape convictions and a nine-year sentence for the kidnapping.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley and Associate Attorney General E. Burke Haywood, for the State.

E. X. de Torres for defendant-appellant.

WELLS, Judge.

[1] In one of his assignments of error, defendant contends that the in-court identification of defendant by Ms. Elliott was so tainted by "the pretrial identification procedure" as to deny defendant due process. "Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). (Citations omitted.)

The factors to be examined to determine the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the individual at the time of the event; (2) the

witness' degree of attention; (3) the accuracy of the witness' prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation. *Wilson*, 313 N.C. at 529, 330 S.E.2d at 460. (Citations omitted.)

At the trial, upon defendant's objection to allowing Ms. Elliott to testify as to her pretrial identification of defendant's photograph, the trial court sustained the objection, however, at the State's request allowed a *voir dire* examination of Ms. Elliott on the question of identification. This examination extended into the general area of the testimony of Ms. Elliott as to identification of the defendant as her attacker. Following the *voir dire* examination, the trial court entered extensive findings of fact which invoked and covered all of the factors set out in *Wilson*, and, after ordering that the photo identification be excluded, found and concluded that Ms. Elliott's in-court identification of defendant was of independent origin based solely upon her observation of defendant at the time of the crime and was not tainted by any pretrial identification procedure that was so impermissibly suggestive as to lead to a mistaken identification.

Where findings of the trial court are supported by substantial competent evidence, they are binding on the appellate court. *Wilson*, 313 N.C. at 529, 330 S.E.2d at 460. (Citations omitted.)

Defendant does not argue to us that the trial court's findings in this case were not supported by substantial competent evidence, but suggests that Ms. Elliott's identification testimony was contradictory. Such contradictions as may have appeared were properly resolved by the trial court in its findings and conclusions. This assignment is overruled.

[2] In another assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the first-degree rape charges. Defendant contends that the State failed to prove that vaginal intercourse had taken place or that defendant had employed or displayed a dangerous or deadly weapon as required by the statute. N.C. Gen. Stat. § 14-27.2 (1986) provides in pertinent part that:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . .

(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.

Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence of each element of the offense charged and of the defendant's being the perpetrator of the offense. If so, the motion is properly denied. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). (Citations omitted.) The evidence is to be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.* (Citations omitted.)

In this case, the victim testified that defendant had sexual intercourse with her on the couch and later in the bedroom. This testimony was sufficient to allow the jury to draw the reasonable inference that defendant had vaginal intercourse with the victim. The evidence was clear that the intercourse was by force and against the will of the victim. Ms. Elliott's testimony that defendant threatened her with an open knife which she saw was sufficient to establish that defendant employed or displayed a dangerous or deadly weapon.

The trial court properly denied defendant's motion to dismiss the rape charges. This assignment is overruled.

[3] In a related assignment, defendant contends that the trial court erred in refusing to "consolidate" the rape charges. The evidence in this case showed two distinct acts of intercourse, both accomplished by force and over the repeated resistance of the victim. This was sufficient to support separate charges and convictions. *See State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987) and *State v. Small*, 31 N.C. App. 556, 230 S.E.2d 425, *cert. denied*, 291 N.C. 715, 232 S.E.2d 207 (1977). This assignment is overruled.

[4] In another assignment of error, defendant contends that the trial court erred in failing to submit to the jury the lesser included offense of second-degree rape in the rape charges. As we have previously noted, the State's evidence in this case established all the constituent elements of first-degree rape. Defendant's contention under this assignment is that there was "substantial doubt"

that defendant employed or used a dangerous or deadly weapon. Any "doubt" on this issue was for the jury to resolve. There being no evidentiary basis on which to submit second-degree rape charges to the jury, the trial court properly denied defendant's request. This assignment is overruled.

Defendant has presented other arguments as to his rape convictions. We have carefully examined these arguments and have found them to be without sufficient merit to warrant discussion.

[5] Defendant has also assigned error to the trial court's denial of his motion to dismiss the charge of first-degree kidnapping. He correctly contends that a defendant cannot be convicted of both first-degree rape and first-degree kidnapping when the rape is used to prove an element of the kidnapping charge. *See, e.g., State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987). The trial court in this case corrected this error by arresting judgment on the first-degree kidnapping conviction and properly entering judgment and sentencing defendant for second-degree kidnapping. *See State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). This assignment is overruled.

We note that there has been included as an appendix to defendant's brief a *pro se* brief prepared by defendant. We do not condone such practice in cases where a defendant is represented by counsel who has submitted an appropriate brief. We also note that defendant's *pro se* brief does not present any questions or arguments not adequately present in the brief filed by his counsel.

No error.

Judges PHILLIPS and PARKER concur.

RANDY DEAN McDANIEL v. DIVISION OF MOTOR VEHICLES

No. 8922SC62

(Filed 5 December 1989)

Automobiles and Other Vehicles § 126.3 (NCI3d)— breathalyzer test—refusal to take until witness arrived—failure to communicate willingness—refusal willful

Petitioner, having failed to indicate at the time he refused to take the breathalyzer test that he desired to have a witness present, waived his statutory right to delay the test until after his witness arrived, even if the witness arrived within the allowable 30 minute period, and petitioner's refusal, made with full knowledge of his rights, but without explanation, was thus willful within the meaning of N.C.G.S. § 20-16.2(d).

Am Jur 2d, Automobiles and Highway Traffic §§ 122, 124, 127.

APPEAL by petitioner from judgment entered 23 August 1988 by *Judge Ralph Walker* in DAVIE County Superior Court. Heard in the Court of Appeals 31 August 1989.

In this civil action petitioner seeks reversal of an administrative ruling by the North Carolina Division of Motor Vehicles rescinding petitioner's driver's license. Pursuant to G.S. 20-16.2(e) a *de novo* hearing was held in Superior Court. The evidence adduced at the hearing tended to show the following facts: Petitioner was involved in an automobile accident in Davie County on 15 January 1988 and was arrested and charged with driving while impaired, a violation of G.S. 20-138.1. Before he was removed from the scene of the accident, petitioner asked one of his friends to get petitioner's father to come to the Davie County jail as a witness.

At the county jail, petitioner was read his rights regarding chemical analysis at 9:06 p.m. and acknowledged that he understood his rights. The petitioner did not request to call an attorney or a witness. At 9:13 p.m. petitioner was asked to take the breathalyzer test. Petitioner refused but he told neither the arresting officer nor the chemical analyst that he wanted to wait till his father arrived to witness the test. Petitioner did not ask to make, or make, any telephone calls. The breathalyzer machine was shut off at 9:23 p.m. and the officer told petitioner that he had wilfully

refused to submit to the breathalyzer examination. Petitioner then told the officer that he would take the test but only when his father arrived. The officer testified that petitioner's father arrived shortly thereafter.

Based on this evidence, the trial court concluded that petitioner had wilfully refused to submit to the breathalyzer test and upheld the revocation of petitioner's driver's license. Petitioner appeals.

Hall & Vogler, Attorneys at Law, by E. Edward Vogler, Jr., for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for respondent-appellee.

PARKER, Judge.

The sole issue presented on this appeal is whether the trial court erred in finding that petitioner wilfully refused to submit to the breathalyzer analysis. Petitioner contends that he was deprived of his statutory rights under G.S. 20-16.2 when he was written up as a refusal before the expiration of the 30-minute statutory time period. Petitioner further asserts that if he had been allowed to take the test when his father arrived, the test could have been administered within the statutory period.

General Statute 20-16.2 provides that any person charged with driving while impaired and required to submit to a breathalyzer examination "has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights." G.S. 20-16.2(a)(6).

Relying on *Etheridge v. Peters, Comr. of Motor Vehicles*, 301 N.C. 76, 269 S.E.2d 133 (1980), petitioner argues that he was entitled to take the test anytime within the 30-minute period after he was notified of his rights. *Etheridge*, however, is distinguishable on its facts. Unlike petitioner in this case, Etheridge informed the officer at the time he was advised of his rights that he wanted to call a lawyer. Etheridge was then offered the test at the expiration of 20 minutes and again at the expiration of 30 minutes, but refused each time. Thereafter, when 35 minutes had passed, Etheridge elected to take the test, and the officer refused to administer it. In the instant case, when petitioner refused to take the breathalyzer examination at 9:13 p.m., seven minutes after

he had been advised of his rights, he gave no indication whatever that he intended to exercise his right to call a lawyer or have a witness present. Petitioner did not state that he would take the test but only when his father arrived until ten minutes later, at 9:23 p.m., when the officer advised petitioner that he was being written up as a refusal and cut off the machine. The record is devoid of evidence as to what, if anything, occurred during this ten-minute interval. *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 259 S.E.2d 544 (1979), and *In re Vallender*, 81 N.C. App. 291, 344 S.E.2d 62 (1986), cited by petitioner, are similarly distinguishable. In both of these cases, the petitioner indicated a desire to call a lawyer or a witness at the time the petitioner refused the breathalyzer test.

Under G.S. 20-16.2(a)(6), the only purposes for which the test may be delayed are for the defendant to call an attorney and to select a witness to view the test. Since driving while impaired is an implied consent offense, the 30-minute period is a grace period to enable defendant to have the benefit of these statutory purposes. Therefore, to permit a defendant to delay the breathalyzer examination for any period of time without affirmatively indicating his intention to call a lawyer or to have a witness present would be contrary to the express intent of the statute.

In upholding the constitutionality of the 30-minute limitation on the length of the permitted delay, our Supreme Court recognized the State's need to obtain chemical evidence before the metabolic processes of the body obscure such evidence. *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. at 463, 259 S.E.2d at 551. For this reason to avoid obstruction of the testing procedure by impermissible delay, the burden must be on the person arrested for driving while impaired to assert at an early stage his intention to exercise his statutory right to a lawyer and witness.

Accordingly, we hold that petitioner, having failed to indicate at the time he refused to take the breathalyzer examination that he desired to have a witness present, waived his statutory right to delay the test until after his witness arrived, even if the witness arrived within the 30-minute period. Petitioner's refusal, made with full knowledge of his rights, but without explanation, was thus wilful within the meaning of G.S. 20-16.2(d).

Although not necessary to our resolution of this appeal, we note with respect to petitioner's second contention that the record

reveals only that petitioner's father arrived a "short time" after petitioner was told that he had refused the breathalyzer test. No evidence in the record shows conclusively, however, that petitioner's father arrived within the 30-minute period.

For the foregoing reasons, the decision of the trial court is affirmed.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RUDOLPH PRESTON HOPE

No. 8826SC1250

(Filed 5 December 1989)

1. **Criminal Law § 20 (NCI4th)— competency to proceed to trial— sufficiency of evidence to support court's finding of competency**

There was no merit to defendant's contention that the trial court's finding that he was competent to proceed to trial was not supported by competent evidence, since defendant's witness, as he had done in an earlier hearing before another judge, testified that in his opinion defendant was incompetent to stand trial, but he also testified, in effect, that defendant's condition was essentially the same as when the other judge had found him to be competent, and such testimony was support enough for the court's finding that defendant was competent to proceed to trial.

Am Jur 2d, Criminal Law § 81.

2. **Criminal Law § 20 (NCI4th)— defendant's competency when crimes committed—psychiatrist's testimony admissible**

Testimony by a psychiatrist, who examined defendant during his first Dorothea Dix commitment for the purpose of determining his competency to stand trial, as to his competency when the crimes were committed did not violate defendant's rights against self-incrimination and to effective assistance of counsel.

Am Jur 2d, Criminal Law §§ 67, 109.

3. Criminal Law § 1102 (NCI4th)— judge's comments made after sentence—no aggravation by implicit finding of nonstatutory factors

There was no merit to defendant's contention that his sentences were aggravated because the judge implicitly found as nonstatutory factors without supporting evidence that the mental health system was ineffective in treating conditions such as defendant's and that defendant would be dangerous to himself and others in the future since defendant's contention was based on random comments made by the court after the sentences were announced.

Am Jur 2d, Criminal Law § 554.

APPEAL by defendant from *Kirby, Judge*. Judgments entered 21 January 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 August 1989.

Attorney General Thornburg, by Special Deputy Attorney General Charles M. Hensey, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant was convicted and sentenced for attempted first degree rape, first degree sexual offense, and felonious breaking and entering. His main contention here is that the trial court's finding that he was competent to proceed to trial is not supported by competent evidence. The contention has no merit and we overrule it. *State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977). The facts bearing upon this question follow:

After being arrested on 11 July 1986 and before his indictment defendant moved for examination of his capacity to proceed to trial and on 24 July 1986 he was committed to Dorothea Dix Hospital for temporary observation and treatment pursuant to G.S. § 15A-1002. One of the psychiatrists who examined him there was Dr. Bob Rollins, Clinic Director of the Forensic Unit and Director of Forensic Services for the North Carolina Department of Mental Health. After being indicted on 11 August 1986 defendant notified the State of his insanity defense, and when the case first came on for trial on 11 December 1986 he again raised the question of

his capacity to proceed, and was again committed to Dorothea Dix Hospital for observation and evaluation. His competency to proceed to trial was first determined by Judge Saunders on 24 July 1987 after receiving expert testimony for both the State and defendant. In January 1988, when the case next came on for trial, defendant again raised the issue of his competency to proceed, and following a hearing at which the only expert testimony presented was by defendant's witness, Dr. Billinsky, Judge Kirby found him competent to proceed. As he had done in the earlier hearing before Judge Saunders Dr. Billinsky testified that in his opinion defendant was incompetent to stand trial, but he also testified, in effect, that defendant's condition was essentially the same as when Judge Saunders found him to be competent, and that the only change that had occurred—not sleeping as well and hearing voices more often—was due to changing his medications.

Dr. Billinsky's testimony, though perhaps not so intended, is support enough for the court's finding that defendant was competent to proceed to trial. In arguing to the contrary, defendant mistakenly relies upon *State v. Reid*, 38 N.C. App. 547, 248 S.E.2d 390 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E.2d 31 (1979). For in that case the only expert relied upon had *no* opinion of the defendant's condition, whereas Dr. Billinsky expressed the opinion that defendant's condition was substantially the same as it was at the previous hearing when another expert expressed the opinion that he was competent.

[2] Another trial error that defendant cites is permitting Dr. Rollins to testify for the State in rebuttal to the effect that he was not insane when the crimes were committed. The contention is that since Dr. Rollins examined defendant during the first Dorothea Dix commitment for the purpose of determining his competency to stand trial the opinion as to his competency when the crimes were committed violated his right against self-incrimination and to effective assistance of counsel under the Fifth and Sixth Amendments of the United States Constitution and Article I, Secs. 19, 23 and 24 of the North Carolina Constitution. This argument has been rejected by our Supreme Court which has said that when a defendant relies on the insanity defense and introduces expert testimony on his mental status, the State "may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without implicating the fifth amendment." *State v. Huff*, 325 N.C. 1, 44, 381 S.E.2d

635, 660 (1989). Since the circumstances do not encroach upon the Fifth Amendment *a fortiori* they do not violate the Sixth Amendment.

[3] The only other error to his prejudice that defendant asserts concerns the sentencing process. In sentencing defendant to terms greater than the presumptive sentences for the breaking and entering and attempted first degree rape convictions Judge Kirby found factors in both aggravation and mitigation and concluded that the factors in aggravation outweighed the factors in mitigation. These findings, supported by evidence showing that defendant had served 17 years for a prior burglary conviction and 90 days for a misdemeanor breaking and entering conviction, are not disputed. The contention is rather that defendant's sentences were aggravated because Judge Kirby implicitly found as nonstatutory factors without supporting evidence that the mental health system is ineffective in treating conditions such as defendant's and that defendant will be dangerous to himself and others in the future. The contention is based upon the following comments by the court after the sentences were announced:

> That's as charitable to this defendant, and I think this community, that I can be. He needs a place to stay, and that is the only place that I know where he can stay for his lifetime where he can be protected, hopefully, against his fellow inmates, although I make no guarantee of that, but certainly against others and against himself for the crimes that might be committed if he were free. I just don't see that there is hope for anything being of great value to him, as tragically as it may be. So, that is my sentence.

The contention is overruled. Viewed in the context of the trial and the sentencing hearing we do not regard these remarks as findings; in our view they were merely random observations about defendant's situation and the limits of the prison system. To vacate the sentences on this ground, as defendant urges, would require us to surmise that the random remarks above quoted rather than the factors expressly found were the basis for the court's action, and that we decline to do.

No error.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES EARL MANNING

No. 893SC218

(Filed 5 December 1989)

1. **Criminal Law § 1140 (NCI4th)— pecuniary gain—no nonstatutory aggravating factor**

Pecuniary gain may not be used as a nonstatutory aggravating factor, since the Legislature has indicated that pecuniary gain may be considered as an aggravating factor only where the criminal act occurs as a result of a bargained for arrangement. In this case the State did not prove by a preponderance of the evidence that defendant participated in a homicide as a result of a bargained for arrangement, though he allegedly did conspire with the victim's wife to have the victim killed and intended to share with the victim's wife in the proceeds from the victim's insurance policies and in his estate. N.C.G.S. § 15A-1340.4(a)(1)(c).

Am Jur 2d, Homicide §§ 29, 554.

2. **Criminal Law § 1218 (NCI4th)— statutory mitigating factor of passive participant—insufficient evidence**

The trial court did not err in failing to consider as a statutory mitigating factor that defendant played a minor role or was a passive participant in the commission of the crimes where the State's evidence tended to prove that defendant actively participated in planning the murder, took part in the attempted cover-up, and assisted in the search for an assassin. N.C.G.S. § 15A-1340.4(a)(2)(c).

Am Jur 2d, Homicide §§ 29, 554.

APPEAL by defendant from order entered 23 November 1988 by *Judge David Reid* in PITT County Superior Court. Heard in the Court of Appeals 1 September 1989.

Lacy H. Thornburg, Attorney General, by Wilson Hayman, Assistant Attorney General, for the State.

Blount & Fornes, by Robin L. Fornes, for defendant-appellant.

GREENE, Judge.

The defendant James Earl Manning entered pleas of guilty to aiding and abetting solicitation to commit murder, second-degree murder, and conspiracy to commit murder. He was sentenced to life imprisonment and ten years with the sentences running concurrently. Defendant appeals.

The State's evidence tends to show that in 1987 the defendant began a sexual affair with Sandra Faye White, then the wife of the deceased victim, Bobby White. This extramarital relationship continued for several months. During this period the defendant and Sandra White conspired to have Mr. White killed and did eventually solicit the defendant's first cousin, James Alton Mobley, to kill Mr. White in exchange for $35,000. Pursuant to this agreement, Mobley killed Mr. White. The State also produced evidence tending to prove the defendant and Sandra White intended to live off the proceeds of the victim's estate and insurance policy. The trial court found as a nonstatutory aggravating factor that the murder was committed for pecuniary gain. The trial court declined defendant's request that a mitigating factor should be considered since the defendant was a passive participant or played a minor role in the commission of the offenses.

The issues presented are: I) whether the trial court erred in finding as a nonstatutory aggravating factor that the crimes were committed for pecuniary gain; and II) whether the trial court erred in failing to find as a statutory mitigating factor that defendant was a passive participant or played a minor role in the commission of the offenses.

I

[1] The defendant argues the trial court erred in considering pecuniary gain as a *nonstatutory* aggravating factor in sentencing. The State provided evidence that the defendant hoped to share in the life insurance proceeds payable upon the victim's death to Ms. White as well as enjoy other benefits from the decedent's estate. However, the State produced no evidence tending to prove the defendant was hired or paid to commit the offense. From this it is clear the trial judge could not have considered pecuniary gain as a *statutory* aggravating factor since the Fair Sentencing Act allows consideration of this factor only where "[t]he defendant

was hired or paid to commit the offense." N.C.G.S. § 15A-1340.4(a)(1)(c) (1988); *see, e.g., State v. Abdulla*, 309 N.C. 63, 76, 306 S.E.2d 100, 108 (1983).

We must therefore determine whether pecuniary gain may be used as a nonstatutory aggravating factor even though, on the facts of this case, it would not have been allowed as a statutory aggravating factor. The trial court "may consider any aggravating . . . factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purpose of sentencing . . ." even though not enumerated on the statutory list. N.C.G.S. § 15A-1340.4; *State v. Thompson*, 310 N.C. 209, 220, 311 S.E.2d 866, 872 (1984), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988). A primary purpose of sentencing is imposition of punishment commensurate with the injury caused by the offense, taking into account factors diminishing or enhancing defendant's culpability. *State v. Barts*, 316 N.C. 666, 696, 343 S.E.2d 828, 847 (1986).

The aggravating factor asserted here does not relate to the nature of the injury. Rather it relates to the defendant's culpability and motivation. The State argues that pecuniary gain, when present as a motivation for the crime, may be considered by the trial court as a nonstatutory aggravating factor. We find this argument unconvincing.

The North Carolina Legislature has indicated that pecuniary gain may be considered as an aggravating factor only in very peculiar circumstances. In essence, the "hired or paid" language of N.C.G.S. § 15A-1340.4(a)(1)(c) requires the criminal act occur as a result of a bargained for arrangement. *See Abdulla*, 309 N.C. at 76-77, 306 S.E.2d at 108. The Legislature was not concerned with the fact that "money or other valuables were involved in the crime charged." *Id.* Rather, the Legislature sought to impose greater punishment where the crime arose from a contractual agreement involving pecuniary compensation. Here, the State did not prove by a preponderance of the evidence that the defendant participated in the crime as a result of a bargained for arrangement. Certainly he hoped to profit in various ways from the crime, as do most criminals. However, the State did not prove that Ms. White or anyone else promised the defendant any particular pecuniary gain which was a precondition of his participation in the crime.

A trial court should not be allowed to assign in aggravation a factor as nonstatutory where the statute clearly prohibits its use as a statutory aggravating factor. *See State v. Puckett*, 66 N.C. App. 600, 606, 312 S.E.2d 207, 211 (1984) (provocation as a mitigating factor is limited to the definition of § 15A-1340.4(a)(2)(i)); *see also State v. Winnex*, 66 N.C. App. 280, 284, 311 S.E.2d 594, 597 (1984) (for good character or reputation to be considered as mitigating factors, the evidence must fall within the definition of § 15A-1340.4(a)(2)(m) (1981 Cum. Supp.)).

II

[2] The defendant also argues the trial court erred by failing to consider as a statutory mitigating factor that the defendant played a minor role or was a passive participant in the commission of the crimes. N.C.G.S. § 15A-1340.4(a)(2)(c) (1988). The trial court's failure to take into consideration uncontradicted and manifestly credible evidence of a mitigating factor is reversible error. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). Representative of the cases cited by the defendant is *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983), where the trial court erred in not finding the defendant to be a passive participant since he acted only as a lookout in a store robbery where a murder was unanticipated.

Here, the State's evidence tended to prove that the defendant actively participated in planning the murder and took part in the attempted cover-up. Also, the State produced some evidence tending to prove that defendant assisted in the search for an assassin. We conclude the State's evidence contradicted defendant's evidence sufficiently to preclude consideration of this mitigating factor.

Affirmed in part, reversed in part, and remanded for resentencing.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. ERNEST JOHN MARINO

No. 8912SC743

(Filed 5 December 1989)

1. **Criminal Law § 536 (NCI4th)— defendant's outburst—misconduct not prejudicial to defendant**

The trial court did not abuse its discretion in denying defendant's motion for mistrial based on his contention that the jury was prejudiced by his own intemperate and profane outburst, since defendant could not be heard to complain of his own misconduct, and evidence of his guilt was so overwhelming that it was unlikely that his outburst prevented him from receiving a fair and impartial verdict.

Am Jur 2d, Criminal Law § 293.

2. **Criminal Law § 1227 (NCI4th)— drug habit—no mitigating factor of mental or physical condition reducing culpability**

The trial court did not err in failing to find as a statutory mitigating factor that defendant was suffering from a mental or physical condition which reduced his culpability in that he had a drug habit requiring him to steal in order to support the habit and that he had endocarditis.

Am Jur 2d, Criminal Law §§ 527, 599.

APPEAL by defendant from *Britt, Joe Freeman, Judge.* Judgments entered 8 February 1989 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 13 November 1989.

Defendant was indicted and convicted of felonious breaking or entering and felonious larceny. He was sentenced to consecutive terms of imprisonment of ten years for felonious breaking or entering and eight years for felonious larceny. Both sentences exceeded the presumptive terms.

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

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

WELLS, Judge.

At trial while defendant's mother was testifying for the defense, defendant engaged in an intemperate and profane outburst. During the defendant's misconduct, the trial court excused the jury, but defendant's misconduct continued briefly. Following a bench conference, defendant moved for a mistrial, asserting his own misconduct as the basis for his motion. The trial court denied his motion.

[1] Defendant's first assignment of error is to the denial of his motion for a mistrial. The decision whether or not to grant a mistrial is within the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982). A mistrial is appropriate only when there are such serious improprieties as to make it impossible for a fair and impartial verdict to be rendered. *Id.*

Defendant argues that the trial court's ruling was based upon an erroneous recollection of the facts in that the jurors were present and did hear at least some of the profane outburst. The record, however, shows that the court stated it would probably deny the motion even if the jurors were present and heard the entire outburst.

We cannot say that the court abused its discretion in denying the motion. If defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain. In addition, the evidence of defendant's guilt was overwhelming and it is unlikely that the outburst prevented him from receiving a fair and impartial verdict. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

[2] Defendant also contends that the court erred in failing to find as a statutory mitigating factor that defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but which significantly reduced his culpability for the offense. He argues the evidence was uncontradicted that he had a drug habit requiring him to steal in order to support the habit and that he suffered from endocarditis. Although the evidence may have shown that defendant did have these conditions, no evidence was presented to show that his culpability for the offenses was reduced by these conditions. The court therefore properly refused to make the finding. *State v. Arnette*, 85 N.C. App. 492, 355 S.E.2d 498 (1987); *State v. Grier*, 70 N.C. App. 40, 318 S.E.2d 889 (1984), *cert. denied*, 318 N.C. 698, 350 S.E.2d 860 (1986).

On the errors assigned we find

No error.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. TERRY L. RICHARDSON

No. 8819SC1409

(Filed 5 December 1989)

Criminal Law § 146.5 (NCI3d)— infraction—guilty plea—no right to appeal for trial de novo in superior court

A defendant who is charged with a traffic infraction and admits responsibility in the district court has no right to appeal for a trial *de novo* in superior court. N.C.G.S. § 15A-1115.

Am Jur 2d, Automobiles and Highway Traffic § 392; Criminal Law § 490.

APPEAL by defendant from order of *Judge William Z. Wood* entered 10 November 1988 in RANDOLPH County Superior Court. Heard in the Court of Appeals 29 August 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Ottway Burton, P.A., for defendant appellant.

COZORT, Judge.

This appeal addresses the question of whether a defendant who is charged with an infraction and admits responsibility in the district court has a right to appeal for a trial *de novo* in superior court. We hold that the defendant does not, and we affirm the trial court.

Defendant was charged with operating a motor vehicle at a speed of 47 m.p.h. in a 35 m.p.h. zone. He signed a waiver of his right to a trial, admitted responsibility, and paid a fine of $10.00 and $40.00 in costs. Within ten days of the district court's acceptance of the plea, defendant filed a notice of appeal to superior court. He later filed a motion to dismiss for an alleged violation of the Speedy Trial Act, N.C. Gen. Stat. §§ 15A-701 through 15A-704

(since repealed). The State thereafter filed a Motion to Vacate Appeal, contending that the trial court did not have jurisdiction. The trial court granted the State's motion. We affirm.

N.C. Gen. Stat. § 15A-1115 provides:

> (a) Appeal of District Court Decision.—A person who *denies* responsibility and is found responsible for an infraction in the district court, within 10 days of the hearing, may appeal the decision to the criminal division of the superior court for a hearing de novo. (Emphasis added.)

There is no provision for an appeal from an *admission* of responsibility.

Affirmed.

Judges ARNOLD and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 NOVEMBER 1989

BARTLETT v. BARTLETT No. 8929DC628	McDowell (88CVD425)	Dismissed
CARSON v. CARSON No. 893DC40	Pitt (79CVD528)	Affirmed
CARTWRIGHT v. FIRST UNION NATIONAL BANK No. 891SC37	Dare (87CVS409)	Affirmed
EBERHART v. HOUSTON No. 8919SC22	Rowan (85CVS611)	Affirmed
IN RE FLETCHER No. 8911DC659	Lee (88J55)	Affirmed
IN RE JOHNSON No. 896DC197	Halifax (88J33B)	Reversed
IN RE MORRIS v. DUKE POWER CO. No. 8910UC337	Utilities Commission (E-7, SUB 438)	Affirmed
IN RE WILLARD No. 892DC543	Beaufort (88J104)	Affirmed
PARTON v. PARTON No. 8830DC1100	Haywood (84CVD719) (85CVD276)	Affirmed
SAMPO CORP. v. FRANKLIN No. 8926SC261	Mecklenburg (87CVS5266)	Affirmed
SEVEN LAKES LANDOWNERS ASSN. v. ATWATER No. 8920DC392	Moore (86CVD618)	Dismissed
SOWELL v. CHESTERFIELD LUMBER CO. No. 8910SC430	Wake (83CVS5350)	Reversed & Remanded
STATE v. BOONE No. 8918SC755	Guilford (88CRS49316)	No Error
STATE v. DAVIS No. 895SC306	New Hanover (88CRS13111)	No Error
STATE v. DONALDSON No. 8918SC282	Guilford (88CRS32363)	No error; remanded for resentencing

STATE v. KELLY No. 8918SC599	Guilford (88CRS20675) (88CRS20676)	No Error
STATE v. McINTOSH No. 8812SC1382	Cumberland (87CRS34282) (87CRS22607) (87CRS33608) (87CRS33609) (87CRS33610) (87CRS33611) (87CRS33613) (87CRS33614) (87CRS33615) (87CRS33616) (87CRS33618) (87CRS33619) (87CRS33620) (87CRS33621) (87CRS33622) (87CRS33624) (87CRS33625) (87CRS33627) (87CRS33629) (87CRS33486)	No Error
STATE v. MORANT No. 8926SC632	Mecklenburg (88CRS68359)	No Error
STATE v. OWENS No. 8926SC662	Mecklenburg (88CRS48482) (88CRS48481)	No Error
STATE v. SWINT No. 8926SC569	Mecklenburg (88CRS55138)	No Error
STATE v. WARREN No. 8818SC1348	Guilford (87CRS41855) (87CRS41856) (88CRS20259) (88CRS20260)	No Error
WALKER v. BINNIX No. 893SC138	Carteret (87CVS208)	Affirmed

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BEHAR v. TOYOTA OF FAYETTEVILLE No. 8912SC436	Cumberland (84CVS2840)	No Error
BRAME v. GALYEAN No. 8823SC1269	Wilkes (86CVS615)	Affirmed as to plaintiffs' appeal; dismissed as to defendant Galyean's appeal
COLBORN v. COLBORN No. 8920DC403	Moore (88CVD275)	Affirmed
COLEMAN v. COLEMAN No. 8921DC390	Forsyth (84CVD3571)	Affirmed
COX v. BLAINE No. 8930SC747	Macon (88CVS53)	No Error
DIXON v. DIXON No. 894DC806	Onslow (85CVD984)	Affirmed
FULLER v. COPLAND FABRICS No. 8915SC594	Alamance (88CVS2050)	Affirmed
HOPE v. DON KIMBALL CHEVROLET No. 895DC281	New Hanover (88CVD243)	Affirmed
IN RE BAILEY No. 8927DC613	Gaston (88J268)	Adjudication affirmed; sentence vacated; remanded for resentencing
IN RE BECKLEY No. 8921DC431	Forsyth (88SPC1019)	Affirmed
JOHNSON HOSIERY MILLS v. CAMERLENGO No. 8925SC711	Catawba (88CVS1548)	Affirmed

LOWDER v. ALL STAR MILLS No. 8920SC256	Stanly (79CVS015)	As to the corporate defendants, the appeal is dismissed. As to the appeal of W. Horace Lowder individually, the orders appealed from are affirmed.
M. F. DULLEA AND CO. v. STEWART No. 8826SC1369	Mecklenburg (88CVS3066)	Dismissed
REDDEN v. REDDEN No. 8922DC775	Iredell (86CVD753)	Affirmed in part; reversed in part & remanded
STATE v. ADAMS No. 8927SC621	Gaston (88CRS18049)	No Error
STATE v. ARTIS No. 896SC714	Bertie (87CRS525)	Affirmed
STATE v. AVERY No. 8912SC366	Cumberland (87CRS30811)	No Error
STATE v. COKER No. 8921SC606	Forsyth (88CRS32199)	No Error
STATE v. CUTHBERTSON No. 8926SC771	Mecklenburg (88CRS86650)	No Error
STATE v. DAUGHTRY No. 895SC532	Pender (89CRS0140)	Affirmed
STATE v. DAVIS No. 8927SC99	Gaston (87CRS4886) (87CRS4887) (87CRS4888)	No Error
STATE v. DORSEY No. 8927SC260	Gaston (88CRS12163) (88CRS12164)	No Error
STATE v. EDMONDSON No. 898SC415	Lenoir (88CRS2487)	Reversed & remanded
STATE v. EDWARDS No. 8925SC485	Catawba (88CRS791) (88CRS792) (88CRS793)	No Error

STATE v. GARCIA No. 8926SC600	Mecklenburg (88CRS56584)	No Error
STATE v. GARDNER No. 8928SC715	Buncombe (88CRS16199) (88CRS16200) (88CRS16201) (88CRS16203) (88CRS18678)	No Error
STATE v. GILLESPIE No. 8927SC608	Lincoln (88CRS4010)	No Error
STATE v. GRAHAM No. 897SC463	Wilson (87CRS6326) (87CRS6328)	No Error
STATE v. HAIGLER No. 8926SC425	Mecklenburg (88CRS37068)	Affirmed
STATE v. HILL No. 8919SC708	Randolph (88CRS7803) (88CRS7804)	No Error
STATE v. JOHNSON No. 8926SC481	Mecklenburg (88CRS42510)	No Error
STATE v. KALKBRENNER No. 895SC512	New Hanover (88CRS13124) (88CRS12394) (88CRS12395) (88CRS12396) (88CRS12397)	Defendant Robert Lee Kalkbrenner's sentences are Affirmed. Defendant Allison Kalkbrenner's sentences are Affirmed.
STATE v. KISER No. 8920SC503	Union (88CRS3954) (89CRS1319)	Affirmed
STATE v. LEWIS No. 895SC692	New Hanover (88CRS24592)	No Error
STATE v. LITTLE No. 895SC695	New Hanover (87CRS19027) (88CRS16870)	Sentence vacated & remanded for resentencing
STATE v. MALDONADO No. 892SC644	Washington (88CRS951)	No Error
STATE v. MATHIS No. 8922SC590	Iredell (88CRS8383)	No Error

STATE v. MURRAY No. 893SC560	Carteret (88CRS7033)	No Error
STATE v. RICHARDSON No. 8911SC762	Johnston (88CRS11500) (88CRS11501)	No Error
STATE v. SMITH No. 8927SC664	Gaston (88CRS4772)	No Error
STATE v. SUMLIN No. 8926SC702	Mecklenburg (88CRS20430) (88CRS20432)	No Error
STATE v. THOMAS No. 894SC435	Onslow (88CRS2302) (88CRS2303) (88CRS2304) (88CRS2305) (88CRS2306) (88CRS2307) (88CRS2308) (88CRS2309) (88CRS2310) (88CRS2311)	No Error
STATE v. WHITE No. 894SC451	Onslow (87CRS6918) (87CRS6979)	Affirmed
STATE v. WILLIAMS No. 895SC458	New Hanover (88CRS17716)	No Error
WILLS v. WAKE MEDICAL CENTER No. 8910IC581	Ind. Comm. (889307) (955350)	Affirmed

STEVEN G. HOWELL v. MARY F. LANDRY

No. 8910DC217

(Filed 19 December 1989)

1. **Husband and Wife § 2.1 (NCI3d)— premarital agreement— order declaring invalid—findings and conclusions**

In a divorce action which declared invalid a premarital agreement, findings which were in fact conclusions that the wife had had insufficient time to discuss the agreement with an attorney and that negotiations between husband and wife resulted in only two minor adjustments in the agreement were not binding on the Court of Appeals because they were not supported by the findings. Other findings were accepted as conclusive on appeal where there was substantial evidence in the record supporting those findings, although some disagreement existed.

Am Jur 2d, Husband and Wife §§ 283, 299.

2. **Husband and Wife § 2.1 (NCI3d)— premarital agreement— invalidity of agreement—burden of proof**

In an action to enforce a premarital agreement executed prior to the enactment of N.C.G.S. Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Unlike the usual situation in which there is a dominant party who has the burden of showing the validity of the agreement, here there are two parties who are equally fiduciaries and equally beneficiaries and therefore the burden of demonstrating the invalidity of the premarital agreement is upon the person who would have it held invalid.

Am Jur 2d, Husband and Wife §§ 313, 314.

3. **Husband and Wife § 2.1 (NCI3d)— premarital agreement— defenses—necessity for pleading or litigation**

Although undue influence and duress were not affirmatively pled as defenses to a premarital agreement, the trial court addressed those issues without objection and the pleadings are regarded as amended to conform to the proof. As the defenses of unconscionability, fraud, and the statute of limita-

tions were neither pled nor litigated, those issues were not properly raised and will not be addressed on appeal.

Am Jur 2d, Husband and Wife § 312.

4. Husband and Wife § 2.1 (NCI3d)— premarital agreement—duress and undue influence—burden of proof not met

The wife did not meet her burden of proof in showing that a premarital agreement was executed under duress and undue influence where the parties agreed in early December 1979 to be married and the husband indicated that he would like to enter into a premarital agreement; the wife responded that she would be more than willing to look at the agreement; the parties agreed to be married in Las Vegas and the wife made arrangements to travel to Las Vegas for marriage on New Year's Day; the husband presented the wife with a premarital agreement at 8:00 p.m. on the evening before they were to leave for Las Vegas to be married on the next day; the agreement had been prepared by his attorney without the knowledge of the wife; the husband told the wife that they would not get married if the agreement was not signed; the wife told the husband that she should have an attorney of her own choosing review the document and indicated that she didn't want to sign; she nevertheless executed the agreement after making some adjustments because she very much wanted to get married and because of her financial involvement with his company; and at that time she had an active roll in the business of which the husband was a major stockholder. The shortness of the time interval between the presentation of the premarital agreement and the date of the wedding combined with the threat to call off the marriage if the agreement was not executed is insufficient per se to invalidate the agreement; moreover, the totality of the circumstances surrounding the execution of the agreement does not support a conclusion of duress and undue influence where the wife was aware that she should not sign the agreement without the advice of an attorney but proceeded to execute the agreement; it could not be presumed from the findings that she had insufficient time to seek the advice of an attorney had she decided to do so; the wife read the agreement which was not lengthy and in fact made some adjustments before signing; the husband did not threaten to terminate her employment if she refused to execute the agreement; and there was

no finding that the failure to execute the agreement would have resulted in any loss of funds which may have been expended by the wife in preparation for the wedding.

Am Jur 2d, Husband and Wife §§ 313, 314.

5. **Husband and Wife § 2.1 (NCI3d)— premarital agreement—requirement of acknowledgment**

A premarital agreement was not invalid because it was never acknowledged where N.C.G.S. § 52-10, which at the time of execution of the agreement dealt with contracts between persons of full age about to be married and married persons, required acknowledgment only of those contracts executed during marriage. The validity of a premarital agreement is not affected by the lack of acknowledgment.

Am Jur 2d, Husband and Wife § 286.

6. **Husband and Wife § 2.1 (NCI3d)— premarital agreement—alimony provisions—no effect on property provisions**

Unenforceable provisions in a premarital agreement dealing with alimony did not affect the property provisions of the agreement because there is a presumption that provisions for property division and support payments are separable and there were no findings in the record to rebut that presumption.

Am Jur 2d, Divorce and Separation § 19; Husband and Wife § 289.

7. **Husband and Wife § 2.1 (NCI3d)— premarital agreement—conclusion that agreement identical to Equitable Distribution Act—distribution of property under Act—error**

The trial court erred by concluding that a premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the agreement. The Equitable Distribution Act did not exist at the time of the agreement's execution and the parties could not have intended that the Act cover their property division; furthermore, public policy permits spouses and prospective spouses to execute an agreement disposing of their property and the court should not ignore such agreements simply because of similarity to statutory provisions.

Am Jur 2d, Divorce and Separation § 19; Husband and Wife § 289.

APPEAL by Steven G. Howell, defendant in 85CVD4312 and plaintiff in 85CVD5688, from judgments filed 28 June 1988 by *Judge Russell G. Sherrill, III* in WAKE County District Court. Heard in the Court of Appeals 20 September 1989.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor and Hoyt G. Tessener, for plaintiff-appellant.

Johnny S. Gaskins for defendant-appellee.

GREENE, Judge.

Plaintiff husband appeals from an order declaring a premarital agreement invalid and dividing the property according to the Equitable Distribution Act. The husband and the defendant wife met in the summer of 1978 and began cohabiting in July or August, 1979. The wife has a Bachelor of the Arts degree in accounting and was employed by Gray Inc., the husband's business, as its corporate accountant and financial officer beginning sometime in 1979. In August 1979, she acquired about five percent of the outstanding shares of Gray Inc. stock.

The parties married on December 31, 1979 and separated on August 14, 1984. A divorce judgment was entered September 24, 1985.

Some disagreement exists as to the facts, but the trial court made the following findings of fact:

> 4. In early December, 1979, Landry and the defendant agreed to be married and agreed to marry in Las Vegas, Nevada at the end of the month because both of their divorces with their previous spouses would have been completed by that time and they were in love. Howell, at the beginning of December, 1979, indicated to Landry that he would like to enter into a premarital agreement. Landry indicated that she would be more than willing to look at an agreement but did not give any indication as to whether or not she would sign one. Howell never mentioned anything about any premarital agreement until the night before they were to get married.
>
> 5. In the meantime, both parties were telling their close friends that they would be getting married in Las Vegas at the end of December. Consequently, Landry made all of the arrangements to go to Las Vegas to get married on New Year's Day.

6. The next time that Howell mentioned anything about the premarital agreement was at approximately 8:00 p.m. on the evening before they were to go to Las Vegas the next day to get married.

7. Howell, unknown to Landry, had asked his lawyer to prepare a document entitled Premarital Agreement without consulting with Landry or asking her advice. The night when they got home from work, Howell in the kitchen, pulled two duplicate original documents from his suit pocket and showed them to Landry for the first time.

8. He told her that she was to sign the agreement and that if the agreement was not signed, they would not get married. Landry had no time to discuss the agreement with an attorney or anyone else because of the late time.

9. Landry had never seen a premarital agreement and did not know what should be in one. She told Howell that she felt that she should have an attorney of her own choosing look at it because the person who wrote it was Howell's personal attorney.

10. She indicated she did not want to sign the agreement but that because she very much wanted to get married and because of her financial involvement with the company, including lending the company money to survive and because the company was then her job, she, after making two minor adjustments to the agreement, signed it.

11. The agreement was not dated although it stated that it was made "on the date set out below." The agreement was not acknowledged by a Notary Public in accordance with NCGS 50-20(d), 52-10 or 52-10.1.

12. The document attempts to preclude the parties' right to receive alimony if otherwise eligible under the laws of North Carolina. The law of North Carolina is that alimony cannot be waived by a document in that such attempt by a party to force another to waive her rights is against public policy and as such any such attempt or document is therefore void.

13. The document in question does not contain a severability clause and, because the document contains a section that is void, the document as a whole is therefore also void.

14. The language of the document relating to separate property simply states that the parties would own their separate property. However, the language relating to separate property does not contain language in essence different than that found in the North Carolina Equitable Distribution Act, NCGS 50-20, *et seq.* As such, the court should still determine under the Equitable Distribution Act the separate and marital property of the parties and distribute the marital property as required by law notwithstanding the wording of the document.

15. The fair market value of the business in the form that it was at the time that the parties married on December 31, 1979, was zero. While the corporation did have assets of $500,000, it also had debts in the amount of $500,000. The total cash equity in the business was approximately $25,000, the amount of the money that Landry had put into the company.

16. Landry continued to take an active role in the company until the defendant fired her from her job as the financial controller of the company in January, 1984. She continued to work at home for the business until approximately July, 1984. The parties ultimately separated on or about August 15, 1984.

17. At all times during the course of marriage and for approximately one year prior to the marriage, Landry took an active role in the business as an employee and as a stockholder and as the wife of the major stockholder in the corporation. The business has appreciated in value from the net value of zero in December, 1979, to a net value of more than zero, the exact amount to be determined after further hearings.

18. Even if the business was separate property at the time of the marriage, Landry was actively involved with the business and is entitled to a marital share of the net value of the increase in the business worth from date of marriage to the date of separation.

The premarital agreement in pertinent part states:

WHEREAS the parties hereto intend to be married in the immediate future, and

WHEREAS each of the parties owns property individually the nature and extent of which has been disclosed to the other, and

WHEREAS the parties hereto desire that all property now owned or hereafter acquired by each party shall be free from any claim of the other party acquired as a result of the contemplated marriage,

It is therefore agreed:

1. *Separate Property.* After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.

. . . .

4. *Support Claims.* In the event of a separation of the parties that would constitute grounds for divorce, and in the event of a divorce, each of the parties agrees to make no claim against the other for alimony, support or costs of any action to enforce such a claim.

The trial court's conclusions of law stated in pertinent part:

2. The document entitled Premarital Agreement was signed under undue influence and duress of the defendant Howell and is therefore void and of no effect.

3. The document entitled Premarital Agreement was not executed in accordance with the requirements of NCGS 50-20(d), 52-10 or 52-10.1 and is therefore not validly executed and is void and of no effect.

4. The document entitled Premarital Agreement was on its face to be effective "on the date set out below" and because the document was never dated, it is void and of no effect.

5. The document entitled Premarital Agreement contained a paragraph relating to waiver of alimony but did not contain a severability clause indicating that if one paragraph was void, the remaining paragraphs would not be void. As such because the alimony section is and was void as against public policy and there was no severability clause in the document, the entire document is void and of no effect.

6. The document entitled Premarital Agreement, even if it is valid, on its face does nothing more than recite the language of the North Carolina Equitable Distribution Act, NCGS 50-20, *et seq.*, and, as such, the court may still determine what is separate and marital property under the law of North Carolina. Furthermore, even if the property in question as of the date of marriage was separate property, any increase in the value of the property in question may be marital property because of Landry being actively involved in the business of which she is entitled to an equitable share under the North Carolina law.

The issues presented are: I) whether the evidence supports the factual findings; II) whether the trial court erred in finding the premarital agreement invalid because of (A) the circumstances of its execution, (B) a lack of acknowledgment, or (C) illegal alimony provisions; and III) whether the trial court erred in applying the Equitable Distribution Act because of its supposed similarity to the provisions of the premarital agreement.

I

[1] The husband argues that the trial court's findings of fact are not supported by the evidence. We disagree. "Findings of fact when supported by any evidence, are conclusive on appeal . . . . Conclusions of law, even if stated as factual conclusions, are reviewable." *Fairchild Realty Co. v. Spiegel*, 246 N.C. 458, 465, 98 S.E.2d 871, 876 (1957) (citations omitted). Although we may not question the facts found which were supported by the evidence, we are not bound by the conclusions or inferences drawn by the trial court. *Heath v. Kresky Mfg. Co.*, 242 N.C. 215, 218, 87 S.E.2d 300, 302-03 (1955).

The husband assigns error to "finding of fact" No. 8 in which the trial court stated "Landry had no time to discuss the agreement with an attorney or anyone else because of the late time." The husband also assigns error to "finding of fact" No. 10 where the trial court stated that the negotiation which occurred between the husband and the wife resulted only in two "minor" adjustments to the agreement. Since these two statements are conclusions rather than direct factual findings, we are not bound to accept them when they are not supported by the findings. In Finding No. 8, the trial court concluded that the wife had insufficient time to discuss

the agreement with an attorney. However, nowhere in the findings did the trial court state any facts indicating why the wife had no opportunity to discuss the agreement with a lawyer the following day before leaving for Las Vegas. Furthermore, the wife was not compelled by financial or other considerations to marry the next day, and she could have put off the marriage in order to discuss the agreement with an attorney. Regarding the so-called "minor" adjustments to the agreement as concluded in Finding No. 10, the trial court in the findings does not list the nature of these adjustments. Therefore, we have no way of determining from the findings whether the trial court's conclusion that they are minor is accurate. Accordingly, we are not bound by these conclusions, labeled by the trial court as findings of fact.

Also, we need not determine whether Findings Nos. 11, 12, 13 and 14 were supported by competent evidence since each of these findings also is a conclusion of law. We will address these legal conclusions later in this opinion. Regarding Findings Nos. 15, 16 and 17, we need not decide whether they are supported by competent evidence since the outcome here makes those findings irrelevant. Regarding Findings Nos. 4, 6, 7 and 9, we find they are supported by competent evidence. Although some disagreement exists as to the facts, there is substantial evidence existing in the record as to each of these findings, and they are accepted on appeal as conclusive. *Heating & Air Conditioning Associates v. Myerly*, 29 N.C. App. 85, 89, 223 S.E.2d 545, 548, *rev. denied, appeal dismissed*, 290 N.C. 94, 225 S.E.2d 323 (1976).

II

A

[2] Premarital agreements, like postmarital agreements, are generally formed within a confidential relationship. *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 132, 370 S.E.2d 852, 854 (1988) (premarital agreement); *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968) (separation agreement); *Joyner v. Joyner*, 264 N.C. 27, 32, 140 S.E.2d 714, 719 (1965) (confidential relationship terminated when wife employs counsel and deals through counsel with husband as adversary). Accordingly, transactions between such parties, according to *Eubanks*, must be free of fraud, undue influence and duress, and furthermore must also be fair and reasonable. 273 N.C. at 196, 159 S.E.2d at 567; *see also Link v. Link*, 278 N.C. 181, 193, 179 S.E.2d 697, 704 (1971).

However, in *Knight v. Knight*, 76 N.C. App. 395, 333 S.E.2d 331 (1985), this court determined that courts should not review the *substantive* fairness of separation agreements, as they "should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing." *Knight*, 76 N.C. App. at 398, 333 S.E.2d at 333; *see also Hill v. Hill*, 94 N.C. App. 474, 480-81, 380 S.E.2d 540, 545 (1989). As principles of construction applicable to contracts also apply to premarital agreements, *Turner v. Turner*, 242 N.C. 533, 539, 89 S.E.2d 245, 249 (1955), we are bound to apply the principles enunciated in *Knight* to premarital agreements. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) (one panel of Court of Appeals bound by another panel). Nonetheless, a *procedural* fairness inquiry is required. Neither premarital nor postmarital agreements are enforceable if "unconscionable or procured by duress, coercion, or fraud." *Knight*, 76 N.C. App. at 398, 333 S.E.2d at 333 (citations omitted). Furthermore, the agreement must be free of undue influence, *Curl v. Key*, 311 N.C. 259, 265, 316 S.E.2d 272, 276 (1984), and when the parties to the agreement stand in a confidential relationship to one another, there must be full disclosure between the parties as to their respective financial status. *See Tiryakian*, 91 N.C. App. at 132-33, 370 S.E.2d at 854-55.

As a matter of comparison, we note that effective for all premarital agreements executed after 1 July 1987 (the agreement here was executed in 1979), the party against whom enforcement of a premarital agreement is sought, in order to avoid the agreement, must prove:

(1) That party did not execute the agreement voluntarily; *or*

(2) The agreement was unconscionable when it was executed *and*, before execution of the agreement, that party:

(i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party

N.C.G.S. § 52B-7(a) (1987) (emphases added).

In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Unlike the usual situation existing in confidential relationships where there is a dominant party who has the burden of showing the validity of the agreement, *see McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943), we are here presented with two parties who are equally fiduciaries and equally beneficiaries and therefore the burden of demonstrating the invalidity of the premarital agreement is upon the person who would have it held invalid. *See Gant v. Gant*, 329 S.E.2d 106, 116 (W.Va. 1985); *see also* 1 *Valuation and Distribution of Marital Property*, § 4.11 (J. McCahey ed. 1989). This is consistent with the current Uniform Premarital Act, N.C.G.S. § 52B-7(a) (1987).

[3] As the defenses of undue influence, duress, fraud, unconscionability and inadequate disclosure are all affirmative in nature, they must be affirmatively pled. N.C.G.S. § 1A-1, Rule 8(c) (1983). This record does not reveal any such pleadings. However, as the trial court addressed the issues of duress and undue influence, without any objection from the husband, those issues were necessarily before the trial court for determination, and the pleadings are "regarded as amended to conform to the proof even though the defaulting pleader made no formal motion to amend." *Mangum v. Surles*, 281 N.C. 91, 98, 187 S.E.2d 697, 702 (1972). As the defenses of unconscionability, fraud and inadequate disclosure were neither pled nor litigated, those issues are not properly raised and will not be addressed by this court. *See In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 723, 208 S.E.2d 670, 675 (1974).

We also note that the issue of whether the statute of limitations bars these defenses was not raised in the pleadings or at trial, and accordingly we do not address that issue. *See generally* N.C.G.S. § 1-52(9) (1983) (establishing three-year statute of limitations for fraud or mistake); *Swartzberg v. Reserve Life Insurance Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 276-77 (1960) (N.C.G.S. § 1-52(9) applies to "all forms of fraud, including deception, imposition, duress, and undue influence"); N.C.G.S. § 52B-9 (1987) (statute of limitations tolled during marriage).

[4] Duress and undue influence "are related wrongs" and

> to some degree, overlap. They are, however, not synonymous . . . . Duress is the result of coercion. It may exist even though

> the victim is fully aware of all facts material to his or her decision. Undue influence may exist where there is no misrepresentation or concealment of a fact and the pressure applied to procure the victim's ostensible consent to the transaction falls short of duress.

Link, 278 N.C. at 191, 179 S.E.2d at 703 (citations omitted). Undue influence is the "fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *Loftin*, 285 N.C. at 722, 208 S.E.2d at 674-75. Duress exists where one, by the unlawful or wrongful act of another, "is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Link*, 278 N.C. at 194, 179 S.E.2d at 705. An act is wrongful "if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Id.* Relevant factors in determining if the victim was subject to undue influence and whether that person's will was actually overcome include "the age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship with the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation." *Curl v. Key*, 64 N.C. App. 139, 142, 306 S.E.2d 818, 820 (1983), *reversed on other grounds*, 311 N.C. 259, 316 S.E.2d 272 (1984). In a general sense, actions taken by one voluntarily cannot be said to be given under duress or undue influence. *See* 25 Am.Jur. 2d *Duress and Undue Influence* § 3 at 357 (1966).

We next determine if the findings support the trial court's conclusion that the premarital agreement was secured by virtue of duress and undue influence exerted by the husband on the wife.

In summary form, the trial court's findings reveal that in the early part of December 1979 the parties agreed to be married and that the husband indicated to the wife before marriage that he would "like to enter into a premarital agreement." The wife responded that "she would be more than willing to look at the agreement." The parties had agreed to be married in Las Vegas, and the wife made the arrangements to travel to Las Vegas for

marriage on New Year's Day. At 8:00 p.m. on the evening before the parties were to leave for Las Vegas to be married on the next day, the husband presented to the wife a premarital agreement which had been prepared by his attorney, without the knowledge of the wife. The husband told the wife that "if the agreement was not signed, they would not get married." The wife told the husband that "she felt she should have an attorney of her own choosing" to review the document and indicated that she "did not want to sign the agreement." However, as "she very much wanted to get married and because of her financial involvement with the company," she nevertheless executed the agreement after making some adjustments to it. At the time the premarital agreement was executed, the wife had an active role in the business of which the husband was a major stockholder.

The wife primarily argues that the presentation of the premarital agreement to her on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, amounted to duress and undue influence. We disagree.

The mere shortness of the time interval between the presentation of the premarital agreement and the date of the wedding is insufficient alone to permit a finding of duress or undue influence. *See* 1 *Valuation and Distribution of Marital Property*, § 4.10[2][c]. Some states, but not North Carolina, require that premarital agreements be executed at least a minimum amount of time prior to the marriage. *See* Delaware Code, Title 13, § 301 (at least ten days before the marriage); Minnesota Stat. Ann. § 519.11 (prior to day of marriage). The shortness of the time interval when combined with the threat to call off the marriage if the agreement is not executed is likewise insufficient per se to invalidate the agreement. 1 *Valuation and Distribution of Marital Property*, § 4.10[2][c] at 4-85.

The facts in this case are distinguishable from the facts in *Link* where the court determined that there was evidence of duress where the husband threatened to take the house and the children from the wife unless she agreed to transfer to him her interest in the house and in the stock. 278 N.C. at 193-94, 179 S.E.2d at 704. Here, the threat to cancel the marriage and the execution of the premarital agreement were closely related to each other. The marriage would have redefined the respective property rights

of the parties, and the premarital agreement would have avoided that redefinition to some extent. Indeed, the cancellation of a proposed marriage would be a natural result of a failure of a party to execute a premarital agreement desired by the other party. These facts should be contrasted with the facts in *Link* where the husband's threat to take custody of the children was unrelated to the agreement that was ultimately executed dealing with the wife's transfer of her interest in the stock and in the house.

Having determined the absence of facts giving rise to per se duress or undue influence, we now must determine if the totality of the circumstances surrounding the execution of the premarital agreement supports a conclusion of duress or undue influence. We find no such evidence. In fact, the evidence is to the contrary. The wife, aware that she should not sign the agreement without the advice of an attorney, proceeded in any event to execute the agreement. Neither party was obligated to be married. *See DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986) ("While it may have been embarrassing to cancel the wedding only a few hours before it was to take place, she certainly was not compelled to go through with the ceremony."). We cannot presume from the findings that the wife had insufficient time to seek advice of an attorney had she decided to do so. The premarital agreement was presented to the wife at 8:00 p.m. on the night before the parties were to leave for Las Vegas. The findings are not specific as to the time the parties were to be married on the next day. The wife had read the agreement which was not lengthy and in fact made some adjustments in the agreement before signing. The husband did not threaten to terminate the wife's employment with Gray, Inc. if she had refused to execute the agreement. There is no finding that the failure to execute the premarital agreement would have resulted in any loss of funds which may have been expended by the wife in preparation for the wedding.

Accordingly, we determine the wife has not met her burden of proof, and the findings are insufficient to support the trial court's conclusion that the premarital agreement was executed under duress and undue influence. Therefore, the order declaring the premarital agreement void for the reasons of duress and undue influence is reversed.

B

[5] The wife also argues we should find the premarital agreement invalid since it was never "acknowledged." Had the agreement

been executed after 1 October 1981, this issue would be determined by the Equitable Distribution Act which provides in pertinent part:

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

N.C.G.S. § 50-20(d) (1987).

N.C.G.S. § 52-10 provides in pertinent part that:

> No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

N.C.G.S. § 52-10(a) (1984). Since § 52-10 requires acknowledgment only during coverture, the period of marriage, it does not require acknowledgment for premarital agreements.

The agreement at issue was executed in 1979, and no statutory requirement for acknowledgment existed then either. N.C.G.S. § 52-10, which then also dealt with contracts between "persons of full age about to be married and married persons . . . ," required acknowledgment only of those contracts executed during marriage. N.C.G.S. § 52-10 (1977). We find this omission to be a significant indication that the Legislature did not intend to require parties to a premarital agreement to formally acknowledge the agreement. Also, the language of the statute should be given its clear effect, which is not to require acknowledgment of premarital agreements.

The wife argues that case law placed an acknowledgment requirement on premarital agreements, citing *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955), and *In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 208 S.E.2d 670 (1974). However, neither of these cases explicitly requires acknowledgment of premarital contracts. In *Turner*, the court simply noted that acknowledgment occurred. 242 N.C. at 536, 89 S.E.2d at 247. In *Loftin*, the agreement at issue actually was executed during mar-

riage, and the court reviewed it as such. 285 N.C. at 721, 208 S.E.2d at 673-74. Furthermore, the *Loftin* Court stated as follows:

> We also observed in passing that the Court of Appeals used language which seemed to interpret our decision in *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245, to *require* that an antenuptial agreement satisfy the provisions of G.S. 52-6. It appears to us that this court in *Turner*, while considering the total circumstances surrounding the execution of the antenuptial agreement, merely *observed* that the Clerk of Superior Court of Gates County did conduct a privy examination incorporating in its certificate the statement that the Agreement was not unreasonable or injurious to the *femme* contractor.

Loftin, 285 N.C. at 723, 208 S.E.2d at 675 (emphases in original).

The *Loftin* Court went on to hold that the acknowledgment or certification requirement of N.C.G.S. § 52-6, a predecessor of § 52-10, did not apply to antenuptial agreements. 285 N.C. at 723-24, 208 S.E.2d at 675. We conclude that the validity of a premarital agreement is not affected by the lack of acknowledgment.

Although the Uniform Premarital Agreement Act is inapplicable here, we note that it does not require acknowledgment of premarital agreements. N.C.G.S. § 52B-3.

C

[6] The wife also argues that the entire premarital agreement is invalid because of the illegality or invalidity of its alimony provisions. A premarital agreement concerning alimony is void as against public policy. *Motley v. Motley*, 255 N.C. 190, 193, 120 S.E.2d 422, 424 (1961). The husband does not dispute the unenforceability of the alimony provisions, but he asserts the property provisions are severable from the alimony provisions. He cites *Rose v. Vulcan Materials Company*, 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973), for the general proposition that "[w]hen a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced."

There is a presumption that "the provisions for property division and support payments are separable." *Rowe v. Rowe*, 305 N.C. 177, 184, 287 S.E.2d 840, 844 (1982). As there are no findings in this record to rebut that presumption, we determine the wife

has failed in her burden of proof, and the invalidity of the alimony provision does not affect the property provisions of the agreement. *See Small v. Small*, 93 N.C. App. 614, 621, 379 S.E.2d 273, 277, *rev. denied*, 325 N.C. 273, 384 S.E.2d 579 (1989) (alimony provisions of postmarital agreement are severable from the property division provisions).

III

[7] The husband also argues the trial court erred in concluding that the premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement. We agree. Premarital agreements, like all contracts, must be interpreted according to the intent of the parties. The Equitable Distribution Act did not exist at the time of the agreement's execution, and thus the parties could not have intended that the Equitable Distribution Act govern their property division. Furthermore, public policy of North Carolina permits spouses and prospective spouses to execute an agreement disposing of their property at any time, and a court should not ignore such agreements simply because of its supposed similarity to statutory provisions. *See Buffington v. Buffington*, 69 N.C. App. 483, 488, 317 S.E.2d 97, 100 (1984).

The husband also argues that the trial court erred in concluding that the premarital agreement was void because it lacked a specific date. Since the wife concedes that the trial court erred in that respect and declined to argue the issue, we need not discuss it.

As we have determined the trial court erred in voiding the premarital agreement for the reasons asserted and assigned as error, we reverse the judgment below and remand the cause for distribution pursuant to the Equitable Distribution Act to the extent any properties the parties may own are not covered by the premarital agreement.

Reversed and remanded.

Judges EAGLES and PARKER concur.

SUMMEY OUTDOOR ADVERTISING, INC., PLAINTIFF v. THE COUNTY OF HENDERSON, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. 8829SC900

(Filed 19 December 1989)

1. **Municipal Corporations § 30.13 (NCI3d)— sign control ordinance—enacted under general police power—valid**

A county sign control ordinance was well within the parameters of N.C.G.S. § 153A-121 and, while it may have been more desirable and better planning for defendant to adopt a county-wide zoning ordinance under N.C.G.S. § 153A-340, the fact that defendant did not do so does not preclude defendant from regulating outdoor advertising under N.C.G.S. § 153A-121, which confers general police power upon cities and towns.

Am Jur 2d, Advertising §§ 8, 13, 24-26.

2. **Municipal Corporations § 30.13 (NCI3d)— sign control ordinance—equal protection—valid**

A sign control ordinance involving an off-premise/on-premise classification provided a constitutionally valid basis for regulation of outdoor advertising signs in that the validity of such classifications has been accepted and upheld as a valid distinction in an equal protection context. The regulations apply to all off-premises signs not otherwise exempted, defendant established legitimate reasons for the ordinance, and the ordinance was not for aesthetics only.

Am Jur 2d, Advertising §§ 8, 13, 24-26.

3. **Municipal Corporations § 30.13 (NCI3d)— sign control ordinance—not a taking—not a violation of general due process**

A sign control ordinance did not violate due process where it was clear that the objectives stated in the ordinance are within the scope of the police power. Restriction of outdoor advertising signs is reasonably necessary to promote traffic safety, prevent fire hazards or obstructions of light, air and visibility, and the ordinance was not unreasonable in its interference with plaintiff's right to use his property as he deems fit. The fact that it will be costly for plaintiff to bring some of his signs into compliance with the ordinance does not rise to the level of interference with his right to use the property

as he deems fit and plaintiff presented no evidence that compliance with the ordinance would completely deprive him of the beneficial use of his property.

Am Jur 2d, Advertising §§ 8, 13, 24-26.

4. Municipal Corporations § 30.13 (NCI3d)— sign control ordinance—amortization provisions—valid

Amortization provisions in a sign control ordinance were valid and did not constitute a taking of plaintiff's property without compensation because the nature of plaintiff's business is outdoor advertising and the fact that plaintiff is engaged in a "single purpose" does not exempt it from any and all regulations; although plaintiff's improvements to the land were legal when built or bought, that does not mean that defendant could never subject plaintiff to any regulations; prohibitive cost of compliance which diminishes plaintiff's property values is not sufficient reason to render an ordinance invalid; that the "character of the neighborhood" is a factor in determining reasonableness makes no difference here; and the five year amortization period was sufficient compensation.

Am Jur 2d, Zoning and Planning § 190.

APPEAL by plaintiff from *Owens (Hollis M.), Judge.* Orders entered 17 February 1988 and 28 April 1988 in Superior Court, HENDERSON County. Heard in the Court of Appeals 16 March 1989.

On 13 February 1987, plaintiff filed a complaint against defendant alleging that a sign control ordinance enacted by defendant on 21 May 1986 with subsequent amendments (hereinafter the ordinance) was illegal, *ultra vires* and unconstitutional. On 2 November 1987, defendant filed a motion for summary judgment, and plaintiff filed a cross-motion for partial summary judgment on 30 December 1987.

The trial court heard arguments and entered an order on 17 February 1988 denying plaintiff's cross-motion for summary judgment and ruling that the ordinance is "statutorily authorized and constitutionally valid . . . .", thereby effectively granting defendant's motion for summary judgment. Plaintiff moved to alter or amend the judgment. The trial court denied plaintiff's motion by order dated 28 April 1988.

From the orders of 17 February 1988 and 28 April 1988, plaintiff appeals.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed and Michelle Rippon, for plaintiff-appellant.

Michael B. Brough & Associates, by Michael B. Brough and Frayda S. Bluestein, for defendant-appellee.

ORR, Judge.

The ordinance in question concerns the regulation of certain outdoor advertising signs. It was enacted on 21 May 1986 by the Henderson County Board of Commissioners pursuant to G.S. 153A-121(a). The purpose of the ordinance:

> [I]s to permit such signs that will not, by their reason, size, location, construction, state of repair, or manner of display, endanger the public safety of individuals, confuse, mislead or obstruct the vision necessary for traffic safety, or otherwise endanger public health, safety and welfare. Signs, if improperly constructed, located, or concentrated in large numbers can be hazardous to public health, safety and welfare and result in aesthetic harm. A sign left unregulated may be a fire hazard, dangerous in high winds, a cause of garbage accumulation, an obstruction of light and air, and a traffic hazard by distracting a driver's attention from the road.

The ordinance regulates the size, height, configuration and location of signs not advertising a business located on the same lot or parcel as the sign. This distinction is commonly known as one between "off-premise" and "on-premise" signs.

The ordinance regulates only off-premise signs larger than 15 square feet. Therefore, on-premise signs and those less than 15 square feet are not subject to regulation. The ordinance further provides that all outdoor advertising signs (subject to the ordinance) shall have a permit prior to construction. Those signs already in existence must be brought into compliance with the ordinance to receive a permit.

The key provisions of the ordinance under section 402.8A require that the maximum permissible size for new and existing signs is 380 square feet. Sign structures may have two sides per structure with one face per side. Sign structures must be set back

25 feet from paved roads or 35 feet from the center line of unpaved roads. Signs may not be located closer than 1,000 feet to another sign, residence or jurisdictional boundary. There are also various height requirements depending upon the size of the sign.

Section 604.3 of the ordinance allows existing nonconforming signs to be brought into compliance with the ordinance requirements or be removed within five years of enactment (by 21 May 1991). This period of time is generally considered an "amortization period." There are two exceptions to this requirement. First, under section 604.3, nonconforming signs located on interstate or federal and primary highways are "grandfathered in" and not subject to removal. Second, section 604.3 excepts signs nonconforming solely because they violate the minimum spacing requirements.

Plaintiff, an outdoor advertising company, is in the business of buying and building outdoor advertising signs. Beginning in June 1986, plaintiff submitted applications for signs and building permits pursuant to the ordinance. Of the 12 applications for permits listed in Schedule A, each was denied for violating the setback, spacing and/or height requirements.

Plaintiff maintains that 32 of his signs were legally permitted when he bought or rebuilt them. These 32 signs are now "nonconforming" under the ordinance, because 27 are four inches to 10 feet too close to the road and five are three to 11 feet too tall. Five of the 32 signs have too many faces under the ordinance.

Plaintiff maintains that the ordinance is not statutorily authorized, cannot survive as an aesthetics-only ordinance on at least two grounds, is an arbitrary violation of due process of law, and its provisions for amortization are invalid. Plaintiff argues that the trial court erred in ruling in favor of defendant on these issues, effectively granting defendant's motion for summary judgment.

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, 87, 336 S.E.2d 653, 654 (1985), *disc. rev. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 258, 335 S.E.2d 79, 83 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). This remedy allows the trial court to decide whether a genuine issue of fact exists, but it does not permit the trial court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In the case before us, the trial court made findings of fact and conclusions of law. We note that the trial court's findings are uncontested except for Finding No. 5, which deals only with plaintiff's applications for sign permits, and not with a genuine issue of material fact. While it is not advisable to make findings of fact in a summary judgment proceeding, such findings do not render the summary judgment invalid. *White v. Town of Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179, *disc. rev. denied*, 318 N.C. 511, 349 S.E.2d 874-75 (1986).

> A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Shuford, N.C. Practice and Procedure, Sec. 56-6 (1977 Supp.). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment. *Insurance Agency v. Leasing Corp.* 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Id., citing Mosley v. Finance Co., 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E.2d 9 (1978).

I.

[1] Plaintiff first argues that defendant did not have the statutory authorization to enact the ordinance without complying with the procedural safeguards for zoning. We disagree.

Article I of the ordinance indicates that it was enacted under G.S. 153A-121(a) which states:

> A county may by ordinance define, regulate, prohibit or abate acts, omissions, or conditions detrimental to the health, safety,

> or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

This statute and its predecessor, G.S. 153-9(55), confers general police power upon cities and towns. *Whitney Stores v. Clark*, 277 N.C. 322, 325-26, 177 S.E.2d 418, 420 (1970).

Plaintiff concedes that defendant has the authority to regulate its outdoor advertising signs under the zoning power enumerated in G.S. 153A-340, "[f]or the purpose of promoting health, safety, morals, or the general welfare, ..." We do not believe that because defendant has authority to regulate signs under G.S. 153A-340, it may not regulate signs in a similar manner under the general police powers in G.S. 153A-121 (allowing regulation of "conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the county . . ."). G.S. 153A-121 and 153A-340 do not operate exclusively of each other. *See* G.S. 153A-124 (Specific powers enumerated in Article 6, Chapter 153A to "regulate, prohibit or abate acts, omissions or conditions is not exclusive [or] a limit on the general authority to adopt ordinances . . . [under] G.S. 153A-121.").

Moreover, defendant has not exceeded its authority under G.S. 153A-121. Our Legislature, in G.S. 153A-4, mandated that Chapter 153A and local acts "shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of that power." *Cf., Variety Theaters v. Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972), *appeal dismissed*, 411 U.S. 911 (1973) (the validity of a local act found immaterial when G.S. 153-9(55) (predecessor of 153A-121) was broad enough to authorize the contested ordinance).

G.S. 153A-121 does not allow defendant to engage in total land use planning without a plan, does not prohibit uses without concern to adverse or beneficial effects on the economy, is not exclusively remedial in nature, and does not permit regulations *solely* in a prohibitive manner, as plaintiff maintains. The language of G.S. 153A-121 is clear. Therefore, we hold that defendant's ordinance is well within the parameters of the statute. While it may have been more desirable and better planning for defendant to adopt a county-wide zoning ordinance, the fact that defendant did not do so does not preclude defendant from regulating outdoor advertising signs under G.S. 153A-121.

II.

[2] Plaintiff's next assignment of error concerns whether or not the ordinance is authorized under *Shuford v. Waynesville*, 214 N.C. 135, 198 S.E. 585 (1938), and whether the ordinance denies plaintiff equal protection and is rationally related to the legitimate public purposes for which it was adopted.

In *Shuford*, a zoning case concerning service stations, our Supreme Court stated that so long as an ordinance or regulation is reasonable and not arbitrary and applies uniformly to all persons similarly situated, then the ordinance meets the due process and equal protection requirements of the law. 214 N.C. at 139, 198 S.E. at 588. The *Shuford* court concluded that although the ordinance was statutorily authorized, it was invalid on constitutional grounds because the defendant, Town of Waynesville, established no legitimate reason for allowing a service station on one block and not permitting an identical one on the next. The court found that the ordinance was arbitrary and discriminatory and, in effect, gave a monopoly to the service station already in operation. *Id.* at 140, 198 S.E. at 588.

The classification established in the case *sub judice* concerns off-premise outdoor advertising signs in Henderson County. On-premise signs are exempted from the ordinance, as are off-premise signs located on interstate or federal aid primary highways and those that are nonconforming with the ordinance solely because they violate the minimum spacing requirements.

Unlike the classification in *Shuford*, the validity of the classification for off-premise and on-premise sign regulations has been accepted and upheld as a valid distinction for such regulation in a constitutional equal protection context. *Metromedia v. City of San Diego*, 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981). In *Metromedia*, a plurality of the court found that an ordinance prohibiting off-premise commercial billboard advertising would not have offended the first amendment if it had not preferred commercial over noncommercial advertising. *Id.* Relying on *Metromedia*, the Fourth Circuit affirmed summary judgment and validated a Durham ordinance prohibiting *all* commercial off-premise advertising signs (except those on interstate or federally-aided primary highways) (emphasis added). *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 173 (4th Cir. 1988). *Cf. Givens v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*,

307 N.C. 127, 297 S.E.2d 400 (1982) (zoning ordinance prohibiting off-premise outdoor advertising signs was not overbroad and did not exceed the town's police power).

Based upon the foregoing principle of law, we find that the off-premise/on-premise classification is a constitutionally valid basis for regulation of outdoor advertising signs. Moreover, although our case is factually distinct from that of *Shuford*, we find that the off-premise/on-premise classification can be reconciled with the equal protection principles in *Shuford*.

First, regulating off-premise advertising signs in size, height and distance from the road is reasonable and not arbitrary. These regulations apply to *all* off-premise signs not otherwise exempted.

Second, defendant has established legitimate reasons for the ordinance. Article II of the ordinance states that its purpose is to protect "public health, safety and welfare," and prevent "aesthetic harm, . . . fire hazard, . . . garbage accumulation, obstruction of light and air, and . . . traffic hazard[s]." We find that all of these reasons are legitimate and note that similar ordinances have been upheld on the basis of aesthetics alone. *See State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *Naegele*, 844 F.2d 172 at 174 (4th Cir. 1988).

Plaintiff further argues that the ordinance fails the test of *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982), for an aesthetics-only ordinance. The *Jones* court held that aesthetics based regulatory ordinances are permissible when they are reasonable. Reasonableness depends on the facts and circumstances of each case, including a determination of "whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation." *Id.* at 530-31, 290 S.E.2d at 681 (citations omitted). We find *Jones* to be inapplicable to the case at bar, because the ordinance in question is not for aesthetics only. Plaintiff argues that defendant acknowledged that the ordinance was solely for aesthetic purposes in interrogatories numbers 46 and 48. We have reviewed these interrogatories and other evidence and find that defendant made no such concession. Furthermore, we rely on Article II of the ordinance where aesthetics is listed as only one of several purposes.

III.

[3] Plaintiff next argues that the ordinance is an oppressive and arbitrary violation of due process of law under a takings theory and on general due process grounds.

The source of substantive due process and constitutional takings claims in North Carolina is Article I, sec. 19 of the North Carolina Constitution:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The "law of the land" clause has the same meaning as "due process of law" under the Federal Constitution. *Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970), *rev'd on other grounds*, *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982).

In *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 217, 258 S.E.2d 444, 450 (1979), our Supreme Court stated that a regulation must be reasonably related to a legitimate public purpose to meet the constitutional requirements of due process. The court went further in *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983). There, the issues were similar to the issues in the case *sub judice*.

In *Responsible Citizens*, the plaintiff alleged that a city ordinance concerning land-use regulations in a flood plain area constituted an unlawful exercise of the police power because it effected a "taking" of property without just compensation and because it violated the constitutional equal protection provisions, benefitting one class of citizens at the expense of another. Citing *A-S-P Associates*, the court engaged in an "ends-means" analysis in deciding whether a particular exercise of the police power is legitimate. This is a two-pronged test: the court first determines whether the object of the legislation (the ends sought) is within the scope of the power. Then the court determines whether the means chosen are reasonable. In determining the second prong, the court must determine if the regulation is reasonably necessary to "promote the accomplishment of a public good" and if "the interference with

the owner's right to use his property as he deems fit reasonable in degree[.]" *Id.* at 261-62, 302 S.E.2d at 208.

Applying these principles to our case, it is clear that the objectives stated in Article II of the ordinance fall within the scope of the police power. We now turn to whether the ordinance is reasonable. We believe that the ordinance is reasonably necessary to "promote the accomplishment of a public good." We agree with defendant that size, height, location, state of repair, and manner of display restrictions in outdoor advertising signs are reasonably necessary to promote traffic safety, prevent fire hazards or obstructions of light, air and visibility. Without any such restrictions, it is not inconceivable that Henderson County could have "wall-to-wall" outdoor advertising signs.

Moreover, we find that the ordinance is not unreasonable in its interference with plaintiff's "right to use his property as he deems fit." The ordinance allows plaintiff to obtain permits for *all* outdoor advertising signs so long as such signs comply with the restrictions. The ordinance places no unreasonable restrictions on plaintiff. The fact that it will be costly for plaintiff to bring some of his signs into compliance with the ordinance does not rise to the level of an interference with his right to *use* the property as he deems fit.

Our Supreme Court stated in *Helms v. Charlotte*, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961), that a zoning ordinance is invalid when it "has the effect of *completely depriving* (emphasis added) an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, ..." (Citation omitted.) Plaintiff has presented no evidence that compliance with the ordinance will completely deprive him of the beneficial use of his property. Plaintiff has presented only evidence of the cost of compliance and *speculation* that under the ordinance some of his sign leases may be in jeopardy.

Our Supreme Court noted in *A-S-P Associates* and in *Responsible Citizens* that "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate, is not sufficient reason to render the ordinance invalid." 298 N.C. at 218, 258 S.E.2d at 451 (citations omitted).

In summary, we hold that the ordinance is reasonably related to the legitimate public purposes stated in Article II of the ordinance and therefore meets the constitutional requirements of due process. Further, we hold that the objectives of Article II are within defendant's police powers, that the ordinance is reasonably necessary to promote the accomplishment of its stated purposes for the public good, and that the ordinance does not unreasonably interfere with plaintiff's "right to use his property as he deems fit."

IV.

[4] Plaintiff's remaining issues concern whether the ordinance's amortization provisions are valid under North Carolina law. Plaintiff contends that the ordinance fails the test in *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975), and constitutes a taking of his property without just compensation.

We find that the trial court's conclusion that the ordinance "does not effect an unlawful taking of plaintiff's property without compensation" is not in conflict with *Joyner*. In *Joyner*, our Supreme Court held that "provisions for amortization of nonconforming uses [in a rezoning ordinance] are valid, if reasonable . . . ." 286 N.C. at 375, 211 S.E.2d at 325. The *Joyner* court, *citing Harbison v. Buffalo*, 4 N.Y. 2d 553, 562-63, 176 N.Y.S. 2d 598, 605, 152 N.E.2d 42, 47 (1958), considered the following factors:

> '. . . When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid.'

286 N.C. at 374, 211 S.E.2d at 325.

Taking these factors into consideration, we hold that the ordinance, in the case before us, is reasonable. First, the nature of plaintiff's business is outdoor advertising. Plaintiff makes a lengthy argument concerning the "single purpose" of his business. The fact that plaintiff is engaged solely in a "single purpose" business does not thereby exempt it from any and all regulation.

Second, although his alleged improvements to the land (if outdoor advertising signs are indeed improvements) were legal when built or bought, it does not mean that defendant could *never* subject plaintiff to any regulations.

Third, plaintiff argues that the cost of compliance is a substantial detriment. When the cost of compliance with such ordinance is prohibitive and diminishes plaintiff's property values, it is not sufficient reason to render an ordinance invalid. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 265, 302 S.E.2d 204, 210 (1983), *citing A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979).

Finally, the "character of the neighborhood" as a factor determining reasonableness makes no difference here. The ordinance applies throughout the county to off-premise signs unless otherwise excepted. The fact that an on-premise unregulated sign may still exist in a particular area while an off-premise sign in the same area is regulated by the ordinance does not necessarily impact on the character of the neighborhood. Defendant's overall purpose in Article II of the ordinance would generally improve the character of a neighborhood even if only a few signs were subject to compliance.

We further find that the ordinance does not constitute a taking of plaintiff's property without compensation. We hold that the ordinance's five-year amortization period is sufficient compensation and rely on a number of cases upholding similar amortization provisions. *See State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975) (three-year amortization for removal of junkyards upheld); and *Givens v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982) (five and one-half year amortization of outdoor advertising signs upheld). We further note that there are numerous other federal cases supporting corollary amortization provisions.

For the reasons set forth above, we affirm the trial court's denial of plaintiff's cross-motion for summary judgment, its findings and conclusions of law in favor of defendant and its denial of plaintiff's motion to alter or amend its order.

Affirmed.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES RICHARD DAVIS

No. 8928SC373

(Filed 19 December 1989)

1. **Constitutional Law § 28 (NCI3d)— prosecution of tax protestor—not selective prosecution**

The trial court did not err by denying defendant's motion to dismiss tax related charges on the ground of selective prosecution. Defendant failed to show that prosecution was based on his affiliation with a recognizable, distinct class that suffered discrimination while others similarly situated were ignored in that his statistical evidence was too tenuous and he was incorrect in comparing the rate of prosecutions against the Patriot Network tax protestors with the number of people who fail to file but are not tax protestors. Defendant ignores the fact that preceding 1988 the Special Investigation Unit of the Department of Revenue initiated charges against numerous non-Patriot Network members.

Am Jur 2d, Criminal Law §§ 833, 834.

2. **Constitutional Law §§ 28, 18 (NCI3d)— tax protestor—selective enforcement—no violation of free speech**

A tax protestor's contention that the statutes under which he was charged, N.C.G.S. § 105-236(9) (failure to file a return) and N.C.G.S. § 105-236(7) (tax evasion), were unconstitutional as applied to him and that they represented attempts to suppress his right to free speech was feckless, even assuming that the State singled defendant out for prosecution because of his vocal stand against paying income taxes, because such prosecutions are predicated in part on a potential deterrent effect and serve a legitimate interest in promoting more general tax compliance.

Am Jur 2d, Criminal Law §§ 833, 834.

3. **Searches and Seizures § 1 (NCI3d)— tax protestor—administrative summons—wage and exemption records—not an illegal search**

The trial court did not err in the prosecution of a tax protestor by denying his motion to suppress evidence obtained pursuant to N.C.G.S. § 105-258, an administrative summons

statute used by the Department of Revenue to obtain wage and exemption information from defendant's former employer. A summons under N.C.G.S. § 105-258 would violate constitutional protections if it was overly broad, not issued in good faith for a legitimate purpose, or not relevant to that purpose. The information sought must not be in the possession of the Department at the time the summons is issued, and the proper administrative steps must be followed in issuing the summons. The Department of Revenue complied with those requirements in this case, rendering defendant's assignments of error without merit.

Am Jur 2d, Searches and Seizures § 28.

4. **Taxation § 28.5 (NCI3d)— tax evasion—failure to give notice of assessment of taxes—not related to criminal offenses**

The trial court did not err by denying defendant's motions to dismiss tax related charges based upon the State's failure to comply with N.C.G.S. § 105-241.1, which requires the State to give notice of assessment of taxes. This statute addresses only the civil assessment of taxes and is fully independent of the criminal offenses with which defendant was charged.

Am Jur 2d, State and Local Taxation § 7.

5. **Criminal Law § 50 (NCI3d)— tax evasion—refusal to recognize witness as expert—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for tax related charges by failing to recognize a witness as an expert and in failing to allow him to testify as a layman concerning certain matters.

Am Jur 2d, State and Local Taxation § 7.

6. **Taxation § 28 (NCI3d)— tax evasion—proof required—subject to being taxed and willful evasion**

The trial court did not err by failing to dismiss charges of tax evasion on the ground that the State did not prove that defendant owed taxes for the years in question, or by failing to instruct the jury that the State must show that a tax is due. Where a defendant is charged with attempting to evade or defeat the ascertainment of a tax, and that person fails to file a return, the State must only show that defendant was subject to being taxed under the law and

that he willfully attempted to evade or defeat the imposition of the tax.

Am Jur 2d, State and Local Taxation § 7.

7. Taxation § 28 (NCI3d)— tax evasion—good faith belief that tax is not owed—no defense

The trial court did not err in the prosecution of a tax protestor by not instructing the jury that defendant's subjective good faith belief that he did not owe the taxes was a defense. The trial court conveyed the required instruction that, while a good faith misunderstanding of the law may negate willfulness, a good faith disagreement with the law does not.

Am Jur 2d, State and Local Taxation § 7.

APPEAL by defendant from judgments entered 17 November 1988 by *Judge W. Terry Sherrill* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 11 October 1989.

This is a criminal action, heard de novo in the Superior Court of Buncombe County on appeal from convictions of several tax-related misdemeanors in district court. Appellant was arrested on nine warrants, six that charged him with Wilful Failure to File a North Carolina Tax Return in violation of N.C.G.S. § 105-236(9), and three warrants that charged him with Attempting to Evade or Defeat a Tax in violation of N.C.G.S. § 105-236(7). At the close of the State's case in Superior Court, the counts charging willful failure to file a return for 1981 and 1982 were dropped. A jury found appellant guilty on all other counts, and he was sentenced to a total of seven months. Appellant, Mr. James Davis, received a consolidated term of six months on the three counts of attempting to evade or defeat a tax, followed by a consolidated thirty-day sentence for the four counts of failing to file. Mr. Davis appealed to this Court. We affirm.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.

Assistant Public Defender William D. Auman for defendant appellant.

ARNOLD, Judge.

The facts important to this case will be examined as we discuss the issues involved.

1. Selective Prosecution

[1] The first three assignments of error involve the Superior Court judge's denial of appellant's motion to dismiss the case based upon the theory of selective prosecution. Appellant argues the court should not have required him to show as an element of selective prosecution that the State perpetrated "invidious discrimination" against him. As a result of his failure to produce evidence of this element, the court denied appellant's motion to dismiss.

The Superior Court was correct in demanding a showing of invidious discrimination. The two-part test for discriminatory selective prosecution is:

> (1) the defendant must make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; and (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Howard, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-602 (1985), *cert. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986).

Mr. Davis argues that he was singled out for prosecution because of his affiliation with the Patriot Network, an organization opposed to personal income tax laws. He points out that in 1988 five of eight charges for tax-related offenses initiated by the N.C. Department of Revenue's Special Investigations Unit were against persons affiliated with the Patriot Network. Mr. Davis states that by contrast in 1988, 600,000 out of 3.2 million North Carolinians did not file a tax return and could have been prosecuted by the Department of Revenue. Appellant contends this five-person class was singled out for selective prosecution by the State in violation of their guarantees of equal protection under the Federal and State Constitutions. Mr. Davis argues that when a claim of selective prosecution involves violations of equal protection rights a defendant is not required to show discriminatory intent if the claim is based

on an "overtly discriminatory classification." *Wayte v. U.S.*, 470 U.S. 598, 84 L.Ed. 2d 547 (1985).

Wayte, however, is not applicable here. Appellant has failed under the first prong of the *Howard* test to show his prosecution was based on his affiliation with a recognizable, distinct class that suffered discrimination while others similarly situated were ignored. Appellant's statistical evidence for supporting his claim of selective prosecution is too tenuous, and he is incorrect in comparing the rate of prosecutions against the Patriot Network tax protestors with the number of prosecutions against people who fail to file but are not tax protestors.

Appellant's statistical evidence ignores the fact that preceding 1988 the Special Investigations Unit of the Department of Revenue initiated charges against numerous non-Patriot Network members. Mr. Davis fails to include in his "statistical survey" the number of prosecutions initiated by the Department outside the Special Investigations Unit or the number of prosecutions that occurred under other statutes. Appellant makes no showing that the State purposefully ignored other individuals known to be routinely filing false exemption forms or not filing tax returns in the manner of Mr. Davis. Finally, Special Investigator Richard Holt of the Department of Revenue testified that when he began his investigation he was not aware of Mr. Davis' affiliation with the Patriot Network.

More importantly, appellant's method of comparing prosecutorial rates is flawed. He is incorrect in comparing the prosecutorial treatment he received against the treatment received by the 600,000 other North Carolinians who failed to pay their personal income taxes in 1988. These two groups are not "similarly situated." Unlike Mr. Davis, most people who failed to file an income tax return that year did so out of neglect. Tax protestors such as Mr. Davis, openly advocating noncompliance with tax laws, are not similarly situated with neglectful taxpayers, and it is erroneous to compare prosecution rates between these two groups.

[2] Mr. Davis makes a feckless argument that the statutes he was charged under are unconstitutional as applied to him because selection for his prosecution was impermissibly based on an attempt to suppress his first amendment right of free speech. He seeks a dismissal under N.C.G.S. § 15A-954(a)(1).

The evidence shows that appellant is an outspoken critic of the North Carolina personal income tax system. He has written and spoken often in support of his theory that the taxing of personal income is unconstitutional. Nevertheless, even assuming for a moment that the State in fact singled out Mr. Davis for prosecution because of his vocal stand against paying income taxes, no constitutional violation occurred in the application of these tax enforcement statutes. Federal courts, which have ruled on this issue as it has arisen under parallel federal statutes, have held that the prosecution of individuals who publicly assert privileges not to pay taxes does not necessarily constitute selection upon an impermissible basis. This is because such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance. *U.S. v. Rice*, 659 F.2d 524 (5th Cir. 1981); *U.S. v. Catlett*, 584 F.2d 864 (8th Cir. 1978); *U.S. v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *U.S. v. Scott*, 521 F.2d 1188 (9th Cir. 1975), *cert. denied*, 424 U.S. 955, 47 L.Ed. 2d 361 (1976); *U.S. v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818, 50 L.Ed. 2d 79 (1976).

The federal cases have consistently rejected this claim by tax protestors, holding that selective enforcement of a law is not itself a constitutional violation in the absence of an invidious purpose. *Rice*, 659 F.2d at 526-27. In *Catlett*, a case similar to one before us now, the Court of Appeals for the Eighth Circuit noted that while the decision to prosecute an individual cannot be made in retaliation for the exercise of first amendment rights, the prosecution of an outspoken tax protestor is not a selection on an impermissible basis. *Catlett*, 584 F.2d at 867. A decision to prosecute is fine, even if the decision rests upon the amount of publicity one's protest receives. "[S]election for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws." *Id.* at 868. The court noted that the government lacks the means to prosecute everyone suspected of violating a tax law, so it made sense to prosecute those likely to receive the most exposure. *Id.*

2. Administrative Summons

[3] Mr. Davis contends that N.C.G.S. § 105-258, an administrative summons statute, used by a Department of Revenue investigator to obtain information from the appellant's employee file, is unconstitutional under the fourth amendment to the U.S. Constitu-

tion and under Article I, §§ 19 and 20 of the N.C. Constitution. Appellant argues the trial court erred in denying his motion to suppress the evidence obtained in this alleged illegal search.

As part of his investigation of Mr. Davis, Special Investigator Holt sought wage and exemption information from appellant's former employer. To gain access to Mr. Davis' employee file, Agent Holt showed the employment records custodian an Order issued by the Department of Revenue to make the records available. The custodian complied, and Agent Holt received Employee Withholding Exemption Certificates, NC-4s; Employee's Statement of No Income Tax Liability; and W-2s concerning appellant's wages and compensation for the years 1983 through 1986.

We uphold N.C.G.S. § 105-258 against Mr. Davis' constitutional attack and affirm the trial court's denial of appellant's motion to suppress the evidence obtained in that search. N.C.G.S. § 105-258 is modeled after 26 U.S.C. 7602, which enables the Internal Revenue Service to issue an administrative summons in aid of either civil or criminal tax investigations. This federal statute has been upheld as constitutional by the U.S. Supreme Court. *Couch v. U.S.*, 409 U.S. 322, 326, 34 L.Ed. 2d 548, 552-53 (1973).

Furthermore, N.C.G.S. § 105-258 does not violate constitutional search and seizure provisions because the statute is *not* self-enforcing. The Secretary of Revenue does not have the authority to compel compliance with a summons. As is explained in the statute:

> [i]f any person so summoned refuses to obey such summons or to give testimony when summoned, the Secretary may apply to the Superior Court of Wake County for an order requiring such person to comply with the summons of the Secretary, and failure to comply with such court order shall be punished as for contempt.

N.C.G.S. § 105-258. At the time Investigator Holt requested the employee records, Mr. Davis' former employer did not have to comply with the Department of Revenue Order. If a revenue agent is forced to go to superior court to enforce compliance with an order, the court's scrutiny of the order will ensure that no abuse of process occurs.

Like its federal counterpart, N.C.G.S. § 105-258 does not require that a tax investigator have probable cause before examining a taxpayer's records. *See Ryan v. U.S.*, 379 U.S. 61, 13 L.Ed. 2d

122 (1964). This administrative summons power is more analogous to that held by a grand jury than to the search and seizure power of a police officer. It grants inquisitional powers, allowing investigations on the suspicions that a law is being violated or even because the Department wants assurances that it is not.

A summons under N.C.G.S. § 105-258, however, would violate constitutional protections if it was overly broad, not issued in good faith for a legitimate purpose, or not relevant to that purpose. The information sought must not be in the possession of the Department at the time the summons is issued, and the proper administrative steps must be followed in issuing the summons. In the case before us, Investigator Holt complied with these requirements, rendering appellant's assignments of error concerning this statute to be without merit.

3. Notice of Tax Assessment

[4] Appellant next assigns error to the trial court's denial of his motion to dismiss based upon the State's failure to comply with N.C.G.S. § 105-241.1. The statute in question states in pertinent part: "[i]f the Secretary of Revenue discovers . . . that any tax or additional taxes are due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of tax which is due and of his intent to assess the same. . . ." N.C.G.S. § 105-241.1. Appellant contends the State failed to give the required notice, violating his right to procedural due process.

Appellant's position on this issue is not well taken. Our state tax laws, like the federal tax statutes, impose both civil and criminal sanctions. N.C.G.S. § 105-241.1 addresses only the civil assessment of taxes and is fully independent of the criminal offenses set forth in N.C.G.S. § 105-236(7) and (9), under which Mr. Davis was charged. Appellant was entitled to and received all the due process protections of a person charged under a criminal statute. He was not entitled to any procedural protections offered under the civil assessment statute.

4. Expert and Opinion Testimony

[5] Appellant contends that the trial court erred in failing to recognize Mr. Robert Clarkson as an expert witness in the field of income tax law and in failing to allow Mr. Clarkson to testify as a layman concerning a "primary meeting" and the requirements to file a state personal income tax return.

It is a question of fact whether or not a witness is qualified as an expert. A trial judge's decision on this question is only reversed if his ruling is based on an abuse of discretion or an erroneous view of the law. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). Appellant has failed to manifest any abuse of discretion by the trial judge in his rulings concerning the expertise of Mr. Clarkson.

5. Proof of Tax Liability

[6] Appellant argues that the trial court erroneously failed to dismiss the charges of attempting to evade and defeat a tax under N.C.G.S. § 105-236(7) because the State did not prove one element of that crime: that Mr. Davis owed taxes for the years in question. Similarly, appellant contends the trial court committed prejudicial error in failing to instruct the jury that as part of its charge the State must show a tax was in fact due.

The evidence is clear that the State did not prove Mr. Davis owed a tax for the three years he is accused of violating N.C.G.S. § 105-236(7). Investigator Holt testified he did not know the amount of Mr. Davis' tax liability for those years. Of course, the reason the State could not prove whether Mr. Davis owed taxes was because the appellant refused to file a state tax return for those years. Appellant's position on this issue places an almost impossible burden on the State—one which we will not endorse. We hold that where a defendant is charged with attempting to evade or defeat the *ascertainment* of a tax, and that person also fails to file a return, the State must only show defendant was subject to being taxed under the law, and that he willfully attempted to evade or defeat imposition of the tax.

Our holding on this point is buttressed by federal interpretation of a parallel section of the Internal Revenue Code, 26 U.S.C. § 7201. Section 7201 penalizes "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or payment thereof." 26 U.S.C. § 7201. *U.S. v. Dack*, 747 F.2d 1172 (7th Cir. 1984), interpreted § 7201 and is helpful to understanding N.C.G.S. § 105-236(7). In *Dack*, the court recognized that § 7201 defines two distinct crimes: (1) the willful attempt "to evade or defeat any tax" and (2) the willful attempt to evade or defeat the "payment" of any tax. *Dack*, at 1174. N.C.G.S. § 105-236(7) also recognizes two crimes. It penalizes (1) "[a]ny person who willfully attempts . . . to evade or defeat any tax imposed by this

Subchapter," . . . (2) "*or* the payment thereof." (Emphasis added.) N.C.G.S. § 105-236(7).

While it is true that the existence of a tax deficiency is an element of both crimes defined in these statutes, *Dack* recognized that in certain situations the element of a tax deficiency can be satisfied without a formal tax assessment. *Dack*, at 1174. "When, as here, the taxpayer fails to file a return, and the Government can show a tax liability pursuant to the provisions of the tax code, then a tax deficiency within the meaning of Section 7201 is deemed to arise by operation of law on the date the return is due." *Id.* In the case at bar, as in *Dack*, the tax liability arose by operation of the law when the appellant failed to file a timely return.

The State offered evidence beyond a reasonable doubt that Mr. Davis willfully attempted to defeat the ascertainment of his taxes in 1984, 1985, and 1986. Appellant admitted that he considered it unconstitutional to pay taxes. Most notably, on at least four occasions during this period, Mr. Davis claimed on his employee withholding exemption certificates personal and dependent exemptions totaling at least $16,800 to which he was not entitled. Also, Mr. Davis did not file a state personal income tax return between 1980 and 1986. Taken together, this evidence is adequate to show a willful attempt to evade a tax.

6. Willfulness and a Subjective Belief

[7] Finally, appellant argues that the trial judge erroneously instructed the jury concerning the element of willfulness in both charges against him. Mr. Davis believes he is not liable to pay state income taxes on his wages because wages are not "income," but rather are compensation for services rendered. He argues his subjective, good faith belief that he did not owe these taxes is a defense to willfulness, and the trial judge erred in failing to instruct the jury of this matter.

Again, while this is a new issue for our Court, federal courts have addressed this question as it has arisen in the context of parallel federal tax statutes. *See U.S. v. Aitken*, 755 F.2d 188 (1985); *U.S. v. Kraeger*, 711 F.2d 6 (1983). Essentially, the trial court is required to inform the jury that while a good-faith misunderstanding of the law may negate willfulness, a good-faith disagreement with the law does not. *Kraeger*, 711 F.2d at 7. The trial

judge conveyed this instruction; therefore, appellant's request for a reversal on this issue is denied.

For the foregoing reasons, the order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

WILLIAM L. BAMBERGER, JR. v. ROGER B. BERNHOLZ AND COLEMAN, BERNHOLZ, DICKERSON, BERNHOLZ, GLEDHILL AND HARGRAVE, A NORTH CAROLINA GENERAL PARTNERSHIP

No. 8815SC1363

(Filed 19 December 1989)

1. **Attorneys at Law § 5.1 (NCI3d)— legal malpractice—negligence—summary judgment for defendant improper**

Summary judgment should not have been granted for defendant on a negligence claim in a legal malpractice action where there was sufficient evidence of defendant attorney's breach of duty to plaintiff; there was no evidence of any contributory negligence by plaintiff; and there was evidence that plaintiff could have recovered on the underlying claim (which was voluntarily dismissed by defendant and not filed within one year) in that the trial court in the original action had denied summary judgment as to one of the defendants, the trial court which granted summary judgment in the refiled action did not state a reason for granting summary judgment, and defendants offered no opinion evidence that plaintiff could not have recovered as a matter of law while plaintiff offered affidavits from two attorneys that defendant's departure from the standard of care caused plaintiff to lose a substantial possibility of recovery.

Am Jur 2d, Attorneys at Law §§ 202, 203, 215, 223-225.

2. **Attorneys at Law § 5.2 (NCI3d)— legal malpractice—breach of fiduciary duty and fraud—summary judgment for defendants improper**

The trial court erred by granting summary judgment for defendants on a claim for breach of fiduciary duty and fraud

in a legal malpractice action where the evidence at the summary judgment hearing raised the issue of whether defendant Bernholz falsely failed to inform plaintiff that his case had been dismissed rather than continued; whether that act was calculated and intended to deceive; and whether plaintiff was injured by the alleged false representation.

Am Jur 2d, Attorneys at Law §§ 202, 203, 215, 223-225.

3. Attorneys at Law § 5.1 (NCI3d)— legal malpractice—breach of contract—summary judgment for defendants improper

The trial court erred by granting summary judgment for defendants on a breach of contract claim in a legal malpractice action where both parties signed a contract, defendants' only hope of prevailing on summary judgment on this issue rests on the contention that plaintiff suffered no injury, and defendants failed to show that a genuine issue of material fact was present as to the damage issue.

Am Jur 2d, Attorneys at Law §§ 202, 203, 215, 223-225.

Judge LEWIS dissenting.

APPEAL by plaintiff from *Farmer (Robert L.), Judge.* Order entered 19 August 1988 in Superior Court, ORANGE County. Heard in the Court of Appeals 8 June 1989.

Plaintiff, William L. Bamberger, Jr., instituted a legal malpractice action against defendants Roger Bernholz and the partnership of Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave on 20 August 1987. A hearing on defendants' motion for summary judgment under G.S. 1A-1, Rule 56 was held on 19 August 1988. The court granted summary judgment for the defendants on 22 August 1988. Plaintiff appeals.

Elliot & Pishko, P.A., by David C. Pishko, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by M. Lee Cheney, for defendant-appellees.

ORR, Judge.

The Original Case

The original case out of which this malpractice action arose concerned injuries to plaintiff, Bamberger, that allegedly were caused

by the negligence of plaintiff's girlfriend, Mary Vilas. On 13 March 1980, Bamberger was asked by Mary Vilas to help her type a paper for a graduate school class. Bamberger agreed and proceeded over to Vilas' apartment which was owned by Sally Vilas, Mary Vilas' mother.

After some period of time at the apartment, Bamberger decided to go to bed there while Vilas finished the paper. He went upstairs to the loft where two single beds were located. Vilas' bed was closest to the edge of the loft. There was no railing or other barrier on the loft. Bamberger decided to sleep in Vilas' bed rather than in her roommate's bed.

Bamberger started to push the twin beds together as he had in the past when he had stayed there. Mary Vilas stated in her deposition, "[H]e started to push my bed over towards hers away from the edge. And I told him not to do that." She was asked why she told him not to push the beds together. She responded,

> Because I was a little pissed off at him about the paper. And I didn't want to have to climb over him to get into bed, because that—I remember—I think that—I am pretty sure that my bed was the trundle bed. So it didn't actually have a footboard.
>
> . . .
>
> And I would have to climb over that. And it was just easier. I told him to leave it and that I would move it when I came to bed, which was going to be pretty soon, but not right that minute.

When Ms. Vilas came to bed, she decided not to push the beds together because she was tired, and it would be hard to move the bed with plaintiff in it. During the course of the night, plaintiff got out of the bed to go down the stairs and use the bathroom. He tried to walk along the side of the bed closest to the edge of the loft. The bed was still along this ledge, and he fell from the loft to the floor below.

Plaintiff later engaged Bernholz to either settle his claims with Vilas' insurer or file suit. Bernholz made a settlement offer to the insurer for $150,000.00, which was denied. On 20 February, 1983, plaintiff wrote Bernholz and reminded him to file the complaint because the three-year statute of limitations would expire on 13 March 1983. There is no evidence that Bernholz ever discouraged plaintiff from filing suit for any reason.

Mary Vilas and her mother who owned the loft apartment where the accident occurred were named as defendants in the original case. On 14 February 1984, they made a motion for summary judgment. The court allowed summary judgment on 9 April 1984 as to the mother, Sally Vilas, but not as to the daughter, Mary.

On 22 August 1984, the original case was called for trial. Plaintiff was supposed to move out of town that week, and he alleges he spoke to Bernholz several times about delaying the moving date in order to be present for the trial. Bernholz believed he would have no trouble getting a continuance for the trial and told the plaintiff to go ahead and move. On 22 August 1984, when the case was called, the court denied plaintiff's motion for a continuance, and Bernholz took a voluntary dismissal in open court under G.S. 1A-1, Rule 41. However, he failed to notify plaintiff of this action.

In October, plaintiff wrote Bernholz inquiring whether the court date would be scheduled during his November vacation. Bernholz knew that plaintiff did not even have a current case pending after the voluntary dismissal. However, he wrote plaintiff a letter leading him to believe that he did in fact have a case which simply needed to be rescheduled, not refiled.

The Refiled Original Case

Since the voluntary dismissal of the original case was taken on 22 August 1984, plaintiff's attorney had one year to refile the action. G.S. 1A-1, Rule 41(a)(1), N.C. Rules of Civil Procedure. *See Danielson v. Cummings*, 300 N.C. 175, 265 S.E.2d 161 (1980). The case, however, was not filed until 26 August 1985, more than one year after the dismissal.

The attorney for the defendants, Mary and Sally Vilas, moved for summary judgment which was heard on 7 July 1986. At the hearing, the Vilas' attorney presented three arguments as grounds for granting the summary judgment motion in his clients' favor. First, there was no issue of fact regarding liability against Sally or Mary Vilas and they were entitled to judgment as a matter of law because they did not breach the duty of care owed to the plaintiff. Secondly, he argued that as to Sally Vilas this action was *res judicata* because of Judge Battle's judgment of 8 April 1984 granting summary judgment in her favor. Finally, he contended the suit against Mary and Sally Vilas could not go to trial because the action would be barred for failing to refile the action

within one year of the voluntary dismissal per Rule 41. The trial court granted summary judgment for both defendants, but did not indicate the basis for the judgment.

The Legal Malpractice Case

Plaintiff Bamberger subsequently filed this suit against the defendants Bernholz and the law firm in which he is a general partner. The complaint alleged four primary causes of action arising out of Bernholz's handling of Bamberger's original case against Mary and Sally Vilas: (1) negligence, (2) fraud, (3) breach of fiduciary duty, and (4) breach of contract. Defendants moved for summary judgment on 21 July 1988.

On 11 August and 15 August 1988, plaintiff filed the sworn affidavits of B. Ervin Brown, II and J. Wilson Parker, licensed attorneys in North Carolina who practice in general civil litigation, including personal injury cases. Each attorney averred that he had handled at least 50 personal injury actions. Further, each attorney averred that had defendant been prepared for trial on 22 August 1984, he "could or might have obtained a judgment or settlement favorable to Bamberger."

On 22 August 1988, the trial court granted all of defendants' motions. The defendants' principal argument is that plaintiff's claims in the case *sub judice* must fail because any alleged wrongdoing by the defendant Bernholz could not have proximately caused any damage to plaintiff, since plaintiff's original claim was without merit as a matter of law based upon the defendant Mary Vilas' lack of duty to the plaintiff as a licensee. In North Carolina, an owner or occupier of premises is not under a duty to a licensee to maintain the premises in a safe or suitable condition or warn him of hidden dangers or perils of which the owner has actual or implied knowledge. *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E.2d 50 (1970).

A. The Negligence Claim

An attorney is liable to his client for legal malpractice if the client proves "(1) that the attorney breached the duties owed to his client, as set forth by *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954), and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985).

In addressing the question before this Court as to the correctness of the trial court's entry of summary judgment for defendants, we first note the standard for granting such a motion.

A motion for summary judgment under G.S. 1A-1, Rule 56(c) "shall be rendered . . . if the pleadings, depositions, . . . 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." 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, 535, 303 S.E.2d 358, 360 (1983) (citations omitted). The trial court must 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, 87, 336 S.E.2d 653, 654 (1985), *disc. rev. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 258, 335 S.E.2d 79, 83 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986).

The standard for granting summary judgment in a legal malpractice action was refined further in *Rorrer:*

> In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.

Rorrer, 313 N.C. at 355, 329 S.E.2d at 366 (citations omitted).

We now consider whether plaintiff's evidence was sufficient in light of these standards to overcome the summary judgment motion.

[1] Clearly, there was sufficient evidence of defendant Bernholz's breach of duty to plaintiff by failing to refile the original case in a timely fashion, and there was no evidence of any contributory negligence by plaintiff in that regard so as to defeat the defendants' summary judgment motion. The ultimate question therefore remains whether there was a genuine issue of material fact raised as to the alleged negligent conduct being the proximate cause of an injury.

> Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney's negligence,

to prove that but for the attorney's negligence plaintiff would not have suffered the loss, plaintiff must prove that:

1) The original claim was valid;

2) It would have resulted in a judgment in his favor; and

3) The judgment would have been collectible.

Rorrer, 313 N.C. at 361, 329 S.E.2d at 369 (citations omitted).

Defendants contend that they are entitled to summary judgment because plaintiff could not have recovered on his original claim and that there is no genuine issue of fact on this question. We disagree.

The evidence relied upon by defendants consists of the record of the original case and the refiled case and affidavits filed in the case *sub judice*. We see nothing there, however, that would mandate summary judgment for defendants. In the original case, the trial court *denied* defendant Mary Vilas' motion for summary judgment which certainly indicates one Superior Court Judge felt that plaintiff's claim was not defeated as a matter of law upon the facts pled.

Likewise, in the refiled case, defendant's reliance on the record is misplaced. At best, this Court can conclude that the trial court considered all of the grounds argued by Mary and Sally Vilas including the merits of the claim *and* the fact that the case had been refiled beyond the one-year limitation. The trial court did not state a reason for granting summary judgment in the refiled case. This Court is not in the position to review the merits of the refiled case which was not appealed.

Furthermore, defendants offered no opinion evidence to the effect that plaintiff could not recover as a matter of law. To the contrary, plaintiff offered affidavits of licensed attorneys B. Ervin Brown, II and J. Wilson Parker, stating in their professional opinions that defendant Bernholz's departure from the standard of care "caused Bamberger to lose a substantial possibility of recovery . . . ." Therefore, defendants failed to carry their burden of showing that there was no genuine issue of material fact on the issue of proximate cause and that they were entitled to judgment as a matter of law. The trial court erred in granting defendants' motion for summary judgment on the negligence issue.

B.

[2] Plaintiff next contends the trial court erred in granting summary judgment for the defendants on claims for breach of fiduciary duty and fraud because the record contains evidence sufficient to raise a genuine issue of material fact.

The Supreme Court established the essential elements of actionable fraud as follows: "(1) [A] false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party." *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951). However, "[c]onstructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced." *Miller v. Bank*, 234 N.C. 309, 316, 67 S.E.2d 362, 367 (1951) (citations omitted). "Where a relation of trust and confidence exists between the parties 'there is a duty to disclose all material facts, and failure to do so constitutes fraud.'" *Vail* at 114, 63 S.E.2d at 206 (citation omitted).

As to each of these elements, there exists a genuine issue of material fact. The evidence produced at the summary judgment hearing raises the issue of whether Bernholz falsely failed to inform plaintiff that his case had been dismissed rather than continued; whether that act was calculated and intended to deceive; and finally whether the plaintiff was injured by the alleged false representation. Summary judgment was improper as to this cause of action.

C.

[3] As to the breach of contract issue, both parties, designated as attorney and client, signed a contract which provided as follows, in pertinent part:

I.

> That the attorneys will represent the client in bringing and prosecuting to a conclusion such action as may be required to enforce client's right as a consequence of damages sustained in an accident which occurred on or about March 13, 1980 . . . .

As consideration for the attorney representation of Bamberger, the contract further provided that:

II.

Compensation shall be due the attorneys at the rate of 33⅓% of any settlement or recovery without the filing of a lawsuit, or 40% in the event a lawsuit is filed for recovery of damages. Such compensation shall be for work performed by the attorneys through a trial if any.

Defendants' only hope for prevailing on summary judgment as to this cause of action would again rest on the contention that no injury was suffered by plaintiff as a result of the alleged breach of contract. Again, defendants have failed, as discussed under the negligence cause of action, to show that no genuine issue of material fact is present as to the damage issue. Plaintiff's likelihood of prevailing on the original case is a question of fact in this case for determination by the jury.

The decision of the trial court is reversed.

Reversed.

Judge PARKER concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent. The standard in a legal malpractice case is set out in *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). These requirements are: (1) that the original claim was valid; (2) it would have resulted in a judgment in his favor; (3) the judgment would have been collectible. Whether we consider the causes of action brought here by the defendant in negligence, fraud, breach of fiduciary duty or breach of contract, the plaintiff would have to prove the original claim against Mary or Sally Vilas was valid. This I do not believe is possible and would sustain the trial judge in granting summary judgment.

The entire underlying case turns on whether Mr. Bamberger was a licensee or an invitee the night he visited Ms. Vilas' home. A social guest in a private home is a licensee; *Murrell v. Handley*, 245 N.C. 559, 562, 96 S.E.2d 717, 720 (1957). One's status does not change from licensee to invitee simply because he renders some minor or incidental service for his host or hostess. *Id.* The

plaintiff here went over to his girlfriend's house to possibly help her type a paper that was due the next day. He in fact never did any typing for her and instead went upstairs to bed. There is nothing in these facts to indicate that he was anything but a licensee. The only duty a person owes a licensee is to refrain from willful, wanton or intentional conduct. There is nothing in the record to indicate that Ms. Vilas willfully or wantonly disregarded the safety of the plaintiff and certainly nothing to indicate any intentional harm inflicted upon him. *See Murrell v. Handley, supra; McCurry v. Wilson*, 90 N.C. App. 642, 369 S.E.2d 389 (1988). The plaintiff's forecast of the evidence as to the defendant's quality of representation is certainly unflattering but that is not the main point in this case; the law is clear as to the requirement for the success of a legal malpractice action and in this case the first hurdle cannot be cleared.

DOROTHY D. DYSON v. GARY B. STONESTREET AND DEOMALEE F. STONESTREET

No. 895SC573

(Filed 19 December 1989)

1. Animals § 2.1 (NCI3d)— injury caused by dog—common law negligence—jury question

The trial court erred by granting a directed verdict for defendant Gary Stonestreet in a personal injury action in which plaintiff alleged that she had been injured when falling off her bicycle after defendant's unrestrained dog ran at her. The record is clear that the dog on this occasion did not obey defendant's command to stop or to come back and the record is not clear that the owner had reason to believe the dog would obey when faced with the stimulating enticement of a cyclist a few feet away on the street. The evidence was for the jury as to whether the owner knew or should have known from the dog's past conduct that the dog was likely if not restrained "to do an act from which a reasonable person in the position of the owner could foresee that an injury to the person or property of another would be likely to result."

Am Jur 2d, Animals §§ 86, 88, 94, 95.

2. Animals § 3 (NCI3d)— injury caused by dog—violation of county ordinance as negligence per se—directed verdict for defendant improper

The trial court erred by granting a directed verdict for defendant Gary Stonestreet on the issue of negligence per se in a personal injury action in which plaintiff alleged that defendant's dog knocked her over as she bicycled down the street in front of defendant's house. A New Hanover County ordinance provides that an owner may not permit his dog to run at large and specifically provides that a dog is under restraint if the dog is controlled by chain, leash or other device, or is sufficiently near the owner or handler to be under his/her direct control and is obedient to that person's commands. The evidence on record as to whether the dog was obedient and whether defendant was sufficiently near his dog to exercise direct control presents a jury question.

Am Jur 2d, Animals §§ 86, 88, 94, 95.

Judge PHILLIPS concurring.

Judge BECTON dissenting.

APPEAL by plaintiff from order entered 12 January 1989 by *Judge Napoleon B. Barefoot* in NEW HANOVER Superior Court. Heard in the Court of Appeals 13 November 1989.

Thomas J. Morgan for plaintiff-appellant.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, for defendant-appellee.

GREENE, Judge.

In this civil action, plaintiff Dorothy D. Dyson filed an action against defendants Gary B. Stonestreet and Deomalee F. Stonestreet alleging that defendants' negligent failure to restrain their dog led to her personal injuries. At the close of all the evidence, the trial court granted defendant Gary Stonestreet's motion for a directed verdict. Plaintiff appeals.

The trial court also granted defendant Deomalee F. Stonestreet's motion for a directed verdict, but plaintiff does not appeal that order.

Plaintiff's evidence tends to show that on 30 May 1983, the defendant's dog knocked her over as she bicycled down the street

in front of the defendant's house, causing her injury. Just prior to that moment she saw the defendant hitting golf balls in his front yard with his dog standing nearby.

The defendant's evidence tends to show that, at the time of the incident, he stood approximately six feet from the paved portion of the street, and his dog stood between him and the street, approximately two feet from the street. Normally, the defendant kept the animal in a fenced pen, but on this occasion the dog was neither fenced nor leashed. The defendant testified that, in fact, his dog did not collide with plaintiff's bicycle.

The defendant provided further evidence tending to show that his dog had a gentle disposition, and had never attacked anyone. The defendant testified that the dog knew and responded to several commands even though the dog did not respond to the defendant's command to "stop" or "come back" during the incident at issue.

The ultimate issues presented are whether the plaintiff provided sufficient evidence to show either I) that defendant was negligent as a matter of common law; or II) that defendant was negligent per se because of his violation of a county ordinance requiring restraint of animals.

I

[1] The plaintiff argues she presented sufficient evidence of the defendant's common law liability for injuries caused by a dog to send the issue to the jury. To establish liability under the common law theory, the plaintiff must meet the following test:

> The test of the liability of the owner of the dog is . . . whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog. The size, nature and habits of the dog, known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent.

Hunnicutt v. Lundberg, 94 N.C. App. 210, 211, 379 S.E.2d 710, 711-12 (1989) (quoting *Sink v. Moore*, 267 N.C. 344, 350, 148 S.E.2d 265, 270 (1966)).

Thus, we must determine whether the evidence, when viewed in the light most favorable to the plaintiff, would allow but one conclusion: that the defendant did not or should not have known that his dog would likely disobey his commands in the situation presented here. We note the record is clear that the dog on this occasion did not obey the defendant's command to "stop" or to "come back." Furthermore, the record is not clear that the owner had reason to believe his dog would obey when faced with the stimulating enticement of a cyclist a few feet away on the street. The defendant's evidence shows that his dog knew and responded to several commands, but it does not indicate the regularity or dependability of the dog's response. When asked what the defendant's experience was with how well his dog responded to commands, the defendant responded "I was well-pleased with the dog. He responded better than any dog I ever had." We do not find the evidence unequivocally requires but one conclusion. This evidence is for the jury—taking into account the credibility of the owner's testimony, the size, nature and habits of the dog, as known to the owner—as to whether the owner knew or should have known from the dog's past conduct that the dog was likely, if not restrained, "to do an act from which a reasonable person in the position of the owner, could foresee that an injury to the person or property of another would be likely to result."

II

[2] The plaintiff also argues the trial court erred in granting the defendant's motion for a direct verdict since the evidence was sufficient to establish defendant's violation of a county ordinance. According to plaintiff, the defendant violated the New Hanover County Animals and Fowl Ordinance § 3-9(a), which violation, argues the plaintiff, would constitute negligence per se. The defendant responds that the facts alleged and proven cannot, as a matter of law, constitute a violation of that ordinance.

In determining whether defendant's motion for directed verdict was properly granted, evidence supporting plaintiff's claim, taken as true and viewed in the light most favorable to her, must be insufficient, as a matter of law, to justify a verdict for plaintiff. *Pearce v. Southern Bell Telephone & Telegraph Co.*, 41 N.C.

App. 62, 254 S.E.2d 243 (1979), *rev'd on other grounds*, 299 N.C. 64, 261 S.E.2d 176 (1980).

The New Hanover County ordinance provides in pertinent part as follows:

> Sec. 3-9. Dogs running at large prohibited; fine.
>
> (a) It shall be unlawful for any owner of a dog to permit said dog to run at large or be off the premises of its owner and not under the restraint of a competent person.
>
> Sec. 3-4. Definitions.
>
> (c) At Large: Any animal shall be deemed to be at large when it is off the property of its owner and not under the restraint of a competent person.
>
> (d) Restraint: An animal is under restraint within the meaning of this chapter if it is controlled by means of a chain, leash, or other like device; or is sufficiently near the owner or handler to be under his/her direct control and is obedient to that person's commands; or is on or within a vehicle being driven or parked; or is within a secure enclosure.
>
> Sec. 3-21. Violations; misdemeanor.
>
> Pursuant to state law, it is a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed thirty (30) days to violate any provisions of this chapter, unless otherwise provided herein.

A violation of this ordinance would constitute negligence per se since the ordinance imposes a specific duty for the protection of others, and is actionable if a proximate cause of the injury. *Lutz Industries v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955).

In determining whether the evidence, viewed in the light most favorable to plaintiff, supports a finding of defendant's violation of the ordinance, our inquiry is first guided by the statutory language. While Section 3-9(a) states that the owner may not permit his dog to run at large, we reject the plaintiff's argument that the defendant is negligent per se in every circumstance where the

dog runs at large. In some instances, as hereinafter described, it would be negligence per se for the dog to run at large.

The dog runs at large unless he is under restraint as that term is defined by the ordinance. Specifically, the ordinance provides that a dog is under restraint if either (1) the dog is controlled by chain, leash or other device, i.e., fence, or (2) the dog is "sufficiently near the owner or handler to be under his/her direct control and is obedient to that person's commands . . . ." In situations where the dog is restrained in a fence or on a leash and the dog escapes, liability is established on the part of the dog owner only if the plaintiff is able to prove consent on the part of the owner or some negligent conduct resulting in the escape of the dog. *See Gardner v. Black*, 217 N.C. 573, 576, 9 S.E.2d 10, 11 (1940). However, under the facts as in this case, where the owner is aware of and consents to the dog being outside a fence or not on a leash, the question for the jury is not whether the defendant was negligent, but rather, whether the dog was "sufficiently near the owner or handler to be under his/her direct control" *and* "obedient to [the owner's] commands." If the plaintiff, who has the burden of proof, is able to prove the negative of either of these propositions, the plaintiff has established negligence per se, and that negligence is actionable if the jury determines it to be a proximate cause of the plaintiff's injuries.

In this case, the plaintiff's evidence indicates the dog was disobedient on the day in question. While the defendant did not specifically testify that the dog was generally obedient, he did state that the dog had "responded better than any dog [he] ever had." The fact that the dog was not obedient on the occasion in question is not controlling on the issue of obediency, as obediency should be determined in a more general context. The evidence on record as to whether the dog was obedient presents a jury question. Likewise, the question of whether the defendant was sufficiently near his dog to exercise direct control is for the jury. Although the defendant's testimony indicated his dog was approximately four feet away at the time the plaintiff approached, we cannot, as a matter of law on this record, say this was or was not "sufficiently near" for the defendant to exercise control over the dog.

Accordingly, we determine the trial judge erred in directing a verdict for the defendant, and the case should be remanded to

the trial court for trial on both the issue of defendant's negligence as a matter of common law and defendant's negligence under the statute.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge BECTON dissents.

Judge PHILLIPS concurring.

I concur in the foregoing opinion but am of the opinion that plaintiff's evidence also makes out a case of negligence *per se* against defendant appellee under Section 3-4(c) of the New Hanover County ordinance. For the evidence tends to show that when the dog injured plaintiff it was "at large" under the explicit provisions of that Section in that it was off of defendant appellee's property in the public street and not under his control.

Judge BECTON dissenting.

Believing that the evidence is insufficient to show that defendant breached the common law or a New Hanover County ordinance regarding animals running at large, I dissent.

Defendant's collie, Prince, was normally kept in a fenced-in backyard and was allowed out of that area only when he was in defendant's presence. There is no evidence that the dog had ever barked at anyone when he was outside the enclosed area, or had ever run at, bitten, or exhibited any vicious propensities toward any person. Indeed, the dog was trained to obey the commands "sit," "stay," "come here," and "lie down," and was further trained not to go into the street and not to go outside of defendant's property line unless attended.

First, regarding the common law negligence issue, I find no evidence that defendant knew or should have known of any dangerous or vicious propensities of his dog. Further, the dog did not snap at, jump on, or bite Ms. Dyson. Rather, the dog disobeyed defendant's command and ran toward Ms. Dyson, her husband, and their dog, causing Ms. Dyson to fall from her bicycle. I know of no reported case holding a dog owner liable under a common law

theory of negligence on as paltry a showing of viciousness as this case presents.

Second, I find no evidence to establish that defendant violated the New Hanover County ordinance, which provides that "it shall be unlawful for any owner of a dog to *permit* said dog to run at large or be off the premises of its owner and not under the restraint of a competent person" (emphasis added). Significantly, the ordinance does not say "It shall be unlawful for any dog to be off its owner's premises." Consequently, negligence or knowledge is required before liability can be imposed under the ordinance. *See Kelly v. Willis*, 238 N.C. 637, 78 S.E.2d 710 (1953) (owner must either knowingly or negligently allow livestock to roam at large before civil liability attaches). I find no evidence in this case that defendant knowingly or negligently permitted his dog to run at large or be off his premises. To the contrary, the evidence shows that the generally and reliably obedient dog was within four feet of defendant and was therefore under the restraint of a competent person within the meaning of the ordinance. The fact that the dog failed to heed its master and crossed the road toward another dog on one particular occasion, with no evidence of any prior disobedience, does not mean that the dog is not "obedient to the commands of its owner or handler."

Finding no breach of the common law nor the violation of the New Hanover County ordinance, I vote to affirm the action of the trial judge.

IN THE MATTER OF THE APPEAL OF FOUNDATION HEALTH SYSTEMS CORPORATION FROM THE DENIAL OF ITS REQUEST FOR EXEMPTION BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1986, APPELLANT

No. 8810PTC850

(Filed 19 December 1989)

1. Taxation § 22.1 (NCI3d)— outpatient surgery center—hospital—entitlement to exemption from taxation

The North Carolina Property Tax Commission erred in concluding that petitioner was not a hospital because it did not provide 24-hour continuous nursing care or inpatient care

or services, since petitioner was an outpatient surgical center providing operating rooms and related services, and petitioner did fit well within the general definition of a hospital. N.C.G.S. § 105-278.8.

Am Jur 2d, State and Local Taxation §§ 370, 385, 386.

2. **Taxation § 22.1 (NCI3d)— outpatient surgery center—charitable purpose—exemption from taxation**

The North Carolina Property Tax Commission incorrectly concluded that petitioner was not wholly and exclusively operated for a charitable purpose, since the conclusion was unsupported by any findings of fact and was directly contradicted by the finding that petitioner provided facilities for the treatment of emergency or urgent care patients without regard for their ability to pay and that it charged fees lower than those of nearby Forsyth Memorial Hospital. N.C.G.S. § 105-278.7.

Am Jur 2d, State and Local Taxation §§ 370, 385, 386.

APPEAL by petitioner-appellant Foundation Health Systems Corporation from the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Final decision entered 2 June 1988. Heard in the Court of Appeals 14 March 1989.

Petree Stockton & Robinson, by G. Gray Wilson and Steve M. Pharr, for petitioner-appellant.

County Attorney P. Eugene Price, Jr. and Assistant County Attorney Jonathan V. Maxwell for Forsyth County, appellee.

ORR, Judge.

Petitioner-appellant, Foundation Health Systems Corporation (Petitioner), is a subsidiary of Carolina Medicorp, Inc. According to its Articles of Incorporation, it was established for the purpose of constructing, equipping, staffing, operating and maintaining an ambulatory surgery center for the residents of Forsyth County. Consistent with that purpose, petitioner currently operates an outpatient surgical center with operating rooms designed to render related services. It is used by area surgeons to perform surgical procedures such as cataract surgeries, arthroscopies, tendon restorations and other minor surgical procedures. Some of these services

are performed on an emergency care basis but most are performed on an urgent care basis.

Petitioner accepts Medicare and other programs' assignments of benefits in lieu of payment. It makes reasonable efforts to charge and collect fees from those clients who are able to pay for their treatment. Petitioner carries a deficit on the uncollectable portions of the outstanding payments of its patients.

In 1986, petitioner filed an application for exemption from property taxation on the ground that it is a non-profit outpatient facility and is owned and operated by a charitable, non-profit tax exempt corporation. By letter from the Tax Supervisor/Collector dated 30 April 1986, that request was denied.

Thereafter, petitioner appealed to the Forsyth County Board of Equalization and Review (Board) on 24 June 1986. Mr. Pardue, the Tax Supervisor/Collector, informed petitioner by letter dated 2 September 1986 that after evaluating the Board's consideration of the oral and written materials submitted, it had voted to deny petitioner's request for tax exemption.

Petitioner subsequently filed application for a hearing before the Property Tax Commission (Commission) on 23 September 1986. In its application, petitioner excepted to the county Board's decision on the ground that the subject property is exempt from taxation as a non-profit charitable hospital facility, pursuant to G.S. 105-278.8. Forsyth County filed a response in opposition to petitioner's application for hearing. The response stated, *inter alia*, that the appellant's property does not qualify for the requested exemption, and that its application should be dismissed.

On 29 October 1986, a final pre-hearing was held. At the pre-hearing, numerous stipulations were made and other preliminary matters were settled.

At the actual hearing before the Commission, petitioner introduced evidence relating to: (1) its application for exemption, (2) its incorporation, (3) its fee schedule, (4) the leasing agreement covering the property in question, and numerous other items. Forsyth County submitted evidence similar to that submitted by petitioner. The Commission concluded that the subject property does not qualify for any exemptions, and that it is subject to taxation. From that determination, petitioner appeals.

I.

At the outset, we note that the scope of review in cases which have been appealed from the Commission is determined by G.S. 105-345.2. The pertinent portions of that statute state:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. 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. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

G.S. 105-345.2(b) and (c) (1989). An appellate court may not, however, "substitute its judgment for that of the agency when two reasonable conflicting results could be reached. . . ." *In re Southview Presbyterian Church*, 62 N.C. App. 45, 47, 302 S.E.2d 298, 299, *rev. denied*, 309 N.C. 820, 310 S.E.2d 354 (1983).

II.

In the case at bar, petitioner has raised two questions for our review. The first question relates to whether the Commission

erred in denying its request for a charitable purposes property tax exemption under G.S. 105-278.7 and 105-278.8. The second issue relates to the Commission's conclusion that petitioner is not a "hospital" which is entitled to a charitable purposes property tax exemption. Petitioner argues that it qualifies for a charitable purposes property tax exemption under G.S. 105-278.7 which deals with tax exemptions for "[r]eal and personal property used for educational, scientific, literary, or charitable purposes[,]" and under G.S. 105-278.8 which governs tax exemptions for "[r]eal and personal property used for charitable hospital purposes." We begin by addressing petitioner's argument made under G.S. 105-278.8 since this section deals more directly with the questions raised by petitioner.

G.S. 105-278.8 states in part that:

> (a) Real and personal property held for or owned by a hospital organized and operated as a nonstock, nonprofit, charitable institution (without profit to members or their successors) shall be exempted from taxation if actually and exclusively used for charitable hospital purposes.
>
> . . .
>
> (c) Within the meaning of this section, a charitable hospital purpose is a hospital purpose that has humane and philanthropic objectives; it is a hospital activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. However, the fact that a qualifying hospital charges patients who are able to pay for services rendered does not defeat the exemption granted by this section.

Pursuant to the language of this statute, the test to determine whether an exemption may be granted is: (1) whether the applicant is a hospital organized and operated without profit to members, (2) exclusively used for humane and philanthropic objectives which benefit a significant segment of the community, and (3) does so without expectation of reward or profit. Furthermore, an applicant which meets the requirements of this test will not be rejected simply because it charges those patients who are able to pay for their services.

The Commission set forth the following Findings of Fact:

2. The facility is an outpatient surgical center providing operating rooms and related services. Area surgeons use the facility for a variety of surgical procedures, including cataract surgeries, arthroscopies, severed tendon restorations, etc. A limited number of surgical procedures are performed on an emergency basis, with emergency patients moved from the nearby emergency room at Forsyth Memorial Hospital to HSC for surgery, then back to the hospital.

3. As a facility designed and built solely for outpatient surgery, HSC is more efficient to operate than the outpatient surgery clinic at nearby Forsyth Memorial; therefore HSC's operating costs are lower than those of Forsyth Memorial. These savings are reflected in the fees charged by HSC, which are lower than those of the hospital.

4. HSC 'accepts assignment' of Medicare benefits. As a result, HSC writes off the difference between its fees and the amounts paid by Medicare (and certain other programs), without attempting to collect this difference from its patients.

5. With the exception noted above, HSC makes reasonable efforts to collect amounts owed to it by patients, but has not, as of the hearing date, ever elected to sue to collect a bill.

6. The surgical procedures conducted at HSC, for the most part, require general anesthesia. Such procedures are not typically performed in a doctor's office.

7. The appellant is a non-profit corporation for state and federal income tax purposes. The appellant's goal, in creating its fee structure, is to meet all expenses and generate a reasonable reserve. The facility is not operated for profit.

8. HSC patients enter the facility for surgery and depart on the same day. HSC does not provide 24-hour continuous nursing care. HSC does not provide inpatient care or services.

9. HSC provides facilities for the treatment of emergency or urgent care patients without regard for their ability to pay.

10. HSC charges all patients for services rendered and attempts to collect such charges, with the exceptions noted in paragraphs 4 and 5 above.

Based upon these findings, the Commission ultimately concluded that plaintiff was not entitled to an exemption under G.S.

105-278.8 because it did not meet the test set out in the statute in that (1) it was not a hospital, and (2) the property was not "wholly and exclusively used by the appellant for a charitable purpose or purposes."

[1] First, we will address the specific conclusion that "HSC is not a 'hospital,' within the meaning of that term as used in G.S. 105-278.8." We find that the Commission's use of the definition of "hospital" under the Hospital Licensure Act has no applicability to the construction of that term under the Revenue Act. Since there is no definition of "hospital" in the Revenue Act, we are compelled to look to a generally accepted definition, such as that found in Black's Law Dictionary, which states that a hospital is "[a]n institution for the reception and care of sick, wounded, infirm, or aged persons . . . ." Black's Law Dictionary 664 (rev. 5th ed. 1979). The Commission's finding that HSC does not provide 24-hour continuous nursing care nor inpatient care or services and thus is not a hospital is based upon a far too narrow definition. Giving the words of this definition their natural and most obvious import without forcing an illogical construction, petitioner fits well within the general definition of a hospital.

Since the Commission concluded correctly that petitioner is a non-profit corporation, we therefore conclude that as a matter of law it meets the first part of the test set out in G.S. 105-278.8 and is in fact a "hospital" operated without profit to its members.

[2] Next, the Commission incorrectly concluded that petitioner is not wholly and exclusively operated for a charitable purpose or purposes. This conclusion is unsupported by any findings of fact and is, in fact, directly contradicted by the finding that petitioner provides facilities for the treatment of emergency or urgent care patients without regard for their ability to pay and that it charges fees which are lower than those of Forsyth Memorial Hospital. Such findings fall within the definition of a charitable hospital purpose which is one that has humane and philanthropic objectives and that benefits humanity or a significant rather than a limited segment of the community without expectation of pecuniary profit or reward.

The Commission attempts to base, in part, its denial of petitioner's application for exemption on the fact that petitioner charges for its services. The Commission then attempts to avoid the effect of G.S. 105-278.8(c) (the provision which states that hospitals which

charge patients who are able to pay do not lose their exempt status) by relying on its earlier erroneous conclusion that petitioner is not a hospital. As we have already said, that conclusion is unsupported by the evidence and the findings before us and thus the Commission's efforts to avoid the effect of G.S. 105-278.8(c) must fail.

Having concluded that petitioner has met all of the requirements of G.S. 105-278.8, we vacate the judgment of the Commission which denied petitioner its property tax exemption. Accordingly, this action is

Vacated and remanded for entry of judgment consistent with our decision herein.

Judges BECTON and PARKER concur.

NATASHA KATRISS MARSH BY AND THROUGH HER GUARDIAN AD LITEM BESSIE INEZ MARSH, PLAINTIFF v. WILLIAM HENRY TROTMAN, JR. AND STANDARD TRUCKING COMPANY, A DELAWARE CORPORATION, DEFENDANTS

No. 8820SC1327

(Filed 19 December 1989)

1. Automobiles and Other Vehicles § 91.3 (NCI3d)— punitive damages claim—directed verdict improper—sufficiency of evidence of willful and wanton conduct

The trial court erred in directing verdict for defendants on plaintiff's punitive damages claim arising from injuries sustained in an automobile accident where the evidence tended to show that for no apparent reason defendant either intentionally or with reckless indifference to the consequences willfully drove his truck across the lawful path of plaintiff's approaching vehicle at a time and under circumstances which made a violent collision between the vehicles likely, and defendant pleaded guilty to driving his vehicle on the occasion involved "carelessly and heedlessly in willful and wanton disregard of the rights and safety of others in violation of N.C.G.S. § 20-140(a)."

Am Jur 2d, Damages § 749.

2. Trial § 52.1 (NCI3d)— injuries in automobile accident—inadequate damages—failure to set aside verdict—error

In an action to recover for injuries sustained in an automobile accident, the trial court erred in failing to set aside $4,500 in compensatory damages awarded plaintiff for being inadequate as a matter of law, since that amount was less than her stipulated medical expenses, and there were consequences, including scarring, pain, and suffering, of defendant's negligence according to the uncontradicted evidence.

Am Jur 2d, Damages § 1018.

Judge BECTON concurring in the result.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 1 September 1988 in Superior Court, MOORE County. Heard in the Court of Appeals 7 June 1989.

McCrann & Craven, by Michael J. McCrann, and Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Taylor & Taylor, Philadelphia, Pennsylvania, by William J. Taylor and John F. Fox, Jr., and Bell, Davis & Pitt, by Joseph T. Carruthers, for defendant appellees.

PHILLIPS, Judge.

In April 1987 plaintiff, then three years old, was injured when a Honda automobile she was riding in was hit by a tractor-trailer driven by the individual defendant and owned by the corporate defendant. In suing defendants for her injuries she alleged that the tractor trailer was operated willfully and wantonly as well as negligently, and asked to recover both compensatory and punitive damages. The action was tried with that of her grandmother, Lula Mae Marsh, also injured in the collision, and the estate of her uncle, Terry Marsh, who was driving the car and died following the crash. At the end of all the evidence the punitive damages claims of all three plaintiffs were dismissed by a directed verdict, the jury found that the collision was due to the negligence of the defendants, and awarded plaintiff $4,500, Lula Mae Marsh $25,000 and the estate of Terry Marsh $435,000. Judgments on the verdict were entered and those of the other two plaintiffs have been complied with. Plaintiff's appeal is from the denial of her motion to

set the damages verdict aside for being inadequate as a matter of law and the dismissal of her claim for punitive damages.

[1] First, we address the court's ruling on the punitive damages question. The law applicable to the question is plain and well established, though often difficult to apply. Punitive damages are allowable for injuries caused by the willful or wanton operation of a motor vehicle. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956). Willfulness imports a deliberate failure to discharge a duty imposed by law for the safety of others. *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971). Wantonness imports a reckless and heedless disregard for the rights and safety of others. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). "An act is wanton when it is done of wicked purpose, *or when done needlessly, manifesting a reckless indifference to the rights of others.*" (Emphasis supplied). *Wagoner v. North Carolina Railroad Company*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953). The claim for punitive damages is based upon allegations that the tractor-trailer was willfully and wantonly operated on the wrong side of the highway in the face of plaintiff's approaching vehicle in violation of several safety statutes, including G.S. 20-140, the reckless driving statute.

The evidence bearing upon these allegations, supplied mostly by motorists who were following the two principal vehicles involved, indicates the following when viewed in the light most favorable to the plaintiff, *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981): About 5:40 o'clock on a clear, dry morning the Honda automobile plaintiff was riding in, followed by another car, was traveling south on U.S. Highway 1, near the town of Apex some distance north of the New Hill Exit. At that point the highway had two lanes—one for northbound traffic, the other for southbound; plaintiff's vehicle and the other car were both in the southbound lane, had their headlights on, and could be seen from about a half mile away. About the same time defendant company's tractor-trailer, followed by another vehicle, was traveling north on the same highway some distance south of the New Hill Exit. Though the highway had only two lanes at that point, one for northbound traffic, the other for southbound, for a quarter of a mile or more before the New Hill Exit was reached the tractor-trailer, operated by defendant Trotman, weaved or meandered back and forth across the highway from shoulder to shoulder at a speed of about 50 or 55 miles per hour. At the New Hill Exit Highway 1 widened to four lanes and while that condition lasted the tractor-trailer

proceeded in a normal manner. As the highway narrowed to two lanes again upon leaving New Hill area it bore slightly to the right. At that point the truck continued on the line it was on straight across the highway; when about four feet beyond the center line the truck crashed into plaintiff's Honda and the car following it. All three vehicles came to rest on the west shoulder of the highway.

This evidence, in our view, is sufficient to support an award of punitive damages. For it tends to show that: For no apparent reason defendant Trotman either intentionally or with reckless indifference to the consequences willfully drove the truck across the lawful path of plaintiff's approaching vehicle at a time and under circumstances that made a violent collision between the vehicles likely. The evidence does not establish as a matter of law, though a jury could so infer if it chose, that defendant Trotman was merely inadvertent—either by failing to observe the approaching vehicles or the lay of the highway, by failing to control the vehicle, by failing to drive on the right half of the highway, or perhaps even by dropping off to sleep, though this is not mentioned in the evidence. Nor does the evidence establish or even suggest that the bizarre course driven was due to some defect in the vehicle; or that Trotman was distracted by other traffic or something on or near the highway; or that he did not intend to drive as he did. That the truck was in Trotman's control from the time it first began weaving across the highway from shoulder to shoulder until it again for no apparent reason headed across the highway in front of plaintiff's approaching vehicle supports the inference that he so drove in wanton disregard of the rights and safety of those in the car. And for that matter, Trotman admitted as much by pleading guilty to driving his vehicle on the occasion involved "carelessly and heedlessly in willful and wanton disregard of the rights and safety of others in violation of N.C.G.S. 20-140(a)." Though the plea in the criminal case is not binding upon Trotman in this one it is evidence, in the nature of an admission, that he operated the tractor-trailer with reckless indifference to plaintiff's rights and safety. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963); 2 Brandis N.C. Evidence Sec. 177 (1988); 31A C.J.S. *Evidence* Sec. 300(b) (1964). Thus, this evidence from defendant Trotman raised an issue of fact on the punitive damages claim, as did the evidence of following motorists summarized above.

[2] The court also erred in not setting aside the $4,500 compensatory damages awarded plaintiff for being inadequate as a matter of law. For that amount is less than her stipulated medical expenses of $4,727.58, and there were other consequences of defendant's negligence according to the uncontradicted evidence, including: Bleeding from the nose, ears and mouth immediately following the collision; a lacerated spleen; a deep laceration of the forehead all the way to the bone which required surgery and left a permanent scar eight to ten centimeters long; and four days spent in the hospital, two in intensive care. In charging the jury on the damages plaintiff was entitled to if they found that she was injured due to the defendants' negligence, the trial judge stated, among other things, that: "Such damages include on this, the fifth issue as to Natasha Marsh, the hospital and medical expenses, the scarring, and the pain and suffering." In awarding plaintiff less than her hospital and medical expenses and nothing at all for her injuries and their consequences, the jury could not have followed the court's instructions and it was error not to set the award aside. In *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), substantially the same question and situation was involved, and our Supreme Court invalidated the verdict as a matter of law, but ordered a new trial on all issues because it was thought likely that the verdict resulted from a compromise on the negligence and contributory negligence issues. No such likelihood exists in this case for obvious reasons, and a retrial of only the compensatory damages issue is ordered, along with a trial of the punitive damages issue erroneously kept from the jury during the first trial.

We are mindful, of course, that a minor child's medical expenses are not usually sued for by the child, but by the parent or guardian, or other person responsible for them. *White v. Comrs. of Johnston County*, 217 N.C. 329, 332-33, 7 S.E.2d 825, 827 (1940). In this case, however, though not specifically alleged, the jury, with the apparent approval of the court and the parties, was permitted to consider the medical expenses of this plaintiff, now just five years old. Why this was done the record does not show; but since the trial was conducted on this basis and no question about it was raised by either the defendants or the court we assume that the court and the parties had good reason and will not interfere.

The order dismissing plaintiff's claim for punitive damages is vacated; the verdict as to plaintiff's compensatory damages is

set aside; and the case is remanded to the Superior Court for a new trial on the compensatory and punitive damages issues.

New trial.

Judge LEWIS concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Ordinarily, neither a momentary driving miscalculation nor mere inadvertence should expose a person to punitive damages. In this case, however, plaintiff produced evidence from which the jury could have concluded that defendant's erratic driving for an extended period of time exceeded simple negligence and was in reckless disregard of the rights of others and, therefore, wanton. For example, one witness entered U.S. 1 behind the tractor-trailer at the Merry Oaks exit and continued following it North to the New Hill exit. Although there were "right many places" for cars and trucks to pull off onto the shoulders of the road, the truck driver did not do so. Rather, according to the witness, "[t]he truck meandered all over the highway from shoulder to shoulder, ditch to ditch. It continued in the southbound lane in a northerly direction for at least a quarter of a mile or more. It just went back and forth all over the road." Later, when there were more than just two lanes, the witness passed the truck but continued to watch it in his mirror. Still later, the witness saw the truck cross the center line again. Defendant's truck crashed into two cars, not one car. When it struck the first car, "[t]he nose of the truck was completely across the yellow line . . . , and its right rear tires were on the yellow line. Its front tires were completely across the yellow lines."

Believing that the punitive damages issue should have been submitted to the jury, I concur.

WILLIAM ALFRED DAVIS, EMPLOYEE, PLAINTIFF v. WEYERHAEUSER COMPANY, EMPLOYER, AND SELF-INSURER (CRAWFORD AND COMPANY), DEFENDANT

No. 8910IC108

(Filed 19 December 1989)

1. **Master and Servant § 89.4 (NCI3d)— workers' compensation— asbestosis—recovery in third party action—distribution of workers' compensation proceeds improper**

In a workers' compensation claim for asbestosis where plaintiff, during the pendency of the claim, brought a third party action against several asbestos manufacturers and suppliers and recovered, the Industrial Commission erred in allowing defendant employer a credit against third party proceeds pursuant to N.C.G.S. § 97-42, since defendant had not previously made any payments to plaintiff and accordingly was not entitled to a credit; the Commission should have directed defendant to pay plaintiff the compensation he was entitled to at a rate of $194.00 per week for a period of 104 weeks under N.C.G.S. § 97-61.5; and pursuant to the scheme set out in N.C.G.S. § 97-10.2(f)(1) plaintiff's third party recovery should have been used first to pay court costs, then to pay plaintiff's attorney's fee, and finally to reimburse compensation paid by defendant less defendant's proportionate share of plaintiff's attorney's fees incurred in achieving the third party recovery.

Am Jur 2d, Workmen's Compensation §§ 365, 437.

2. **Master and Servant § 99 (NCI3d)— workers' compensation— no award of attorney's fees**

It was within the Commission's discretion to deny attorney's fees in plaintiff's workers' compensation proceeding, and plaintiff failed to show an abuse of discretion in the denial.

Am Jur 2d, Workmen's Compensation §§ 644, 646.

APPEAL by plaintiff from a final decision of the North Carolina Industrial Commission. Opinion filed 18 October 1988 by William H. Stephenson, Commissioner. Heard in the Court of Appeals 13 September 1989.

This is a workers' compensation claim initiated by plaintiff against defendant for injuries sustained as a result of plaintiff's

exposure to asbestos dust. At a North Carolina Industrial Commission (hereinafter Commission) hearing before Deputy Commissioner John Charles Rush, plaintiff testified that he was employed by defendant Weyerhaeuser from 1940 until he retired on 31 December 1985. Plaintiff also testified that initially he worked as an insulator and came into contact with asbestos five days a week. Later, plaintiff became a supervisor of men who removed and installed asbestos insulation. Plaintiff testified that he continued to be exposed to asbestos dust even after he stopped working as an insulator.

In 1972, defendant Weyerhaeuser discontinued use of asbestos insulation and began safety classes and measures to protect employees who came into contact with the old asbestos insulation. Despite these measures, the plaintiff continued to be exposed to asbestos dust at least through 1979. An Advisory Medical Committee later examined plaintiff and diagnosed him as having asbestosis, Grade II with 70 percent disability and told him that he should not be further exposed to asbestos dust.

The plaintiff filed a claim for compensation with the Commission prior to the date that he was first advised that he had asbestosis. Between May 1984 and June 1987 the defendant sought and obtained five continuances of the initial hearing before the Commission. During the pendency of that claim, plaintiff brought a third party action against several asbestos manufacturers and/or suppliers. Plaintiff received third party settlement totalling $51,450.00.

In an opinion and award issued on 29 January 1988, Deputy Commissioner Rush awarded plaintiff compensation for asbestosis at $194.00 per week for 104 weeks beginning 31 December 1979, but allowed defendant Weyerhaeuser full credit against the third party settlement. The hearing officer also did not require defendant Weyerhaeuser to pay plaintiff's attorney's fees for the workers' compensation claim because the third party settlement exceeded the amount of compensation presently payable and did not require defendant to pay a proportionate share of the attorney's fees incurred in the third party action. The Commission did approve the $17,150 attorney's fee collected from the third party fund. Plaintiff then appealed the deputy commissioner's decision to the full Commission.

On 18 October 1988, Commissioner William Stephenson entered an order for the Commission. He affirmed the order of the hearing commissioner making only minor modifications. First, Commis-

sioner Stephenson directed that the third party funds held in trust be paid to plaintiff after paying one-third for attorney's fees. Secondly, the commissioner reworded conclusion of law number 7 so that defendant Weyerhaeuser would be entitled to a credit for all sums received by plaintiff from third party settlement. Plaintiff appeals.

Taft, Taft and Haigler, by Thomas F. Taft, Vickie Bletso and Nicholas Empson, for plaintiff-appellant.

Wallace, Morris, Barwick and Rochelle, by Thomas H. Morris and Martha B. Beam, for defendant-appellee.

EAGLES, Judge.

Plaintiff assigns as error the Commission's failure to direct defendant to pay compensation to plaintiff including attorney's fees incurred in the workers' compensation claim and in the third party action. Plaintiff argues that the Commission erred by allowing a credit against third party proceeds, contrary to the terms of G.S. 97-61.5 and 97-10.2 and the distribution scheme set out in *Hogan v. Johnson Motor Lines*, 38 N.C. App. 288, 248 S.E. 2d 61 (1978). Plaintiff contends that the Commission's reliance on G.S. 97-42 in allowing the credit against third party proceeds was erroneous. We agree with the plaintiff's contentions except for the award of attorney's fees in the workers' compensation claim.

Initially, we note that our Legislature has tried a number of different approaches between the rights of the injured employee and his compensation paying employer as against the third party whose fault created the injury and loss of both. *Id.* at 294, 248 S.E. 2d at 64.

> [O]ur statutes have directed that the burden of the attorney fees incurred in effecting a recovery against the third party be borne by both the injured employee and his employer in proportion to the amount which each receives out of the recovery. . . . This solution has the merit of fairness. Under it neither party is allowed to reap the benefits of a recovery without bearing a share of its costs.

Id. at 294, 248 S.E. 2d at 64.

G.S. 97-61.5 in pertinent part provides that an employer "shall pay or cause to be paid . . . to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six

and two-thirds percent (66⅔%) of his average weekly wages before removal from the industry, . . . for a period of 104 weeks." Further, G.S. 97-10.2(f)(1)(c) provides that an employer shall be entitled to reimbursement from any third party action proceeds for compensation paid under an award of the Commission. Finally, G.S. 97-10.2(f)(2) provides that "[t]he attorney fee under (f)(1) shall be paid by employee and employer in direct proportion to the amount each shall receive under (f)(1)(c) and (f)(1)(d) hereof and shall be deducted from such payments when distribution is made."

The distribution scheme set out in G.S. 97-10.2(f) was discussed in *Hogan*. While the facts in *Hogan* are different from this case, the difference does not affect the distribution scheme contemplated by G.S. 97-10.2(f). In *Hogan*, the appellants challenged the constitutionality of G.S. 97-10.2(f) because the statute ordered the employer to pay a proportionate share of attorney's fees when the employer did not in fact employ that particular attorney to represent its subrogation interests. Also, the plaintiff in *Hogan* had received some compensation from the employer prior to the third party settlement whereas here the plaintiff had not received any compensation from the employer prior to the third party settlement.

In *Hogan* the court pointed out that the proper distribution of proceeds would be as follows:

> a. First to the payment of actual court costs taxed by judgment.
>
> b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not be subject to the provisions of section 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.
>
> d. Fourth to the payment of any amount remaining to the employee or his personal representative.

Id. at 293, 248 S.E. 2d at 63-4, quoting G.S. 97-10.2(f)(1).

[1] Here, the third party settlement was made prior to the award of compensation by the Commission. The award recovered from

the third party action was held in trust. In making its decision to allow defendant a credit against third party proceeds, the Commission relied on G.S. 97-42 which provides that the Commission may deduct from any award any payments made by employer during the period of disability if the payments were not due when made. Here, the defendant had not previously made any payments to plaintiff and accordingly was not entitled to a credit. The Commission should have directed defendant to pay plaintiff $20,176 representing the compensation he was entitled to at a rate of $194.00 per week for a period of 104 weeks under G.S. 97-61.5.

Following the distribution scheme set out in G.S. 97-10.2(f)(1), the $51,450 collected by plaintiff from the third party recovery should have been used first to pay court costs. Secondly, it should have been used to pay plaintiff's attorney's fee. Thirdly, it should have been used to reimburse defendant for the $20,176 less defendant's proportionate share of plaintiff's attorney's fees incurred in achieving the third party recovery. The remainder of the third party recovery should have been disbursed to the employee.

Under this distribution each party will have properly shared pro rata in the costs as well as the benefits of the third party action.

[2] We next address the plaintiff's contention that his attorney should also be compensated additionally for the workers' compensation claim. We disagree.

"An award of attorney's fees is within the Commission's discretion." *Ganey v. S.S. Kresge Co.*, 74 N.C. App. 300, 305, 328 S.E. 2d 311, 314 (1985). In its award, the Commission did not find it necessary to award attorney's fees other than those collected from third party funds. The plaintiff has shown no abuse of discretion.

In summary, we find the Commission's failure to direct payment of awarded compensation to plaintiff is error. We also find the Commission's failure to require defendant to pay its proportionate share of attorney's fees in the third party recovery is error. Accordingly, we remand this matter with directions to the Commission to enter an order releasing the third party funds to be distributed in the following priority: (1) pay court costs; (2) pay plaintiff's attorney's fees; (3) reimburse defendant less its proportionate share of attorney's fees; and (4) distribute the remainder to plaintiff. Accordingly, we reverse the decision of the full Commission and remand for entry of an order consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. HENRY CLARENCE PARKS

No. 8915SC291

(Filed 19 December 1989)

1. **Criminal Law § 51.1 (NCI3d); Rape and Allied Offenses § 4 (NCI3d) — experts in child sexual abuse — testimony admissible**

The trial court did not err in qualifying a child sexual abuse counselor and a social worker as experts in child sexual abuse and admitting their testimony where both witnesses testified to receiving advanced degrees in psychology and counselling, to having extensive experience in evaluating victims of child abuse, and to having testified on numerous occasions before the courts of this state as experts in the field of child sexual abuse; moreover, the witnesses explained to the jury in clear terms the accepted profile of indicators of child sexual abuse, how this profile was applied to evaluate the alleged victim in this case, and how the alleged victim's behavior was consistent with this profile, and such testimony was clearly instructive and helpful to the jury. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Infants §§ 16, 17.5.

2. **Criminal Law § 813 (NCI4th) — instruction on particular character trait not given — no error**

Although defendant presented character witnesses who testified that he was "an excellent father," he did not request a special jury instruction on this character trait, and the trial court therefore did not err in omitting such an instruction from its charge to the jury.

Am Jur 2d, Trial § 794.

3. **Rape and Allied Offenses § 5 (NCI3d) — constructive force — sufficiency of evidence**

There was sufficient evidence of threats and displays of force by defendant for the purpose of compelling the victim's

submission to sexual intercourse on the relevant dates to constitute constructive force within N.C.G.S. § 14-27.3 where the evidence tended to show that defendant told the victim that she would be sent away from home and would be sent to a place where people would have sex with her, and on another occasion defendant became violent, obtained a gun, and fired two shots in the house.

Am Jur 2d, Rape §§ 4, 11.

APPEAL by defendant from *Farmer, Robert L., Judge.* Judgment entered 7 October 1988 in ORANGE County Superior Court. Heard in the Court of Appeals 15 November 1989.

Defendant was indicted on two counts of second-degree rape in violation of N.C. Gen. Stat. § 14-27.3 and two counts of sexual activity by a substitute parent in violation of N.C. Gen. Stat. § 14-27.7. The evidence at trial tended to establish that in December 1987, the victim, age 15, her mother, her younger brother, and defendant resided together in a trailer in Orange County. On the morning of 18 December 1987, the victim was suspended from school for carrying a gun on the school bus. Defendant was called to take her home. Upon their arrival home, defendant became violent. He yelled at the victim and threw objects, including a telephone, about the trailer. Defendant ordered her to go into the bedroom, and repeatedly ordered her to undress. Defendant then undressed and engaged in sexual intercourse with her.

Two days later, defendant informed her that she was being sent to a psychiatrist and that she was not to talk about defendant's sexual conduct with her. He further told her that any statements which she made regarding such conduct would cause the authorities to send her away from home, to a place where the people would also have sex with her. As the victim became more frightened, defendant told her that "they would probably send [her] away. So . . . we would have to do it one more time before they sent [her] away." Defendant then undressed the victim and again engaged in sexual intercourse.

The evidence further tended to establish that defendant moved in with the victim's family when she was in the fifth grade and lived with them continuously thereafter. Although defendant and the victim's mother never married, defendant assumed a parental role in the family and was called "Dad" by the victim. Defend-

ant began having sexual intercourse with the victim when she was twelve years old. He was often violent and asserted a strict, domineering influence over her. On one prior occasion when the victim informed her mother of defendant's sexual conduct, defendant became violent, obtained a gun, went into the bathroom and fired two shots. The victim testified on cross-examination that on the morning she was suspended from school, she was carrying the gun "to commit suicide" because "[h]e [the defendant] was making me have sex with him."

Defendant was found guilty of all charges and was sentenced to twelve years' imprisonment for the two second-degree rape convictions, the judgments for these convictions being consolidated. In addition, the court imposed a consecutive term of four and one-half years' imprisonment for the two convictions of sexual activity by a substitute parent, the judgments for these convictions also being consolidated. Defendant appeals.

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

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

WELLS, Judge.

We note at the outset that defendant failed to discuss his second, third, sixth, and eleventh assignments of error in the brief. These assignments of error are therefore deemed abandoned. N.C. R. App. P., Rule 28. We further note that defendant's discussion contained in part C, sections 3-4, of his first argument is directed to matters not properly preserved under N.C. Gen. Stat. § 15A-1446 and N.C. R. App. P., Rule 10. Therefore, we do not consider it. Defendant consolidates his remaining assignments of error into three arguments challenging respectively the court's qualifying two witnesses as expert witnesses, the court's failure to instruct the jury on a character trait of defendant, and the court's denial of defendant's motion to dismiss. We find no error.

[1] Defendant first challenges the court's qualification of two witnesses, a child sexual abuse counselor and a social worker, as experts in child sexual abuse. Defendant contends that the admission of their opinion testimony was error in that such testimony was of no assistance to the jury as a fact finder. We disagree.

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.* Moreover, the determination whether the witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it." *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984) (citation omitted).

Applying these standards to the record before us, we conclude that the trial court did not err in qualifying the witnesses as experts in child sexual abuse and admitting their testimony. Both witnesses testified to receiving advanced degrees in psychology and counselling, to having extensive experience in evaluating victims of child abuse, and to having testified on numerous prior occasions before the courts of this State as experts in the field of child sexual abuse. This evidence clearly suffices to support the trial court's determination that the witnesses possessed the requisite level of skill to qualify as experts in child sexual abuse. *State v. Bullard, supra.* Moreover, the witnesses explained to the jury, in clear terms, the accepted profile of indicators of child sexual abuse, how this profile was applied to evaluate the victim in this case, and how the victim's behavior was consistent with this profile. "The nature of the sexual abuse of children . . . places lay jurors at a disadvantage." *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527, *cert. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). The testimony under scrutiny here was clearly instructive and helpful to the jury. This assignment of error is overruled.

[2] Defendant next challenges the court's failure to instruct the jury on a pertinent character trait, namely, that he is "a good father," arguing that such failure constitutes plain error. It is axiomatic that "[a] prerequisite to . . . engaging in a 'plain error' analysis is the determination that the [action] complained of constitutes 'error' at all." *State v. Johnson*, 320 N.C. 746, 360 S.E.2d 676 (1987); *see also State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986) (and cases cited therein). "Evidence of the good character of the defendant . . . is a subordinate and not a substantive feature of the trial and the failure of the judge to charge the jury relative thereto will not generally be held for reversible error unless there be a request for such an instruction." *State v. Thompson*, 50 N.C. App. 484, 274 S.E.2d 381, *cert. denied*, 302 N.C. 633, 280 S.E.2d 448 (1981) (citation omitted). The record discloses that, although defendant presented character witnesses who testified that he is "an excellent father," he did not request a special jury instruction on this character trait. The court therefore did not err in omitting such an instruction from its charge to the jury, and a plain error analysis is consequently inapplicable. *State v. Johnson, supra.*

[3] Finally, defendant challenges the court's denial of his motion to dismiss the charge of second-degree rape in that the State failed to produce evidence sufficient to establish the element of force.

N.C. Gen. Stat. § 14-27.3 provides in pertinent part:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person[.]

Constructive force in the form of fear, fright, or coercion suffices to establish the element of force in second-degree rape and may be demonstrated by proof of a defendant's acts which, in the totality of the circumstances, create the reasonable inference that the purpose of such acts was to compel the victim's submission to sexual intercourse. *See State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987) (and cases cited therein). Moreover, where explicit threats or displays of force are absent, constructive force may nevertheless be inferred from the "unique situation of dominance and control" which inheres in the parent-child relationship. *Id.* Finally, a parent-child relationship exists for purposes of a constructive force analysis under G.S. § 14-27.3 where the defendant's "relationship with the victim encompassed nearly all the practical incidents of parent-

hood," notwithstanding the absence of a biological or legal parent-child relationship. *State v. Morrison*, 94 N.C. App. 517, 380 S.E.2d 608 (1989).

Defendant's motion to dismiss for insufficiency of evidence to establish the element of force under G.S. § 14-27.3 raises the question of whether there is substantial evidence to support this element of the crime. 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 for sufficiency of the evidence is the same for both direct and circumstantial evidence. *Id.*

The State contends that, in the present case, the requisite force may be inferred from the *de facto* parent-child relationship which existed between defendant and the victim. *See State v. Etheridge* and *State v. Morrison, supra.* We need not, however, reach this question. For measuring the State's evidence against the above standards, we conclude that there was sufficient evidence of threats and displays of force by defendant for the purpose of compelling the victim's submission to sexual intercourse on the relevant dates to constitute constructive force within G.S. § 14-27.3. Defendant's motion to dismiss was therefore properly denied.

For the reasons stated we find

No error.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. BOBBY MAY RIGGS AND PAMELA RIGGS

No. 884SC1104

(Filed 19 December 1989)

Searches and Seizures § 26 (NCI3d)— application for warrant—insufficiency of showing of probable cause—information from informers unreliable

An affidavit did not provide a substantial basis for a finding of probable cause for issuance of a search warrant where there were statements concerning subjects going to defendants' driveway, walking toward their home and returning with drugs, but there was no statement in the affidavit that the drugs were purchased from defendants in their home; there was no statement that drugs were seen on the premises; subjects with whom the informants dealt were not searched for contraband before they went to defendants' home; in one instance, a subject made a detour to another location before going to defendants' residence; there were periods of surveillance during which the subjects disappeared from the view of officers; though each source was described in the affidavit as being confidential and reliable, the affiant stated at trial that he had mistakenly represented one of the two sources as reliable when he did not know that to be a true fact; and the magistrate testified that he relied solely on the information in the affidavit in making his decision.

Am Jur 2d, Searches and Seizures §§ 65, 69.

APPEAL by defendants from *Reid (David E., Jr.), Judge.* Judgments entered 19 November 1987 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 May 1989.

Defendant, Pamela E. Riggs, was convicted of simple possession of marijuana and possession of drug paraphernalia. For these convictions, a 30-day suspended sentence and a 60-day active sentence were imposed respectively. Defendant, Bobby May Riggs, was convicted of simple possession of marijuana for which a 30-day suspended sentence was imposed. He was also convicted of possession of drug paraphernalia for which he was sentenced to a one-year term of imprisonment.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Gaylor, Edwards, Vatcher & Bell, by Jimmy F. Gaylor, for defendant-appellants.

ORR, Judge.

The first issue raised by defendants' appeal is whether the affidavit which was presented to the magistrate was sufficient to support the magistrate's finding of probable cause for the issuance of a search warrant. Defendants first argue that the information contained in the affidavit is insufficient to establish the presence of contraband in their home. Secondly, defendants contend that the reliability or veracity of the two informants and their basis of knowledge is questionable and is therefore insufficient to support the issuance of a search warrant. The State contends that the facts as stated in the affidavit are sufficient to support the magistrate's issuance of the warrant to search defendants' home. Because we conclude that the denial of defendants' motion to suppress was error, we have included a brief discussion of their second issue along with our consideration of their first one.

On 27 March 1987, Deputy B. W. Floyd with the Onslow County Sheriff's Department completed an application for a warrant to search defendants' residence. A sworn, three-page affidavit was attached to the application. Pertinent parts of that affidavit are set out below:

> Source stated that to purchase marijuana from the above described *residence* the [s]ource would bring a subject who is known and trusted by Riggs to the driveway of the above described residence, there the subject would walk to the above described *residence* purchase the marijuana . . . return to the vehicle and deliver the marijuana to the [s]ource.
>
> On 3-25-87 [a]ffiant met with the [s]ource, the [s]ources [sic] vehicle and person was [sic] searched with no contraband being found. The [s]ource was issued $45.00 of Onslow County narcotics monies, [sic] the [s]ource thereafter was constanly [sic] under surveillance[;] the [s]ource then met with a [s]ubject known and trusted by Riggs, the [s]ource and this [s]ubject then traveled to the driveway of the above described residence, the [s]ource subsequently stated to affiant that at this point $45.00 was

given to the subject and the subject walked down the driveway to the above described residence. Shortly thereafter the subject returned to the [s]ource's vehicle and the [s]ource stated that the subject delivered to the [s]ource appox. [sic] ¼ oz[.] of marijuana, the [s]ource then drove the [s]ubject a short distance away and dropped the subject off. [T]he [s]ource then came directly to affiant and turned over . . . appo. [sic] ¼ oz[.] of marijuana . . . .

This [s]ource is reliable in that this [s]ource knows what marijuana looks like and the information this [s]ource has given to affiant is [sic] always been found to be true and exact[.]

On 2-26-87 Deputy Sheriff L. S. Stevens and affiant searched a separate [s]ource of information and found no contraband. Deputy Stevens issued this [s]ource $45.00 and equiped [sic] the [s]ource with a liste[ning] device. The [s]ource was then followed by Deputy Stevens and affiant to a residence where the [s]ource gave a subject the $45.00. This subject was then followed to the above described residence and then back to the [s]ubjects [sic] residence where the [s]ubject delivered to the [s]ource appox [sic] ¼ oz. of marijuana. Deputy Sheriff Stevens [sic] [s]ource knows what marijuana looks like and has made 2 controlled purchases of narcotics in Onslow Co. for Deputy Stevens—and given information that has led to the arrest of 1 narcotics violat[or] . . . the information Deputy Steven's [sic] [s]ource has provided has always [been] found to be true and exact.

On 4-23-87 Bobby Riggs pled guilty to Felony Possession of Marijuana[.] (Italicized words were added in the margin.)

In addition to the information set out above, the affidavit also gave directions to and a description of the Riggs' residence.

The warrant was issued and the search resulted in the seizure of a small quantity of marijuana and numerous pieces of drug paraphernalia. Thereafter, on 24 July 1987 and 26 August 1987, defendants Pamela and Bobby Riggs filed motions to suppress the evidence which was seized during this search. By orders dated 17 November 1987, their motions were denied. They now appeal their convictions based upon the admission of that evidence.

Turning first to the statutory law in North Carolina, we note that each application for a warrant must be in written form and

contain, among other information, "[a] statement that there is probable cause to believe that items subject to seizure . . . may be found [at the premises to be searched] . . . ." G.S. 15A-244 (1988). Furthermore, the statement must be supported by one or more affidavits which particularly state "the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched . . . ." *Id.* Once that evidence has been made a part of the application, the issuing official must determine whether "the application meets the requirements of [Article 11] . . . ." G.S. 15A-245 (1988). The official must thereafter determine whether there is "probable cause to believe that the search will discover items specified in the application which are subject to seizure . . . ." *Id.* If probable cause is found, the official must issue the warrant. *Id.*

After reviewing the record before us, we find that this affidavit did not provide a sufficient basis for the magistrate's issuance of the search warrant because there was no substantial basis for a finding of probable cause. Therefore, the trial court erred in denying defendants' motions to suppress. Defendants are entitled to a new trial for the following reasons.

In previous cases, we have reiterated the rule of law which states that:

> [i]n order to show probable cause, an affidavit must establish reasonable cause to believe that the proposed search for evidence of the designated offense will 'reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.'

State v. Goforth, 65 N.C. App. 302, 307-08, 309 S.E.2d 488, 492 (1983) (quoting *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972)). In the *Goforth* case, just as in the case at bar, the affidavit failed to implicate the premises to be searched. Here, we have statements concerning subjects going to defendants' driveway, walking toward their home and returning with drugs. There was no statement in the affidavit that the drugs were purchased from *defendants* in their *home*.

Furthermore, in looking at other cases in which the question of the validity of search warrants has been determined, we find that the affidavit here does not meet the particularity requirement which G.S. 15A-244 imposes. *See State v. Beam*, 325 N.C. 217,

381 S.E.2d 327 (1989) (affidavit contained a statement that the informant had seen approximately one pound of marijuana at the defendant's home one week before the affidavit was sworn); *State v. Milloway*, 94 N.C. App. 579, 380 S.E.2d 596 (1989) (affidavit stated that several subjects were hired to deliver marijuana to defendant at his residence and that defendant had sold them marijuana from his residence on other occasions); *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 593 (1988) (affidavit stated that cocaine was seen at the defendant's residence within 24 hours of the affidavit being sworn). In each of these cases, contraband was seen directly on the premises by some person who then relayed this information to the affiant.

Here, we have no such connection between contraband and the Riggs' residence. In fact, in reviewing these cases, the similarities between *Goforth* and the case at bar become more apparent. The affidavit in *Goforth* detailed the "comings and goings" of persons to and from the home of the defendant. *Goforth*, 65 N.C. App. at 307, 309 S.E.2d at 492. There was no statement that drugs were seen on the premises. Although it is true that several of these persons were searched by officers after they left the Goforth residence and no drugs were found, whereas the subjects here turned drugs over to the two sources, this distinction is not significant enough to render the rule in *Goforth* inapplicable to the case at bar. Indeed, in the case at bar, the subjects with whom the informants dealt were not searched for contraband before they went to the Riggs' home. And, in one instance, a subject made a detour to another location before going to the Riggs' residence. Likewise, there were periods of surveillance during which these subjects disappeared from the view of the officers which left them free to have contact with persons other than the defendants.

Additionally, as defendants argue in their second issue, each source was described in the affidavit as being confidential and reliable. However, at trial, Deputy Floyd stated, on cross-examination, that he had mistakenly represented one of the two sources as reliable when he did not know that to be a true fact. Although he admitted to having read over his affidavit and corrected other errors, Deputy Floyd said he had not noticed this error.

The magistrate testified that he relied on the information in the affidavit in making his decision; he did not distinguish one

source from the other. He did not question the officer about the facts in the affidavit or about any other facts pertaining to this case. Consequently, even if the affidavit had contained enough information to support a finding of probable cause, and we conclude that it did not, the magistrate's decision would have been based, in part, on incorrect information. Given the statutory requirement that each written application for a search warrant must be sworn to and accompanied by an affidavit which particularly sets out material facts which establish probable cause, it is imperative that those facts are represented accurately. *See* G.S. 15A-244. To allow magistrates to rely upon affidavits which are materially inaccurate would make a mockery of the rules which were enacted to protect the rights of citizens from unreasonable searches and seizures. "The interest of a defendant to be free from unlawful searches and seizures is, of course, a fundamental constitutional and statutory right in North Carolina." *State v. Hyleman*, 324 N.C. 506, 510, 329 S.E.2d 830, 832 (1989). Therefore, just as our courts have not allowed "bare bones" or conclusory affidavits to support the issuance of search warrants, neither would it be prudent for us to allow an affidavit which contains conclusory and inaccurate statements of material facts to support the warrant here. *Id.*

The search warrant here was invalid because it was issued based upon evidence which failed to establish probable cause. Therefore, the evidence obtained upon the execution of this warrant is inadmissible against these defendants. A new trial is hereby ordered.

New trial.

Judges EAGLES and PARKER concur.

ROY PHILLIP LYNCH v. JACKIE FOSTER LYNCH

No. 899DC129

(Filed 19 December 1989)

1. **Divorce and Alimony § 26.4 (NCI3d)— child custody—proceeding pending in another state—child living in another state—no jurisdiction in North Carolina**

The trial court erred in exercising jurisdiction over a child custody matter where there was no dispute that a proceeding was pending in an Indiana court and that the child had lived in Bloomington, Indiana for six years; Indiana was therefore the child's home state; and there was no longer available in this state substantial evidence relevant to the child's present or future care, protection, training, and personal relationships. N.C.G.S. §§ 50A-3(a), 50A-6(a).

Am Jur 2d, Divorce and Separation § 964.

2. **Divorce and Alimony § 26.1 (NCI3d)— Indiana child support order—full faith and credit**

A child support order issued by an Indiana court was entitled to full faith and credit in this state and was res judicata on the issue of child support.

Am Jur 2d, Divorce and Separation § 1130.

APPEAL by defendant from order of *Judge J. Larry Senter* entered 6 September 1988 in VANCE County District Court. Heard in the Court of Appeals 13 September 1989.

Bobby W. Rogers for plaintiff appellee.

Stainback & Satterwhite, by Paul J. Stainback, for defendant appellant.

COZORT, Judge.

The question before us is whether the trial court erred in exercising jurisdiction over the parties and the cause for modification of a previous North Carolina order establishing custody and support when there was a pending action in a foreign jurisdiction. We hold that the trial court erred in denying defendant's motion to dismiss for lack of jurisdiction under the Uniform Child Custody

Jurisdiction Act. We further hold that the order issued by the Indiana court was entitled to full faith and credit in this State and was res judicata on the issue of child support.

Plaintiff and defendant were married on 11 July 1971 and had one child, a son, born on 19 February 1976. In 1977, the parties separated and executed a Deed of Separation, registered in Vance County, North Carolina, which provided (as subsequently amended) that defendant would have custody of the parties' child, subject to visitation rights of plaintiff, and that plaintiff would pay child support. On 14 July 1978, the parties received an absolute divorce by order of the District Court of Vance County. On 4 September 1981, the Vance County District Court issued an order establishing visitation and ordering plaintiff to pay child support. Defendant thereafter moved to the State of Indiana, where she has resided with the child since 1981.

On 26 October 1987, defendant filed in Monroe County, Indiana, a Petition to Modify Visitation and Support, and the cause was set for hearing on 3 February 1988. On 25 November 1987, plaintiff filed a motion in the cause in Vance County, North Carolina, requesting that the court increase his visitation privileges and define his support obligations. Plaintiff also filed with the Indiana court a pro se Response to defendant's Petition. In that Response he alleged that the proper place of jurisdiction was North Carolina because of the 4 September 1981 order.

On 9 December 1987, defendant filed with the Vance County District Court a motion to dismiss which alleged that North Carolina did not have jurisdiction over the persons or over the subject matter, as there was a pending action for custody and support in the State of Indiana. That motion was denied.

On 7 January 1988, the Indiana court contacted Judge Ben Allen, then District Court Judge of the 9th Judicial District, with respect to the simultaneous child custody proceedings in their respective jurisdictions. Judge Allen agreed with the Indiana court that Indiana was the appropriate forum for hearing defendant's Petition. However, on 25 January 1988, Judge Allen informed the Indiana court that the North Carolina proceedings were to be before Judge Larry Senter. When contacted by the Indiana court, Judge Senter informed the court that North Carolina would retain jurisdiction. Judge Senter did not stay the North Carolina proceedings.

On 23 February 1988, the Monroe County, Indiana, Superior Court entered an order for reduced visitation and increased child support. When plaintiff's motion came on for hearing before Judge Senter on 22 August 1988, defendant renewed her motion to dismiss for lack of jurisdiction. The trial court denied the motion. Defendant appeals.

North Carolina's Uniform Child Custody Jurisdiction Act provides in pertinent part as follows:

> (a) If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Chapter, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.
>
> (b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under G.S. 50A-9 and shall consult the child custody registry established under G.S. 50A-16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.
>
> (c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with G.S. 50A-19 through G.S. 50A-22.

N.C. Gen. Stat. § 50A-6(a) (1989).

The Act further provides that a court shall not modify a custody order of a sister state "unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction."

N.C. Gen. Stat. § 50A-14 (1989). The purposes of that provision are (1) to recognize that courts that render a custody decree will usually retain continuing jurisdiction to modify that decree, and (2) to achieve greater stability of custody arrangements and avoid forum shopping. *See Davis v. Davis*, 53 N.C. App. 531, 539, 281 S.E.2d 411, 415 (1981) (quoting 9 Uniform Laws Ann. at 154).

A court's jurisdiction under the Act is limited to the conditions set forth in § 50A-3, which includes the following conditions potentially applicable to the facts before us:

> (1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or
>
> (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships . . . .

N.C. Gen. Stat. § 50A-3(a) (1989).

[1] We find that, under the foregoing provisions of the U.C.C.J.A., the trial court erred in exercising its jurisdiction over the custody matter. There is no dispute that a proceeding was pending in the Indiana court and that the child had lived in Bloomington, Indiana, since 1981, a period of six years. Indiana was, therefore, the child's home state. *See* § 50A-2. Under the circumstances, there was no longer available in this State "substantial evidence relevant to the child's present or future care, protection, training, and personal relationships." *See* § 50A-3(a)(2). Therefore, Indiana was exercising jurisdiction in substantial conformity with the U.C.C.J.A., and North Carolina was required to decline jurisdiction over the custody issue.

[2] Whether the trial court properly exercised jurisdiction over the support issue is a question not governed by the U.C.C.J.A. *Morris v. Morris*, 91 N.C. App. 432, 371 S.E.2d 756 (1988). An action for child support is an action *in personam* and is governed

by jurisdictional rules as in actions for the payment of money or the transfer of property. N.C. Gen. Stat. § 50-13.5(c); *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985). As such we are not aware of any jurisdictional rule requiring the trial court to dismiss plaintiff's North Carolina action simply because defendant had filed an action in Indiana. However, when plaintiff's motion came on for hearing before Judge Senter on 22 August 1988, the Indiana court had entered an order on the issue of child support. That order was entitled to full faith and credit in this State as long as plaintiff was not denied due process of law in the Indiana court's assertion of jurisdiction over him. *Ft. Recovery Industries v. Perry*, 57 N.C. App. 354, 291 S.E.2d 329 (1982). Plaintiff contends that the Indiana court lacked jurisdiction over his person and that defendant failed to prove proper service of process. The issue of the validity of Indiana's exercise of jurisdiction over him, however, is governed by Indiana law, and plaintiff has presented no Indiana authority in support of his contentions. *See White v. Graham*, 72 N.C. App. 436, 325 S.E.2d 497 (1985). Also, it appears that plaintiff waived any objection to personal jurisdiction when he filed a Response in the Indiana court objecting to that court's jurisdiction solely on the ground that North Carolina was the more appropriate forum because of this State's previous order of custody and support. *See Killearn Properties, Inc. v. Lambright*, 176 Ind. App. 684, 377 N.E.2d 417 (1978). Therefore, the Indiana judgment was entitled to full faith and credit and was *res judicata* on the issue of child support.

Defendant's motion to dismiss plaintiff's North Carolina action should have been granted. The order below must be

Vacated.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. THANAWUTH I. NA AYUDKYA A/K/A TUIE

No. 894SC273

(Filed 19 December 1989)

1. **Conspiracy § 6 (NCI3d)— conspiracy to commit robbery— sufficiency of evidence**

Evidence was sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with another in the robbery with each having preassigned roles and that he and the other person conspired to commit the robbery where the evidence tended to show that defendant had agreed with the third person at some earlier time to rob the victims; the victims testified that defendant was unusually nervous during the visit just prior to the robbery; defendant knew to go out to the car and retrieve duct tape to bind the victims after they had been detained; and when the robbery began, defendant was the first one to act, saying "Let's do it now" as he grabbed one victim.

Am Jur 2d, Conspiracy §§ 10, 13-15, 40.

2. **Criminal Law §§ 89.3, 89.9 (NCI3d)— witness's prior statement—admissibility for corroboration or impeachment**

In a prosecution for robbery, the trial court did not err in allowing into evidence a witness's prior statement to "corroborate or impeach, whatever happens," where the prior statement corroborated the witness's direct testimony and tended to impeach his cross-examination testimony. N.C.G.S. § 8C-1, Rule 607.

Am Jur 2d, Witnesses §§ 596, 629, 641, 645, 648.

APPEAL by defendant from judgments entered 14 September 1988 by *Judge Henry L. Stevens, III,* in SAMPSON County Superior Court. Heard in the Court of Appeals 11 October 1989.

Defendant was indicted on two counts of robbery with a dangerous weapon (88CRS2398 & 3036), two counts of second degree kidnapping (88CRS3038 & 3040), conspiracy to commit robbery (88CRS3039), and felonious larceny and felony possession of stolen goods (88CRS3037).

The evidence for the State tended to show that on the evening of 18 April 1988 defendant and Ricky Powers went to the Lockamy home and gained entry by telling the Lockamys that defendant's car was overheating. Defendant was a friend of the Lockamys. Defendant and Mrs. Lockamy are both originally from Thailand and defendant previously had worked part time for Mrs. Lockamy in her restaurant. When defendant and Powers entered the house, Powers joined Mr. Lockamy in the living room and defendant asked to use the bathroom. Thereafter, defendant asked to have some water. The Lockamys testified that defendant was acting "very nervous" during the visit but Powers was very calm. After defendant and Powers had been in the home for some time, defendant grabbed Mrs. Lockamy and held a knife to her neck. Powers produced a gun and told Mr. and Mrs. Lockamy to get on the floor. Defendant then taped the Lockamys' hands behind their backs and placed tape over their mouths. Defendant and Powers then took jewelry and money from each of the Lockamys. Defendant took a handgun from their bedroom while Powers took the guns that were in a gun cabinet in the living room. The State's evidence also tended to show that defendant pawned several of the items taken from the Lockamy home and had others in his possession when he surrendered to law enforcement officers.

The State also presented evidence from George Malarchek that he, Powers and defendant had decided to rob Mrs. Lockamy because she carried large amounts of cash. Malarchek also testified of an aborted attempt to rob Mrs. Lockamy at her home. While being cross-examined in regard to defendant's involvement in the prior conversations Malarchek contradicted his prior testimony and stated that defendant had nothing to do with the prior attempt or the earlier discussions. Over defendant's objection, the State introduced a prior statement made by Malarchek to "corroborate—or impeach, whatever happens." The statement tended to corroborate Malarchek's direct testimony and impeach his cross-examination testimony regarding prior conversations with the defendant and Powers about robbing Mrs. Lockamy. Defendant's motion to dismiss the charges was denied.

Defendant testified that he was acting under duress exerted by Powers, that Powers had threatened his life and the life of his mother, and that he also feared for the Lockamys' safety if he tried to tell them of the planned robbery. Defendant also denied

any involvement in conversations with Powers and Malarchek about robbing Mrs. Lockamy.

The State called Powers as a witness on rebuttal. He testified that the robbery scheme was defendant's idea and that defendant wanted to kill the Lockamys but that he would not agree to the robbery if defendant intended to harm the Lockamys. Powers also testified that he and defendant had planned the robbery to look like Powers was in charge since defendant was the Lockamys' friend.

At the close of all of the evidence defendant's renewed motions to dismiss were denied. The jury convicted defendant of all charges.

The trial court arrested judgment on the felonious larceny and felony possession conviction but entered judgment on the remaining convictions. The trial court consolidated the two robbery convictions and sentenced defendant to the presumptive term of 14 years. The trial court then consolidated the two second degree kidnapping convictions and sentenced defendant to the presumptive term of 9 years. Finally, the trial court sentenced defendant to the presumptive prison term of 3 years for the conspiracy to commit robbery conviction. Defendant's sentences were to run consecutively. Defendant appeals.

Attorney General Thornburg, by Associate Attorney General David N. Kirkman, for the State.

Philip E. Williams for defendant-appellant.

EAGLES, Judge.

Defendant makes two arguments on appeal. First, defendant asserts that the trial court erred in denying his motion to dismiss the conspiracy charge. Second, defendant asserts that the trial court erred in allowing the admission of Malarchek's prior statement. After consideration of defendant's arguments and careful review of the record, we find no error.

[1] Defendant argues that the conspiracy charge should have been dismissed because there was no substantive evidence of his agreement to rob the Lockamys. Defendant asserts that Malarchek's testimony never showed an agreement was reached and Malarchek's prior statement was admitted for corroboration, not as substantive evidence. Therefore, defendant asserts there was no evidence of a conspiracy. We find no merit in defendant's argument.

> "A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. . . . No overt act is necessary to complete the crime of conspiracy. 'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.'" A criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred.

State v. Branch, 288 N.C. 514, 535, 220 S.E.2d 495, 509-10 (1975) (citations omitted), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977), *rev'd on other grounds*, *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). The existence of a conspiracy may be established by direct or circumstantial evidence. "Direct proof of [conspiracy] is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). Upon a motion to dismiss in a criminal case, the court considers the evidence in the light most favorable to the State, resolves all contradictions and discrepancies in the State's favor and gives the State the benefit of every reasonable inference which can be drawn from the evidence. See *State v. Abernathy*, 295 N.C. 147, 165, 244 S.E.2d 373, 384-85 (1978).

Here there was circumstantial evidence that tended to show that defendant had agreed with Powers at some earlier time to rob the Lockamys. The Lockamys testified that defendant was unusually nervous during the visit just prior to the robbery. Additionally, the victims' testimony reveals circumstances that show a prior agreement regarding the robbery: Powers asked about Mr. Lockamy's elderly aunt although only defendant had known she lived in the Lockamys' house; defendant knew to go out to the car and retrieve duct tape to bind the victims after they had been detained; and, when the robbery began, defendant was the first one to act and he said "let's do it now" as he grabbed Mrs. Lockamy. Taken together, this evidence is sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with Powers in the robbery with each having preassigned roles and that defendant and Powers conspired to commit the robbery.

[2] Defendant's second argument is that the trial court erred in allowing the admission of Malarchek's prior statement. Defendant argues that the State used Rule 607 of the North Carolina Rules of Evidence as a subterfuge for the admission of otherwise impermissible hearsay. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." G.S. 8C-1, Rule 607. Defendant asserts that *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988) is dispositive of this issue. In *Burton*, our Supreme Court stated that where a witness's prior statement contradicted his sworn testimony, the prior statement "was not admissible under the guise of corroborative evidence." 322 N.C. at 451, 368 S.E.2d at 633. The prior statement made by Malarchek was introduced to "corroborate or impeach, whatever happens." The State argues that the admission of the prior statement for purposes other than substantive was an attempt to rehabilitate the witness. The prior statement corroborated Malarchek's direct testimony although it tended to impeach his cross-examination testimony. Therefore, the State argues the statement was properly introduced. We agree.

As this court has stated previously, there is a danger that Rule 607, if not applied cautiously, would make "fair game" almost any out-of-court statement made by a witness. *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987). This is especially true when Rule 607 is combined with our rule allowing use of prior consistent statements for corroboration. See, e.g., *State v. Ramey*, 318 N.C. 457, 468-69, 349 S.E.2d 566, 573-74 (1986). In the instant case Malarchek testified on direct examination that he, defendant and Powers had discussed robbing Mrs. Lockamy and that they attempted to rob her in the afternoon of the 18th of April. On cross-examination, however, Malarchek testified that defendant was not with Powers and him when they went to the Lockamys' house in the afternoon. Malarchek's prior statement was that the three men had made plans to rob Mrs. Lockamy at her restaurant and, after that plan fell through, at her home. There was also testimony that Malarchek had changed his story "eleven or so times" prior to giving the officer a statement. Though not offered as substantive evidence, the prior statement was admitted for a limited purpose, impeachment or corroboration, whichever the jury found. We find no merit in defendant's argument that the statement was erroneously admitted.

In the trial, we find no error.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. CHARLIE EDDIE CARTER

No. 8910SC357

(Filed 19 December 1989)

1. **Criminal Law § 71 (NCI4th)— offense occurring in two counties—concurrent venue—indictment first in Wake County—trial in Wake County proper**

Wake and Franklin counties had concurrent venue for a charge of conspiracy to traffic in cocaine where the indictment alleged that the offense occurred in both counties, and Wake was the proper county for trial where defendant was indicted there before being indicted by the Franklin County Grand Jury; moreover, even if an indictment for trafficking in cocaine failed to name Wake County as a county in which the offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County had jurisdiction to try the offense. N.C.G.S. §§ 15-155, 15A-132, 15A-631.

Am Jur 2d, Criminal Law §§ 361, 362, 366.

2. **Criminal Law § 70 (NCI3d)— tape-recorded conversations—admissibility**

Where the trial court conducted a voir dire with respect to tape-recorded conversations and made findings of fact which complied with the requirements set forth in *State v. Lynch*, 298 N.C. 604, and the record on appeal did not contain the tapes or the transcripts which were admitted into evidence, the court on appeal finds no error in admission of the tapes and transcripts.

Am Jur 2d, Evidence § 436.

APPEAL by defendant from judgment entered 16 September 1988 by *Judge B. Craig Ellis* in WAKE County Superior Court. Heard in the Court of Appeals 22 September 1989.

Defendant was indicted in Wake County for conspiracy to traffic in cocaine and trafficking in cocaine. The indictments contained the following charges:

> The Grand Jurors upon their oath present, that Charlie Eddie Carter, Rayford Doughty and others, late of the counties of Wake and Franklin on the 12th day of February, 1988 with force and arms, at and in the County aforesaid, did unlawfully, willfully, and feloniously agree, plan, combine, conspire and confederate each with the other to commit the felony of trafficking in cocaine. . . .
>
> The Grand Jurors for the State upon their oath present that on or about the 12th day of February, 1988 in Franklin County the defendant named above [Charlie Eddie Carter] unlawfully, willfully and feloniously did commit the felony of trafficking in cocaine by selling to Rayford Doughty more than 400 grams of a mixture containing cocaine. . . .

Defendant made pretrial motions to dismiss the charges for improper venue and lack of jurisdiction. Defendant argued that the indictments charged offenses that did not occur in Wake County. The trial court denied defendant's motions.

At trial defendant objected to the trial court's ruling that certain tape recordings and transcripts of the tape recordings were admissible. The jury found defendant guilty of both charges. From a consolidated judgment entered on the verdicts, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Michael Rivers Morgan and Richard G. Sowerby, Jr., for the State.

Winborne & Winborne, by Vaughan S. Winborne, Jr. and P. Faison S. Winborne, and Robert T. Knott, for defendant-appellant.

EAGLES, Judge.

Defendant makes three arguments on appeal. First, defendant asserts that the trial court erred in conducting the trial and pretrial proceedings in an improper venue. Defendant also argues that the trial court did not have jurisdiction to enter judgment and sentence because the grand jury lacked jurisdiction to indict him. Finally, defendant argues that the trial court erred in allowing the admission of certain tape recordings and transcriptions of those tape

recordings. After careful consideration of defendant's assignments of error and the record on appeal, we find no error.

Defendant's first two arguments relate to the indictments' language and the location of the alleged offenses. In order to properly address defendant's arguments, we first distinguish between jurisdiction and venue.

> Statewide jurisdiction to hear criminal matters is vested in our trial court of general jurisdiction, the Superior Court. N.C. Const. Art. IV, § 12(3) . . . . Because this jurisdiction is statewide, jurisdictional issues should arise only to determine: (i) whether North Carolina courts can hear the case, see *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977); and (ii) which division of the General Court of Justice must first try the matter. See *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98, *disc. rev. denied*, 289 N.C. 618, 223 S.E.2d 394 (1976).
>
> On the other hand, when deciding the proper county in which to bring the criminal action, principles of venue, not jurisdiction, are involved. Improper venue will not deprive the court of jurisdiction. *State v. Cox*, 48 N.C. App. 470, 269 S.E.2d 297 (1980). A jurisdictional challenge questions the "very power of this State to try [the defendant]." *Batdorf* at 493, 238 S.E.2d at 502.

State v. Bolt, 81 N.C. App. 133, 135-36, 344 S.E.2d 51, 53 (1986). Here the question is not whether the State has the power to prosecute the defendant, but rather *where* the State may prosecute him. The question is one of venue.

Defendant's argument that Wake County lacks jurisdiction to prosecute him is without merit. Defendant relies on the common law rule which provided that a grand jury had the power to indict only for crimes allegedly committed within the county in which it sat, and "an indictment which alleged an offense occurred outside the county was void for lack of jurisdiction by the grand jury." See *State v. Randolph*, 312 N.C. 198, 207, 321 S.E. 2d 864, 870 (1984). However, our General Assembly has altered the common law rule. G.S. 15A-631 provides that:

> In the General Court of Justice, the place for returning a presentment or indictment is a matter of venue and not jurisdiction. A grand jury shall have venue to present or indict in

any case where the county in which it is sitting has venue for trial pursuant to the laws relating to trial venue.

[1] With regard to the venue issue, defendant argues that the indictments affirmatively allege that all criminal conduct occurred in Franklin County. The only connection to Wake County revealed in the conspiracy indictment was that at some prior time defendant had been present in Wake County. Defendant argues that the remaining allegations in the conspiracy indictment refer to the "county aforesaid" which is Franklin County. Additionally, defendant asserts that the trafficking indictment affirmatively alleges that the sale occurred in Franklin County. Relying on *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977), defendant argues that because the indictments affirmatively allege that all criminal conduct occurred in Franklin County there was a prima facie showing that Franklin County is the proper county for venue purposes, not Wake County.

The State argues that Franklin and Wake counties had concurrent venue for the conspiracy charge because the indictment alleged that the offense occurred in both counties. Therefore, under G.S. 15A-132, Wake County obtained exclusive venue when it indicted defendant on these charges before the Franklin County Grand Jury. G.S. 15A-132 provides that:

> (a) If acts or omissions constituting part of the commission of the charged offense occurred in more than one county, each county has concurrent venue.
>
> (b) If charged offenses which may be joined in a single criminal pleading under G.S. 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses.
>
> (c) When counties have concurrent venue, the first county in which a criminal process is issued in the case becomes the county with exclusive venue.

Additionally, the State argues that Wake County had venue for the trafficking charge because these offenses were part of the same transaction or occurrence and were joinable under G.S. 15A-926.

We have carefully considered defendant's argument but we are not persuaded. We do not agree that the conspiracy indictment alleges only activities that occurred in Franklin County. The conspiracy indictment names both Wake and Franklin counties. These allegations were sufficient to put defendant on notice of the crimes

charged. Defendant's argument regarding the conspiracy indictment is without merit.

The trafficking indictment alleges only Franklin County as the location of the offense; but contrary to defendant's argument, this is not sufficient to authorize us to reverse defendant's conviction. G.S. 15-155 provides that

> [n]o judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed . . . for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense.

Even if the trafficking indictment fails to name Wake County as a county in which the offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County had jurisdiction to try the offense. As stated previously, G.S. 15A-631 provides that the return of an indictment is a matter of venue, not jurisdiction. Defendant's argument regarding the trafficking indictment is without merit.

[2] Defendant also asserts that the admission of certain tape recordings and the transcripts of those tape recordings constituted reversible error. Defendant argues that the recordings contained numerous inaudible portions which caused the audible statements to be taken out of context. We find no merit in defendant's argument.

> To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement, courts are in general agreement that the State must show to the trial court's satisfaction (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made.

State v. Lynch, 279 N.C. 1, 17, 181 S.E. 2d 561, 571 (1971) (involving defendant's recorded confession). These seven criteria also determine the admissibility of recorded conversations between a wit-

ness and the defendant. See *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). Here the trial court conducted a *voir dire* with respect to each tape recorded conversation and made findings of fact that complied with the requirements set forth in *Lynch*. The record on appeal before us contains neither the tapes nor the transcripts which were admitted into evidence. From this record we cannot say the trial court erred in admitting the tapes and transcripts into evidence.

For the reasons stated, we find no error in the trial court.

No error.

Judges PARKER and GREENE concur.

CAROLINA MILLS LUMBER COMPANY, INC., PLAINTIFF v. NORMAN J. HUFFMAN, DEFENDANT

No. 8918SC189

(Filed 19 December 1989)

Guaranty § 2 (NCI3d)— substitution of pages—failure to show defendant signed particular guaranty agreement

The trial court properly entered judgment for defendant based on plaintiff's failure to meet his burden of proof in his action on a guaranty agreement where the court found that the discoloration of pages, staple removal, and testimony of defendant and a notary who allegedly witnessed his signature were sufficient to support an inference that defendant did not in fact sign and deliver the particular agreement in question; rather, plaintiff merely proved that the signature on the agreement was defendant's but did not show by a preponderance of the evidence that defendant signed that guaranty agreement.

Am Jur 2d, Guaranty § 123.

APPEAL by plaintiff from judgment entered 25 October 1988 by *Judge Peter Hairston* in GUILFORD County Superior Court. Heard in the Court of Appeals 20 September 1989.

This is an action on a guaranty agreement. On 30 March 1987, plaintiff filed suit against defendant alleging that defendant had agreed in writing to guarantee any and all debts not paid by the principal debtor, Marler Corporation. After the date of the agreement, plaintiff secured a judgment against Marler Corporation for $62,826.73 which was unsatisfied. Defendant answered on 2 November 1987 denying all material allegations of complaint.

At the bench trial, plaintiff introduced the purported original guaranty agreement consisting of four pages. The first two pages embodied the whole guaranty agreement. The third page contained only the words "be hereunto affixed this 21st day of September, 1982" and what purported to be defendant's signature. The fourth page was an acknowledgment page signed by John Howell with a notary seal. Plaintiff presented testimony by Emily Will, a handwriting expert, who testified, after comparing exemplars of defendant's signature with the document, that the signature appearing on the third page of the guaranty agreement was in fact defendant's signature. She further testified that there had been no substitution of pages since "the typefaces, spacing, the irregularities in each document are the same" while noting that the document which was introduced was a copy.

Then defendant introduced evidence to show that a substitution of pages had occurred. William Shulenberger, a questioned document examiner, testified that the signature and acknowledgment pages "were not made as a continuous operation or under the exact circumstances. In other words, they show material differences and raised questions as to the integrity of the four pages."

John Howell, the notary, also testified that he had never received the guaranty agreement and that he never witnessed defendant signing the agreement. He further testified that he was not a notary on 21 September 1982 and that he normally notarized a signature by having the individual sign the page on which he affixed his notarial seal.

After hearing all the evidence at the bench trial, the trial judge found that the guaranty agreement was a photostatic copy of the original and that there was a "substantial difference in the coloration between the various pages, indicating that a substitution of pages may have occurred." The judge also found that the staple connecting the pages had been removed at some time before trial also creating an inference that a substitution of pages might have

occurred. The trial judge found that the signatures of both defendant and John Howell were genuine but that John Howell was not licensed as a notary on 21 September 1982 and that he did not see defendant sign or acknowledge the guaranty agreement before him. Finally, the trial judge found that defendant did not sign or deliver to plaintiff the guaranty agreement. The trial judge then entered judgment for the defendant allowing recovery of costs and dismissing the action with prejudice. Plaintiff appeals.

Charles R. Foster for plaintiff-appellant.

Haworth, Riggs, Kuhn and Haworth, by Susan H. Gray, for defendant-appellee.

EAGLES, Judge.

Plaintiff first assigns as error the trial judge's entry of judgment for defendant based on plaintiff's failure to meet his burden of proof. Plaintiff contends that the trial court erred when it based its decision on the fact that a difference in coloration and staple removal indicated that a substitution of pages might have occurred as opposed to basing its decision on the authenticity of the questioned signature. Plaintiff further contends that he carried the burden of persuasion at trial and accordingly presented evidence through testimony of an expert witness that the signature and the guaranty agreement were genuine. Plaintiff contends that since defendant only presented evidence on the substitution of pages and not the genuineness of defendant's signature, defendant did not cast substantial doubt on plaintiff's case and plaintiff should prevail. We disagree.

In order to hold a guarantor liable under a guaranty agreement, plaintiff must first establish the existence of the agreement. "A guaranty of payment is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. This obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity." *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972).

Plaintiff has introduced into evidence an agreement which it alleged was signed by defendant and notarized by plaintiff's agent.

Defendant has denied signing or delivering that agreement to plaintiff. Likewise, the notary has denied notarizing that particular agreement. Plaintiff has attempted to authenticate the guaranty agreement by offering the testimony of a handwriting expert.

We recognize that "every writing sought to be admitted must be properly authenticated" pursuant to Rule 901, North Carolina Rules of Evidence. *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E. 2d 767, 771 (1987). Rule 901 provides that evidence can be authenticated to support a finding that the matter in question is what its proponent claims by an expert witness with specimens which have been authenticated.

While it is not disputed that the signature on the guaranty agreement is defendant's, it is disputed whether the defendant actually affixed his signature to that guaranty agreement.

When determining if the plaintiff has met his burden of proof, the following conditions must be met: (1) The plaintiff must first produce evidence that is satisfactory to the judge of a particular fact in issue; (2) then, the plaintiff has the burden of persuading the trier of fact that the alleged fact is true. McCormick, McCormick on Evidence (3rd Ed.) Section 336.

> The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced. . . . When the time for a decision comes, the jury, if there is one, must be instructed how to decide the issue if their minds are left in doubt. . . . If there is no jury and the judge finds himself in doubt, he too must decide the issue against the party having the burden of persuasion.

Id.

The trial judge sitting as trier of fact found that the discoloration of pages, staple removal and testimony of both defendant and notary were sufficient to support an inference that defendant did not in fact sign and deliver that particular agreement. The plaintiff merely proved that the signature on the agreement was defendant's but did not show by a preponderance of the evidence that defendant signed that agreement. Accordingly, this assignment of error must fail.

Plaintiff's remaining assignment of error was not discussed in plaintiff's brief and pursuant to Rule 28 is deemed abandoned.

For the above-stated reasons, the judgment of the trial court is affirmed.

Affirmed.

Judges PARKER and GREENE concur.

JULIAN CLARK CULTON v. JANE ANDERSON CULTON

Nos. 8926DC614
8926DC615

(Filed 19 December 1989)

Insane Persons § 2.2 (NCI3d)— divorce and equitable distribution— no jurisdiction of court to determine competency of defendant

Though N.C.G.S. § 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, the trial court in this action for divorce and equitable distribution lacked jurisdiction to make a determination with respect to defendant's competency, since N.C.G.S. § 35A-1101 et seq. set forth the sole procedure for determining incompetency of infants and adults. N.C.G.S. § 35A-1102.

Am Jur 2d, Incompetent Persons § 9.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from order entered 7 February 1989 by *Judge Marilyn R. Bissell* in MECKLENBURG County District Court. Heard in the Court of Appeals 15 November 1989.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr. and Fred A. Hicks, for plaintiff-appellant.

Myers, Hulse & Harris, by R. Lee Myers, for defendant-appellee.

GREENE, Judge.

In February 1987 the plaintiff husband, Julian Clark Culton, instituted actions for divorce and for equitable distribution. In August

1988, counsel for defendant wife, Jane Anderson Culton, moved for appointment, under North Carolina Rule of Civil Procedure 17, of a guardian ad litem for the defendant. The trial court conducted a hearing to determine the wife's competency, found her to be incompetent and appointed a guardian ad litem for her. The plaintiff appeals.

The issue presented is whether the court had jurisdiction to determine the wife's incompetency.

The plaintiff argues that the trial court lacked jurisdiction to conduct a hearing to determine the defendant's competency under the rubric of the North Carolina Rule of Civil Procedure 17. That rules states in pertinent part:

> (b)(2) Infants, etc., Defend by Guardian Ad Litem.—In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must *defend* by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, *the court* in which said action or special proceeding is pending, *upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem*, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. . . .

N.C.G.S. § 1A-1, Rule 17(b) (1989) (emphases added).

The plaintiff asserts that although Rule 17 may have once allowed the trial court to conduct a competency hearing (*see Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971); *Sheppard v. Community Federal Savings & Loan*, 84 N.C. App. 257, 352 S.E.2d 252, *rev. denied*, 319 N.C. 459, 356 S.E.2d 6 (1987)), that procedure was preempted on 1 October 1987 by the enactment of N.C.G.S. § 35A-1101 *et seq.* which sets forth the sole procedure for determining incompetency of infants and adults. We agree. In fact, N.C.G.S. § 35A-1102 explicitly states: "This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." The predecessor to Chapter 35A, N.C.G.S. § 32-2, as in effect when both *Rutledge* and *Sheppard*

were decided, did not hold itself out as the exclusive procedure for adjudicating a person incompetent.

"The cardinal principle of statutory construction is that the intent of the Legislature is controlling." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978). "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). We find the language "exclusive procedure" of Section 35A-1102 a clear and unambiguous expression of the Legislature's intent.

In so holding we acknowledge that the Legislature has in fact preempted *Rutledge* and *Sheppard* which had heretofore expanded a trial court's authority under Rule 17, giving it the ability to determine competency in certain circumstances. The defendant argues that such special circumstances were present in this case, and that a role for a Rule 17 incompetency hearing remains in spite of Chapter 35A. Certainly an interpretation consistently and repeatedly given a statute by the courts, arguably as was done here with Rule 17, constitutes a part of the statute, and any change in such interpretation must be carried out by the Legislature. *O'Mary v. Land Clearing Corp.*, 261 N.C. 508, 511, 135 S.E.2d 193, 195 (1964). Here the Legislature has spoken to effect such a change. Furthermore, the doctrine of stare decisis is inapplicable where case law conflicts with a pertinent statutory provision to the contrary. *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954). The language of N.C.G.S. § 35A-1102 requires any adjudication of incompetency to take place within the perimeters of Chapter 35A, even if the person sought to be declared incompetent does not challenge the action. Thus, we conclude the trial court lacked jurisdiction to find the defendant incompetent.

Chapter 35A does not otherwise sap the vitality of Rule 17. Rule 17 still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. *See* N.C.G.S. § 35A-1101(6). We also note the significant impact of Chapter 35A on Rule 25, which discusses the continuation of an action when one party becomes incompetent. That rule states in pertinent part:

> No action abates by reason of the incompetency or insanity of a party. If such incompetency or insanity is adjudicated,

> the court, on motion at any time within one year after such adjudication, or afterwards on a supplemental complaint, may order that said party be represented by a general guardian or trustee or a guardian ad litem, and, allow the action to be continued. If there is no adjudication, any party may suggest such incompetency or insanity to the court and it shall enter such order in respect thereto as justice may require.

N.C.G.S. § 1A-1, Rule 25 (1983). In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of this rule would be referral of the competency issue to the clerk of superior court for action under Chapter 35A.

In this case, we must vacate the trial court's order finding the defendant incompetent since the trial court lacked jurisdiction to make such determination. We remand for action in accordance with this opinion.

Vacated and remanded.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The provisions of Chapter 35A of the General Statutes indicate to me that the Legislature intended for the appointments pursuant to Rule 17 to continue as they had in the past. If it intended Chapter 35A to be the exclusive method of appointing all guardians of any type, kind or description, then the provisions of Rule 17 insofar as they pertain to the appointment of a Guardian *ad litem* in cases like this, where the plaintiff is admittedly not incompetent for all purposes, would be rendered obsolete. Judicial efficiency requires the continued efficacy of Rule 17 in situations such as exist here and I do not believe the Legislature intended otherwise.

AUTOMATED DATA SYSTEMS, PLAINTIFF v. KEN MYERS AND CENTURY DATA SYSTEMS OF CHARLOTTE, INC., DEFENDANTS

No. 8925SC158

(Filed 19 December 1989)

Master and Servant § 11.1 (NCI3d)— covenant not to compete— preliminary injunction—defendant's work not affected—interlocutory appeal dismissed

Defendant's appeal from a preliminary injunction was interlocutory and was dismissed where defendant was enjoined from participating in any employment which competed with plaintiff's business in certain cities and counties, but there was no evidence that defendant worked in any of those areas or that his work for a subsequent employer was affected by the injunction in any way, and defendant therefore was not deprived of a substantial right by the injunction.

Am Jur 2d, Injunctions §§ 115-117.

APPEAL by defendant Myers from judgment entered 20 September 1988 by *Judge Forrest A. Ferrell* in CATAWBA County Superior Court. Heard in the Court of Appeals 14 September 1989.

This is an action for injunctive relief and damages based on defendants' alleged breach of a covenant not to compete.

On 14 October 1986 plaintiff employed defendant Myers as a "Customer Representative in Service, Sales, and Programming." Plaintiff, a corporation with its principal place of business in Hickory, North Carolina, is engaged in the sale, installation, and service of cash registers and other computer equipment. When plaintiff initially employed defendant Myers, they entered into an employment agreement including a covenant not to compete and an agreement not to disclose confidential information. The pertinent restrictions of the covenant not to compete are as follows:

> In the geographic areas below, [Ken Myers will not] own manage, operate, form, contract or participate in the ownership, management or control of, or be employed by or connected in any manner with any business which is or may be directly competitive in any manner to that business engaged in by Automated Data Systems, said business being the sale, installation and

servicing of all types of business equipment, said geographic areas being as follows:

(i) The City of Hickory, North Carolina, or any other city where Automated Data Systems operated offices at the time of this Agreement, or where Ken was employed by Automated Data Systems within a period of two (2) years following the termination of employment with Automated Data Systems;

(ii) The Counties of Catawba, Burke, Caldwell, Lincoln, Iredell, Watauga, and Alexander in the state of North Carolina; or

(iii) An area within a radius of sixty (60) air miles of the present city limits of the City of Hickory, North Carolina, or any other city where ADS operated offices at the time of this Agreement or where Ken Myers was employed by ADS within a period of two (2) years following the termination of employment with Automated Data Systems.

On 27 May 1988 plaintiff terminated defendant's employment. Defendant's job duties had not changed while he was employed by plaintiff. On or about 31 May 1988 defendant Century Data Systems (CDS) employed defendant Myers as a "field technician/board repair technician." CDS is also engaged in the business of sales, installation and service of cash registers. Myers had been employed by CDS for fourteen months before he was hired by plaintiff in October 1986. On 22 June 1988 plaintiff filed its complaint and motion for a temporary restraining order and preliminary injunction against defendants. Plaintiff prayed for injunctive relief against defendants specifically enforcing the terms of the covenants against competition and disclosure of confidential information and for monetary damages for breach of contract.

After a hearing the trial court entered an order granting plaintiff's motion for a preliminary injunction in part. Defendant was enjoined until trial from disclosing any confidential information "used or obtained . . . . or conveyed to him in connection with his relationship to Automated Data Systems"; from soliciting business of a type similar to that solicited by ADS from any customer of ADS; from inducing other employees of ADS to terminate their employment with plaintiff or enter into the employ of any direct competitor of plaintiff; from participating in any manner in the sale, installation and servicing of all types of business equipment

in the city of Hickory (or any other city where defendant was employed by plaintiff) or in the counties of Catawba, Burke, Caldwell, Lincoln, Iredell, Watauga, and Alexander. Defendant Myers appeals.

Sigmon, Sigmon and Isenhower, by C. Randall Isenhower, for plaintiff-appellee.

Hall and Brooks, by W. Andrew Jennings and John E. Hall, for defendant-appellant.

EAGLES, Judge.

> A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.

A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citations omitted). Our first inquiry is whether the preliminary injunction deprives defendant Myers of a substantial right which he would lose unless we review this issue prior to a final determination on the merits. On this record we conclude that defendant would not be deprived of a substantial right if there is no review of these issues prior to a final determination on the merits.

The trial court's injunction barred defendant from participating in any employment that competed with plaintiff's business in the following geographic locations: the city of Hickory or any other city where defendant worked for plaintiff; and the counties of Catawba, Burke, Caldwell, Lincoln, Iredell, Watauga and Alexander. We find no evidence in this record to show that defendant Myers was working for CDS in any of those areas. Myers' testimony was that he worked on cash registers either in the shop (in Charlotte) or that he traveled to Wadesboro (in Anson County), Asheville (in Buncombe County) and Lancaster, South Carolina. Defendant Myers' work is not affected by the injunction because none of those counties are included in the preliminary injunction. Although there was evidence that defendant Myers had been hired by CDS to service accounts in Iredell County, that the Charlotte office also serviced accounts in Lincoln and Catawba Counties, and that

CDS contemplated sending Myers to training school so he could service an account in Caldwell County, there is no evidence that these activities were occurring.

The injunction entered against defendant Myers does not deprive him of a substantial right; it does not enjoin him from engaging in any activity for defendant CDS that he was engaged in before the injunction was entered. Further, the injunction's restrictions are not so broad as to foreclose Myers from all possible employment in his field of expertise. Cf. *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986) (preliminary injunction against working as laborer in field of asbestos removal in five-state area is a deprivation of a substantial right); *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984) (where enforcement of covenant not to compete effectively closed defendants out of the insurance business where they had begun a business of their own, preliminary injunction deprived defendants of a substantial right); *Forrest Paschal Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975) (preliminary injunction against competing with plaintiff within a radius of 350 miles of plaintiff's business affected a substantial right of defendants).

For the reasons stated, defendant's appeal is dismissed as interlocutory.

Dismissed.

Judges JOHNSON and GREENE concur.

MARY BONNEAU (BONNIE) McELVEEN-HUNTER v. FOUNTAIN MANOR ASSOCIATION, INC.

No. 8818SC1087

(Filed 19 December 1989)

Deeds § 19.3 (NCI3d)— restrictions in condominium—declaration amended—amendment applicable to all owners

A duly adopted declaration amendment which restricts the occupancy or leasing of units in a condominium complex

is binding upon owners who bought their units before the amendment was adopted as well as upon owners who bought subsequent to the amendment.

Am Jur 2d, Condominiums and Co-Operative Apartments §§ 17, 39.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered 16 June 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 May 1989.

Osteen & Adams, by William L. Osteen, Sr., for plaintiff appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Charles E. Nichols and Everett B. Saslow, Jr., for defendant appellant.

PHILLIPS, Judge.

This appeal concerns the enforceability of a condominium declaration amendment which restricts the leasing of units in the Greensboro residential condominium complex known as Fountain Manor. The pertinent facts follow: Plaintiff owns four units in that complex. Defendant, a non-profit corporation, operates and manages the complex, which was established under Chapter 47A of the North Carolina General Statutes, the "Unit Ownership Act." When plaintiff's units were acquired—the first in 1978, the last in April, 1985—the condominium declaration did not restrict the leasing of units, but did forbid their use by transients or for commercial purposes. For a year or so before June, 1986 plaintiff rented all her units to tenants for short periods of less than a year, sometimes for less than a month, and some rentals were to corporations; during that time one unit had twelve different sets of tenants, another one had seven, and another had six. The great majority of the Fountain Manor units are occupied by owners, most of whom are elderly and live with their spouses or alone, and some owners complained about plaintiff's short term lessees being too noisy, not maintaining the common spaces properly, and allowing pets to run loose. Through their efforts the condominium declaration was amended effective 24 June 1986 to forbid *inter alia* the leasing of units to corporations, to persons for less than a year, and subleasing. Plaintiff sued to have the amendments declared invalid and their enforcement enjoined; and defendant counterclaimed for plaintiff's failure to abide by them. Following the filing of cross-

motions for summary judgment, along with supporting affidavits, depositions and other materials, the parties agreed that the material facts are not in dispute and that the only question presented, the validity of the amendments, is one of law. In resolving that question the trial judge ruled that the amended declaration is valid as to purchasers of units after their adoption, but is invalid as to plaintiff and other owners who bought their units before the amendment was adopted.

The judgment is erroneous and we reverse it. The rights and duties of condominium unit owners under Chapter 47A of the North Carolina General Statutes are not the same as those of real property owners at common law. Recognizing the interest that all unit owners have in the operation of their mutually owned enterprise, the Chapter permits restrictions to be imposed by the declaration or recorded instrument which submits the property to the provisions of the Chapter and permits the unit owners to amend the declaration by following the procedures prescribed and makes the rules so adopted binding upon all owners involved. G.S. 47A-3(6) provides:

> 'Declaration' means the instrument, duly recorded, by which the property is submitted to the provisions of this Article, as hereinafter provided, and such declaration as from time to time may be lawfully amended.

G.S. 47A-28 provides that:

> (a) All unit owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use the property or any part thereof submitted to the provisions of this Article, shall be subject to this Article and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of this Article.
>
> (b) All agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established in the Article, declaration or bylaws, shall be deemed to be binding on all unit owners.

And G.S. 47A-10 provides that:

> Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended

> from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner.

The amending procedure set forth in Article XXVII of the Fountain Manor Declaration of Condominium requires *inter alia* an affirmative vote by 75 percent of unit owners for the amendment involved, and it is conceded that the procedure was followed, and that over 91 percent of the unit owners—160 out of 174—approved it.

Though our Courts have not heretofore considered whether a duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted, other courts have and most of them have held that such amendments are binding upon earlier buyers. *See Hill v. Fontaine Condominium Association, Inc.*, 255 Ga. 24, 334 S.E.2d 690 (1985); *Ritchey v. Villa Nueva Condominium Association*, 81 Cal.App.3d 688, 146 Cal. Rptr. 695 (1978); *Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484 (Fla. App. 1976); *Kroop v. Caravelle Condominium, Inc.*, 323 So.2d 307 (Fla. App. 1975). This is the sounder view in our opinion, and we adopt it. For the occupancy of a large number of individually owned residential units in a building or complex can raise problems that must be resolved in some orderly and binding way if the enjoyment and tranquility of the occupants is to be secured and promoted, and the foregoing statutes were enacted to serve that purpose. For they authorize the amending of condominium declarations when the designated percentage of owners sees fit, and make such amendments binding upon all unit owners without regard to when the units were acquired. Plaintiff having acquired her units subject to the right of the other owners to restrict their occupancy and that right having been exercised, she is bound thereby. The amendment does not infringe upon any legal right of the plaintiff's; for she had notice before the units were bought that the declaration was changeable and the changes made, no more stringent than the conditions required of many apartment renters, are reasonably related to the common good of all unit owners.

Thus, the summary judgment for the plaintiff is vacated and the case is remanded to the Superior Court for entry of summary judgment for defendant.

Vacated and remanded.

Judges BECTON and LEWIS concur.

JAMES CLEVENGER v. PRIDE TRIMBLE CORPORATION AND W2, INCORPORATED

No. 8920SC598

(Filed 19 December 1989)

Appeal and Error § 6.2 (NCI3d)— summary judgment for fewer than all parties—premature appeal

Plaintiff's appeal was premature where summary judgment was allowed for fewer than all the defendants, and the order allowing summary judgment did not affect a substantial right.

Am Jur 2d, Appeal and Error § 104.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from order entered 6 February 1989 by *Judge William H. Freeman* in MOORE County Superior Court. Heard in the Court of Appeals 9 October 1989.

Plaintiff filed this civil action seeking damages for the alleged conversion of plaintiff's chattels by defendants and for the unauthorized use of plaintiff's telephone by defendants. On 21 December 1988, defendant, Pride Trimble Corporation [hereinafter Pride Trimble], moved for summary judgment. On 6 February 1989, the trial judge entered an order granting Pride Trimble's motion for summary judgment and dismissing plaintiff's action against it. Plaintiff appealed.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by P. Wayne Robbins, for plaintiff appellant.

Poyner & Spruill, by Thomas H. Davis, Jr., for defendant appellee Pride Trimble.

ARNOLD, Judge.

Although the issue was not raised by either party, we must initially determine whether plaintiff's appeal is premature. Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is "no just reason for delay," a plaintiff's appeal will be premature unless the order allowing summary judgment affects a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). "The 'substantial right' test for appealability is more easily stated than applied." *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980). The substantial right question in each case is usually resolved by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Having considered the particular facts and circumstances in this case we hold that the order allowing summary judgment for fewer than all the defendants in the present case does not affect a substantial right. Accordingly, plaintiff's appeal will be dismissed.

Dismissed.

Chief Judge HEDRICK concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In holding that the order appealed from does not affect a substantial right, the majority failed to note that of the "particular facts" of the case the most significant is that the defendants are sued for the same wrongs, one as agent and the other as principal. Which means, of course, that the dismissal of plaintiff's action as to one defendant raises the possibility of two juries in two different trials reaching inconsistent verdicts on the same evidence, and this is a travesty no litigant in this state is required to suffer.

Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976), and many other cases. Furthermore, even if the appeal was technically premature, I would determine it on its merits rather than leave it to return later to the additional delay and inconvenience of the parties and this Court alike.

ROBERT CURTIS STONE, SR., PLAINTIFF v. MARY W. STONE, DEFENDANT

No. 8916DC544

(Filed 19 December 1989)

Divorce and Alimony § 30 (NCI3d); Courts § 14.5 (NCI3d)— equitable distribution claim—issue reserved by one district court judge—dismissal by another district court judge improper

The trial court had no authority to enter an order dismissing defendant's claim for equitable distribution where another district court judge had previously entered an order of absolute divorce and specifically reserved the issue of equitable distribution for hearing by the court at a later date.

Am Jur 2d, Divorce and Separation §§ 232, 233, 418, 430.

APPEAL by defendant from *Richardson, Judge*. Order entered 19 January 1989 in District Court, ROBESON County. Heard in the Court of Appeals 11 December 1989.

The following uncontroverted facts are established by the record: On 20 April 1986, plaintiff instituted an action for absolute divorce. On 8 June 1988, a judgment for absolute divorce was entered in the District Court, Robeson County. In addition to containing the decree for absolute divorce, the judgment contains the following:

> THIS CAUSE coming on to be heard and being heard before the undersigned District Court Judge of the Sixteenth Judicial District . . . and it appearing to the Court that this is an action for an absolute divorce based on the grounds of one year's separation . . . and equitable distribution . . . that defendant has filed answer admitting the allegations contained in plaintiff's complaint . . . and has requested the Court to

make an equitable distribution of the parties' marital properties. . . .

It is NOW, THEREFORE, ORDERED, ADJUDGED and DECREED as follows:

b. The issue of Equitable Distribution is hereby reserved for hearing by the Court at a later date.

Thereafter, on 22 June 1988, plaintiff filed a motion to dismiss defendant's claim for equitable distribution pursuant to G.S. 50-11(e). On 19 January 1989, the matter came on for hearing on plaintiff's motion to dismiss, and the trial judge made detailed findings of fact and conclusions of law and entered an order dismissing defendant's claim for equitable distribution. Defendant appealed.

Tucker, Hicks, Hodge and Cranford, P.A., by Edward P. Hausle, for plaintiff, appellee.

Britt & Britt, by Evander M. Britt, III, and Bailey & Dixon, by Gary S. Parsons and Cathleen M. Plaut, for defendant, appellant.

HEDRICK, Chief Judge.

In violation of Rule 7(b)(1), plaintiff failed to set out in the motion to dismiss the number of the rule pursuant to which the motion was made. We assume, however, the motion was made pursuant to Rule 12(b) or Rule 56. The detailed findings of fact made by Judge Richardson's ruling on the motion were unnecessary whether the motion was made pursuant to Rule 12(b) or Rule 56. In any event, plaintiff's motion to dismiss amounts to nothing more than a collateral attack on the judgment entered by Judge Gardner on 8 June 1988 wherein the parties were divorced absolutely, and defendant's claim for equitable distribution was left open for trial at a later date. This is made clear when we consider Finding of Fact No. 13 made by Judge Richardson:

That the reservation of the equitable distribution action in the divorce judgment was improper since defendant failed to file a counterclaim or separate action for equitable distribution on or before the date the judgment for divorce absolute was granted by this Court.

The rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal. No appeal was

taken from the judgment entered 8 June 1988. Obviously, Judge Gardner had jurisdiction and authority to enter the judgment. It is also obvious that Judge Richardson had no authority as a trial judge to find error and reverse or vacate Judge Gardner's order dated 8 June 1988.

We hardly need say that the better practice would be for members of the Bar to actually file and assert claims for equitable distribution, and for the courts to require that pleadings asserting such claims be filed before the judgment of divorce is granted.

We hold that Judge Richardson had no authority to enter an order dismissing defendant's claim for equitable distribution, and the same will be vacated, and the cause is remanded to the District Court, Robeson County for further proceedings with respect to defendant's claim for equitable distribution.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

DUKE UNIVERSITY v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 8914SC33

(Filed 4 January 1990)

Insurance §§ 150, 6.2 (NCI3d)— hospital liability insurance—exclusion for professional services—professional services defined

Summary judgment was properly granted for plaintiff in an action to recover damages for defendant's refusal to provide liability coverage and legal defense under a general liability insurance policy which contained an exclusion for the rendering of professional services. Decedent died from injuries resulting from a fall as she tried to rise from a dialysis chair. Plaintiff's uncontradicted affidavits establish that, if plaintiff's employees were negligent, their negligence consisted of failing to lock the casters on the dialysis chair, failing to stabilize the chair by other means, or failing to adequately support the decedent as she rose. "Professional services," when it appears in a provision excluding coverage, must be interpreted

to mean only those services for which professional training is a prerequisite to performance. Although the dialysis chair here was a specialized piece of equipment, the injury was not related to any special function of the chair and may have been avoided by simply locking the casters on the chair or by holding the chair. Those tasks are purely manual and no special training is required to know that a chair with casters may move when someone attempts to rise from it.

Am Jur 2d, Insurance § 726.

APPEAL by defendant from judgment entered 17 November 1988 by *Judge Henry W. Hight, Jr.* in DURHAM County Superior Court. Heard in the Court of Appeals 29 August 1989.

Plaintiff brought this action to recover damages for defendant's refusal to provide liability coverage and legal defense under a general liability insurance policy.

The underlying action was a wrongful death action filed against plaintiff in which it was alleged that a patient at plaintiff's dialysis center died as a result of injuries sustained in a fall caused by the negligence of plaintiff's employees. Defendant denied coverage and refused to defend the action on the grounds that the policy excluded coverage for liability arising out of the rendering of professional services by plaintiff's hospital operations. Plaintiff paid $75,000.00 as damages in settlement of the wrongful death action. Thereafter, plaintiff filed this action to recover from defendant the amount of the settlement plus $3,521.12 for plaintiff's expenditures in defending and settling the lawsuit. The trial court granted plaintiff's motion for summary judgment. From a judgment for plaintiff in the amount of $78,521.12, defendant appeals.

Maxwell, Martin, Freeman & Beason, P.A., by John C. Martin, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Theodore B. Smyth and Kari Russwurm, for defendant-appellant.

PARKER, Judge.

The question presented by this appeal is whether the trial court erred in entering summary judgment for plaintiff because plaintiff's insurance policy excluded coverage for liability resulting from the wrongful death action. Summary judgment is appropriate

when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986). It is undisputed in this case that plaintiff's policy required defendant to provide a defense in lawsuits based upon covered claims. By refusing to defend the wrongful death action, defendant obligated itself to pay the amount and costs of a reasonable settlement if its refusal was unjustified. *Nixon v. Insurance Co.*, 255 N.C. 106, 112-13, 120 S.E.2d 430, 434 (1961); *Ames v. Continental Casualty Co.*, 79 N.C. App. 530, 538, 340 S.E.2d 479, 485, *disc. rev. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986). In the proceedings below, defendant admitted that plaintiff settled the action for $75,000.00 and paid $3,521.12 for legal fees and expenses in defending the action. Defendant has not challenged the reasonableness of the settlement in this action; therefore, we need not consider the issue. *See Wilson v. State Farm Mut. Auto. Ins. Co.*, 92 N.C. App. 320, 326, 374 S.E.2d 446, 450 (1988).

The sole remaining issue is whether the policy required defendant to defend the wrongful death action. Since this issue is determined by interpreting the language of the policy, it is a question of law which may be resolved by summary judgment. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. at 691, 340 S.E.2d at 377. The insurer's duty to defend is determined by the pleadings in the underlying lawsuit. *Id.* The duty to defend exists if the events alleged in the pleadings are covered under the terms of the policy, and any doubt as to coverage must be resolved in favor of the insured. *Id.* at 693, 340 S.E.2d at 378. If the claim is within the coverage of the policy, the insurer's refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 376, 343 S.E.2d 15, 19 (1986).

Plaintiff's basic policy excludes coverage for liability resulting from performing or failing to perform professional services. The general exclusion is modified by the following endorsement:

> Under this section, you're protected against claims for injuries that result from the providing or withholding of professional services by any of your non-hospital operations. The company shall in no way be liable for any claims arising out of the providing or failure to provide professional services by your hospital operations.

The parties do not dispute that the dialysis center is a "hospital operation" for purposes of the policy. The issue in this case is whether the wrongful death action is a claim "arising out of the providing or failure to provide professional services."

The complaint in the wrongful death action alleged that the decedent was injured when two attendants who were lifting her from a dialysis table to a wheelchair dropped her to the floor. Affidavits filed by plaintiff in the present case establish that decedent did not undergo dialysis on a table but received the treatment in a specially designed dialysis chair. The affidavits further establish that decedent fell when she attempted to get out of the chair and the fall occurred because the chair was equipped with casters which caused the chair to slide out from under her as she rose. The affidavits tend to show that the negligence of plaintiff's employees, if any, consisted of their failure to lock the casters or take other steps to stabilize the chair while they were assisting the decedent.

Although the insurer's duty to defend an action is generally determined by the pleadings, facts learned from the insured and facts discoverable by reasonable investigation may also be considered. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. at 692, 340 S.E.2d at 377-78. Therefore, the affidavits filed by plaintiff in this case are relevant to the determination of defendant's duty to defend. Plaintiff was not required to establish ultimate liability, however, but only to show that the facts of the claim were within the coverage of the policy. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. at 691, 340 S.E.2d at 377; *W & J Rives, Inc. v. Kemper Insurance Group*, 92 N.C. App. 313, 317-18, 374 S.E.2d 430, 433 (1988), *disc. rev. denied*, 324 N.C. 342, 378 S.E.2d 809 (1989).

Our courts have not previously construed a professional services exclusion in an insurance policy. Provisions which exclude liability coverage are not favored, however, and any ambiguities must be construed against the insurer and in favor of the insured. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73 (1986). The policy in this case excludes liability "arising out of" the providing or failure to provide professional services. Dialysis treatment is clearly a professional service. In *State Capital*, however, our Supreme Court held that "arising out of" language in an insurance policy exclusion must be strictly con-

strued to require that the excluded cause be the sole proximate cause of the injury. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. at 547, 350 S.E.2d at 74. In this case, the decedent's injury did not result from the dialysis treatment itself but from her attempt to get out of the dialysis chair. Therefore, coverage is excluded only if any negligence with respect to assisting decedent out of the chair was a providing or failure to provide professional services. In order to resolve this issue, we must construe the term "professional services."

Those jurisdictions that have considered whether a particular act falls within a professional services exclusion have relied on the particular facts of each case and no uniform rules of interpretation have emerged. *See generally* 12 R. Anderson, Couch on Insurance 2d § 44A:123 (rev. ed. 1981 & Supp. 1988). Nevertheless, two general principles guide our determination in this case. First, a "professional service" is generally defined as one arising out of a vocation or occupation involving specialized knowledge or skills, and the skills are mental as opposed to manual. *See Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415, *aff'd*, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed. 2d 636 (1974) (quoting *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 14, 157 N.W.2d 870, 872 (1968)); Black's Law Dictionary 1089 (5th ed. 1979). Second, the determination of whether a particular act or omission falls within the scope of a professional services exclusion depends upon the nature of the activity rather than the position of the person responsible for the act or omission. *See Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149, 152 (W.D. Okla. 1971).

Cases from other jurisdictions reveal that the courts have reached conflicting results under facts somewhat similar to the facts in this case. Several courts have held that the claims were excluded from coverage. *See Antles v. Aetna Casualty and Surety Co.*, 221 Cal. App. 2d 438, 34 Cal. Rptr. 508 (1963) (injury resulted when heat lamp being used in chiropractor's treatment fell on the patient); *Brockbank v. Travelers Ins. Co.*, 12 A.D.2d 691, 207 N.Y.S.2d 723 (1960) (injury which resulted when the patient fell from her bed was allegedly caused by negligence in adjusting sideboards); *Harris v. Fireman's Fund Indem. Co.*, 42 Wash. 2d 655, 257 P.2d 221 (1953) (injury caused by collapse of defective treatment table). Other courts have held that the claims were not excluded because the particular acts or omissions involved did not require special

skills. *See Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co., supra* (ambulance service held not to be a professional service); *Keepes v. Doctors Convalescent Center, Inc.*, 89 Ill. App. 2d 36, 231 N.E.2d 274 (1967) (child who was receiving care in a home for retarded children suffered burns from a radiator); *D'Antoni v. Sara Mayo Hosp.*, 144 So. 2d 643 (La. Ct. App. 1962) (fall from bed caused by lack of siderails); *American Casualty Co. v. Hartford Ins. Co.*, 479 So. 2d 577 (La. Ct. App. 1985) (patient fell from an examination table). *See also Demandre v. Liberty Mutual Insurance Company*, 264 F.2d 70 (5th Cir. 1959) (whether coverage was excluded for a claim based upon the failure to provide sideboards on a bed was a question of fact).

We find it significant that those courts which have held that coverage was excluded did not employ the strict rule of construction against the insurer that we must follow in this case. In this regard, we note that defendant has cited *American Policyholders Ins. Co. v. Michota*, 156 Ohio St. 578, 103 N.E.2d 817 (1952). In *Michota*, the court held that a professional liability policy provided coverage for a claim arising out of a patient's fall from a specially designed chiropodist's chair. Unlike the present case, however, *Michota* involved a policy which provided coverage for claims based upon professional services, not a policy which excluded such coverage. As our Supreme Court made clear in *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, policy provisions which provide coverage are liberally construed to favor coverage, while exclusions are strictly construed to the same end. 318 N.C. at 538, 350 S.E.2d at 68. Thus, although we are not deciding the question of coverage under a professional liability policy, the claim in this case could come within such coverage and yet not fall within a professional services exclusion. The fact that coverage may exist under another policy does not affect our interpretation of the exclusion at issue in this case. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. at 547-48, 350 S.E.2d at 74.

For similar reasons, we do not find our decision here to be affected by whether or not the claim falls within the statutory definition of medical malpractice actions. *See* G.S. 90-21.11, 21.12. The statutory definition of medical malpractice is a broad one. *See Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 9-10, 330 S.E.2d 242, 249 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). This Court has held that negligence actions against health care providers may be based upon breaches

of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills. *Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 565-66, 344 S.E.2d 839, 846 (1986); *Norris v. Hospital*, 21 N.C. App. 623, 626, 205 S.E.2d 345, 348 (1974). Therefore, a claim for medical malpractice as defined by statute does not as a matter of law fall within a professional services exclusion in an insurance policy which is strictly construed in favor of coverage. We express no opinion, however, as to whether the claim in this case is a medical malpractice action under the statutes.

Under the rule of construction which requires us to construe all ambiguities in favor of coverage, we hold that the term "professional services," when it appears in a provision excluding coverage, must be interpreted to mean only those services for which professional training is a prerequisite to performance. The claim at issue in this case does not arise solely from the furnishing or failure to furnish such services. Plaintiff's uncontradicted affidavits establish that, if plaintiff's employees were negligent, their negligence consisted of (i) failing to lock the casters on the dialysis chair, (ii) failing to stabilize the chair by other means, or (iii) failing to adequately support the decedent as she rose. The performance of these acts would not require any special skills or training. Although the dialysis chair was a specialized piece of equipment, the injury was not related to any special function of the chair but merely resulted from the presence of casters on the chair which enable it to be easily moved. The injury may have been avoided by simply locking the casters or holding the chair. These tasks are purely manual and no special training is required for a person to know that a chair with casters may move when someone attempts to rise from it.

Accordingly, we hold that plaintiff's policy provided coverage for the wrongful death claim and, therefore, defendant's refusal to defend the action rendered it liable for the amount of the settlement and the expenses incurred by plaintiff in obtaining the settlement. For the foregoing reasons, the trial court's entry of summary judgment for plaintiff is affirmed.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. WENDELL WADE STRICKLAND, DEFENDANT

No. 8910SC411

(Filed 4 January 1990)

1. **Criminal Law § 162 (NCI3d)— necessity for objection to testimony**

Defendant was precluded from asserting error in the testimony of two State's witnesses which impeached a defense witness where defendant objected only to the presence of the two witnesses in the courtroom during testimony by the defense witness but failed to object to the testimony of the State's witnesses.

Am Jur 2d, Trial §§ 61, 62.

2. **Criminal Law § 51.1 (NCI3d)— clinical psychologist—expert in behavior of sexual assault victims**

The trial court did not err in qualifying a witness as an expert in clinical psychology and in the specific area of behavior and treatment of sexual assault victims where the witness is an associate professor of psychology at Duke University and has been licensed as a psychologist in North Carolina for fourteen years, has published fifteen research papers, has had eleven research grants, has presented papers at professional organizations, has directed seventeen doctoral dissertations, and has supervised twenty-three major papers and honors theses on the topics of sexual trauma, sexual aggression, stress and coping, and helplessness.

Am Jur 2d, Expert and Opinion Evidence § 197; Rape §§ 68, 68.5.

3. **Rape and Allied Offenses § 4 (NCI3d)— rape victim—Post Traumatic Stress Disorder—admissibility of opinion testimony**

A clinical psychologist was properly permitted to testify that an alleged rape and sexual offense victim was suffering from Post Traumatic Stress Disorder and that her behavior was consistent with that of other sexual assault victims.

Am Jur 2d, Expert and Opinion Evidence § 197; Rape §§ 68, 68.5.

4. Criminal Law § 50.1 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— clinical psychologist—opinion on reliability of victim's responses—long term effect of PTSD—admissibility of testimony

A clinical psychologist's testimony that an alleged rape victim did not fake her responses to tests administered to her and did not exaggerate the symptoms of PTSD and the witness's extensive testimony on the long term effect of PTSD was admissible and relevant as expert testimony on the credibility of psychological tests and as the basis for her diagnosis of the victim.

Am Jur 2d, Expert and Opinion Evidence § 197; Rape §§ 68, 68.5.

5. Criminal Law § 146.2 (NCI3d)— subject matter jurisdiction over crimes—failure to object

Defendant's failure to make a motion to dismiss for lack of jurisdiction or improper venue waived his right to appeal the constitutionality of the statute giving a Wake County trial court subject matter jurisdiction over the charges against defendant.

Am Jur 2d, Criminal Law §§ 339, 361, 364.

APPEAL by defendant from a judgment entered 25 May 1988 by *Judge Anthony M. Brannon* in WAKE County Superior Court. Heard in the Court of Appeals 15 November 1989.

The State's evidence tended to show that after shopping the victim left Crabtree Valley Mall in Raleigh and went to her car. As she was opening the door, the defendant intervened, putting her in the passenger seat and taking the driver's seat himself. The victim stated that the defendant drove the car out of Raleigh, stopped on a deserted road, slapped her in the face with his hand, engaged in cunnilingus upon her and then raped her. He then drove the car to Garner where he used her credit card to take $200 from a bank machine. She testified that defendant took her to his house where she spent the night in his bedroom. Defendant's roommate testified that he saw the defendant and the victim at the house on the night in question and thought he heard the sounds of lovemaking coming from defendant's room. The next day, defendant took the victim to a place near Raleigh and let her out. Defend-

ant's roommate stated that he followed the defendant and victim on that morning, and that, when defendant got out of victim's car, victim kissed him good-bye. Victim denied kissing defendant good-bye. The victim testified that she then contacted her employer, her boyfriend and the police.

At trial, three witnesses were called to impeach the testimony of defendant's roommate. A psychologist testified at trial about Post Traumatic Stress Disorder and stated that the prosecuting witness's symptoms were consistent with sexual abuse and inconsistent with consensual sexual activity. The jury found defendant guilty of common law robbery, second degree rape, second degree sexual offense, assault on a female, and first degree kidnapping. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart, for the State.

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

LEWIS, Judge.

Defendant brings forward on appeal three assignments of error.

I: Testimony of impeaching witnesses

First, defendant argues that the trial court erred in admitting the testimony of three rebuttal witnesses. The State called Rickie Creech, defendant's roommate, who testified that he thought he heard "sex sounds" coming from defendant's room on the night of the alleged rape. On cross-examination, he was questioned about a statement he had made to police officers shortly after the incident. Creech had indicated to the police that he heard the victim state to the defendant, "let's make love." The State called three "impeaching" witnesses who testified about an attempt by the defendant to influence the witness Creech to exaggerate and lie to the police. These witnesses stated that Creech had backed off of some of his earlier "exaggerated" statements and that he was initially deceptive in answering questions. They also stated that Creech told them that the defendant had asked him to lie about the incident. These witnesses were called during the State's case-in-chief for the purpose of impeaching Creech's testimony through extrinsic evidence on a collateral matter.

[1] During Creech's testimony, defendant's counsel objected to the presence of two witnesses, Longmire and Parker, in the courtroom after the judge had ordered witnesses sequestered. The trial judge allowed the witnesses to be present during Creech's testimony saying those witnesses must "actually hear the precise words that [they] are called upon to contradict when they are called to the witness stand." When the challenged witnesses testified, however, defendant's counsel did not object to their testimony. These witnesses impeached Creech's testimony by showing evidence of bias and the extent to which he might have been influenced by the defendant. Defendant states in his reply brief: "No objection beyond that which was made by counsel was needed in order to bring the matter to the court's attention for a ruling." In fact, defense counsel's failure to make a timely objection at the time the State presented the challenged witnesses on direct examination precludes his right to assert this alleged error on appeal. North Carolina General Statute section 15A-1446(a) states: "[E]rror may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." The statute requires that the objection to "the alleged error" must have been "*clearly* presented . . . to the trial court" (emphasis added). In this case, defendant's counsel objected only to the presence of two of the challenged witnesses during the testimony of Creech and not specifically to the content of the challenged witnesses' proposed testimony. Defense counsel stated: "If ['Det. Mike Longmeyer' [sic] and 'Mr. Parker'] are going to be called as witnesses, I want to object and want the record to reflect that they are not in the Courtroom and were so during the testimony of [Creech]." There was no objection at trial to the testimony of Karen Lewis whose testimony the defense counsel is challenging on appeal. Therefore, defense counsel has waived his right to object to her testimony.

II: Testimony by psychologist

[2] The defendant's second assignment of error states that the trial court erred in admitting the testimony of Dr. Susan Roth. Dr. Roth, a clinical psychologist, tested, diagnosed, and treated the victim. She testified at trial that the victim was suffering from Post Traumatic Stress Disorder (PTSD) and that the victim's behavior was consistent with the behaviors of other victims of sexual assault. Defendant states in her brief that Dr. Roth "was not qualified to offer testimony on Post-Traumatic Stress Disor-

der, or to diagnose the [victim]." In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the standard for qualifying an expert witness was stated. Citing *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214, *death sentence vacated*, 428 U.S. 903 (1976), the *Young* court stated: "Where a judge finds a witness qualified as an expert, that finding will not be reversed unless there was no competent evidence to support the finding or unless the judge abused his discretion." *Id.* at 679, 325 S.E.2d at 188. Dr. Roth is an associate professor of psychology at Duke University and has been licensed as a psychologist in North Carolina for fourteen years. She has published fifteen research papers, has had eleven research grants, has presented papers at professional organizations, directed seventeen doctoral dissertations, and supervised twenty-three major papers and honors theses on the topics of sexual trauma, sexual aggression, stress and coping, and helplessness. The trial court properly exercised its discretion in qualifying Dr. Roth as an expert in clinical psychology and as an expert in the specific area of behavior and treatment of victims of sexual assault.

[3] The defendant also contends that "[t]estimony on Post-Traumatic Stress Syndrome should not have been admitted." When the victim went to see Dr. Susan Roth after the alleged rape, Dr. Roth conducted tests, interviewed the victim and then diagnosed her as suffering from Post Traumatic Stress Disorder. At trial, Dr. Roth stated her conclusion:

> Q. Based on your testing that you gave her and based on her narrative to you of what happened to her that night, did you diagnose her as suffering from any recognized trauma?
>
> A. Yes.
>
> Q. What was that diagnosis?
>
> A. Post-traumatic stress disorder.

The American Psychiatric Association recognizes the diagnosis for PTSD in its *Diagnostic and Statistical Manual of Mental Disorders* 236 (3rd ed. 1980). Some jurisdictions have held that expert testimony on post traumatic stress disorder in rape cases is not admissible. *See State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *People v. Bledsoe*, 203 Cal. Rptr. 450, 36 Cal.3d 236, 681 P.2d 291 (1984). Most jurisdictions allow such testimony on PTSD, or on rape trauma syndrome, or expert testimony regarding reactions or behavior consistent with other victims of sexual assault.

See State v. Huey, 145 Ariz. 59, 699 P.2d 1290 (1985); *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986); *Powell v. State*, 527 A.2d 276 (Del. 1987); *Kruse v. State*, 483 So.2d 1383 (Fla. 1986), *rev. dismissed*, 507 So.2d 588 (1987); *Allison v. State*, 256 Ga. 851, 353 S.E.2d 805 (1987); *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); *Simmons v. State*, 504 N.E.2d 575 (Ind. 1987); *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984); *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986); *State v. Liddell*, 211 Mont. 180, 685 P.2d 918 (1984); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984); *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *Commonwealth v. Gallagher*, 353 Pa.Super. 426, 510 A.2d 735 (1986); *Brown v. State*, 692 S.W.2d 146 (Tex. 1985); *U.S. v. Winters*, 729 F.2d 602 (9th Cir. 1984). Legal authors have also been divided in their approach to the admissibility of testimony on rape trauma syndrome. For some advocating admission of such testimony, see Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985). For writers who have criticized the admissibility of this testimony, see Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 Va. L. Rev. 1657 (1984).

As recently as 1986, North Carolina's appellate courts had not directly addressed the question of the admissibility of testimony on PTSD. In *State v. Stafford*, the majority in this North Carolina Supreme Court decision addressed only the question of whether or not this testimony on rape trauma syndrome was presented "for purposes of medical diagnosis or treatment" or was it presented "in preparation for going to court." 317 N.C. 568, 346 S.E.2d 463 (1986). The majority stated: "We do not deem it necessary to reach on this record the question whether in a proper case testimony about rape trauma syndrome will be admissible in the courts of this state." *Id.* at 575, 346 S.E.2d at 468. Justices Martin and Mitchell dissented in that opinion, indicating that statements made by the victim's physician "are within the scope of admissible hearsay permitted by N.C.R.Evid. 803(4)" which permits statements made "for purposes of medical diagnosis or treatment." *Id.* at 578, 346 S.E.2d at 469. The two dissenting justices did not question whether statements on rape trauma syndrome should be admissible in North Carolina courts but, by arguing for the admissibility of

the statements made in this case, indicated that they would allow such testimony if it met the appropriate evidence requirements. In that same case when it was heard in the Court of Appeals, Judge Martin did address this question directly in his dissenting opinion and stated:

> I would hold such expert testimony admissible. There is recognized scientific authority for the medical conclusion that there exists a complex and unique number of physical and emotional symptoms exhibited by victims of rape, which are similar, but not identical, to other post-traumatic stress disorder symptoms. Massaro, *supra* (reviewing scientific studies). An understanding of those symptoms, the unique reactions of victims of rape, is not within the common knowledge or experience of most persons called upon to serve as jurors. Therefore, expert testimony as to the symptoms of the syndrome and its existence, is admissible to assist jurors in understanding the evidence and in drawing appropriate conclusions therefrom. G.S. 8C-1, Rule 702; *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) ("battered child syndrome," expert testimony admissible).

77 N.C. App. 13, 24, 334 S.E.2d 799, 803 (1985), *aff'd*, 317 N.C. 568, 346 S.E.2d 463 (1986).

In 1987, the North Carolina Supreme Court in *State v. Clemmons*, 319 N.C. 192, 353 S.E.2d 209 (1987), addressed the admissibility of evidence of the defendant's prior alleged sexual misconduct. During the trial, "an expert medical doctor specializing in the field of psychiatry" testified that he had diagnosed the victim of this alleged rape as having "post traumatic stress disorder" and he described her behavior which prompted his diagnosis. *Id.* at 196, 353 S.E.2d at 211. In concluding that the challenged testimony on prior sexual misconduct was admissible, the court stated: "Considering . . . particularly the medical evidence of the victim's severe post-traumatic stress disorder for a lengthy period immediately following the incident, we conclude that there is no reasonable possibility that the jury would not have convicted defendant. . . ." *Id.* at 199, 353 S.E.2d at 213. *Clemmons* indicates that evidence on PTSD would be admissible in North Carolina courts.

[4] The defendant also objected to the testimony by the psychologist that the victim "did not fake her responses to the tests administered to her by [the psychologist]," that the victim did not "exaggerate

the symptoms of PTSD," and also to the psychologist's "extensive testimony . . . on the long term effects of PTSD." Such testimony is admissible and relevant as an expert's opinion on the credibility of psychological tests and as the expert's basis for making her diagnosis. *See State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Helms*, 93 N.C. App. 394, 378 S.E.2d 237 (1989); *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988); *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804 (1987).

III: Jurisdiction

[5] Finally, defendant concedes that, "as a matter of statutory law, Wake County trial court had [subject matter] jurisdiction" but that "this statute violates defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution." Defendant never made a motion to dismiss for lack of jurisdiction or improper venue and has therefore waived his right to appeal this assignment of error. N.C.G.S. section 15A-135.

No error.

Judges JOHNSON and COZORT concur.

DONALD W. CARROLL, EMPLOYEE, PLAINTIFF v. DANIELS AND DANIELS CONSTRUCTION COMPANY, INC., EMPLOYER, AND/OR N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8910IC592

(Filed 4 January 1990)

Master and Servant § 81 (NCI3d)— workers' compensation—subcontractor—estoppel of carrier to deny coverage

Although plaintiff was a subcontractor and thus an independent contractor in performing carpentry work on a house the employer was building, the employer's workers' compensation carrier was estopped to deny coverage for plaintiff where the employer's superintendent agreed to deduct 7% from plaintiff's pay to provide workers' compensation coverage under the employer's policy as a condition precedent to the subcontract with plaintiff; the employer routinely added subcontractors to its workers' compensation insurance; the carrier routinely

accepted premiums from the employer for subcontractors; and the employer thus had the implied authority to bind the carrier to provide workers' compensation insurance for a subcontractor.

Am Jur 2d, Workmen's Compensation §§ 171, 172, 679.

APPEAL by defendant-carrier from opinion filed 16 December 1988 by the North Carolina Industrial Commission. Heard by the Full Commission on an appeal by defendant-carrier from an opinion by Deputy Commissioner John Charles Rush holding defendant-carrier liable for plaintiff's workers' compensation benefits. Heard in the Court of Appeals 14 November 1989.

Plaintiff is a carpenter who did work for general contractors. He was hired by defendant Daniels and Daniels Construction Company [employer] in order to do the boxing and siding on a house that employer was building. Prior to beginning work, plaintiff discussed his payment as well as his workers' compensation insurance coverage with employer's residential construction superintendent. In that discussion, the superintendent agreed to deduct money (7%) from plaintiff's pay to provide workers' compensation coverage under the defendant employer's policy. Plaintiff began work under the terms of a subcontract agreement with employer. Two days later, the scaffolding upon which plaintiff worked collapsed and plaintiff was injured. At the time of the accident, employer was insured by North Carolina Farm Bureau Mutual Insurance Company [carrier]. While plaintiff was in the hospital, the superintendent told plaintiff's wife that employer's workers' compensation policy would pay the related hospital and medical expenses as well as provide compensation.

When plaintiff filed a claim for coverage of his injuries, carrier denied that claim and plaintiff subsequently requested a hearing with the Industrial Commission. The Deputy Commissioner heard this matter and issued an opinion and award in which he concluded that carrier was estopped to deny plaintiff workers' compensation insurance coverage. He directed employer and carrier to pay compensation and medical benefits to plaintiff. Defendants appealed this decision to the Full Commission which affirmed the Deputy Commissioner's decision. Defendants appeal.

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

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant-appellant N.C. Farm Bureau Mutual Insurance Company.

LEWIS, Judge.

Plaintiff brought this action against two defendants: (1) plaintiff's employer at the time of the accident and (2) employer's insurance carrier at that time. This appeal was brought by N.C. Farm Bureau Mutual Insurance Company, defendant employer's insurance carrier and does not address plaintiff's action against Daniels and Daniels Construction Company, Inc., plaintiff's employer. The holding of this Court will therefore address only the responsibility of the insurance carrier under the Workers' Compensation statutes.

Defendant-appellant contends that the insurance carrier should not have to pay benefits to the plaintiff because (1) plaintiff is an independent contractor and not entitled to benefits intended for an "employee" under North Carolina law, and (2) neither the employer nor the carrier agreed to bind the carrier to pay workers' compensation to the plaintiff.

I: Plaintiff as Independent Contractor

The Industrial Commission determined that plaintiff was a "subcontractor" and not an employee of the employer. The test for analyzing whether an individual is an independent contractor or an employee is whether the employer has retained the right to control the details of doing the work rather than merely requiring definite results conforming to the contract. *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). The evidence establishes that plaintiff owned and operated his own carpentry business and retained control over the manner and method of his work. Employer paid plaintiff per lineal foot and plaintiff worked at his own speed with his work subject only to employer's final approval. Plaintiff concedes in his brief: "The Plaintiff was technically a subcontractor of the Defendant-Employer."

Defendant contends: "Since plaintiff was not an employee, the Commission has no jurisdiction and plaintiff cannot recover benefits under the [North Carolina Workers' Compensation] Act." Defendant

further alleges that G.S. 97-19, as it read at the time of plaintiff's accident, did not provide recovery from a general contractor for an injured subcontractor. Plaintiff states, on the other hand, that based on the principle of estoppel, "[t]he facts in this case would make it unconscionable for the carrier to be allowed to deny coverage." The Industrial Commission concluded that, even though the plaintiff was in fact a "subcontractor" of defendant employer, defendant employer had "*however*, agreed to provide workers' compensation insurance coverage for the plaintiff" (emphasis added). Thus, the Commission stated: "The defendant carrier, therefore, is estopped from denying said coverage."

II: Alleged Failure to Bind the Carrier

Defendant-carrier states that "[t]he Commission's findings of fact do not support its conclusion that the Carrier is estopped to deny workers' compensation coverage to plaintiff." Defendant's allegation is based on three ways in which plaintiff failed to bind carrier.

(1) The carrier first contends that he "made no representations to plaintiff regarding workers' compensation coverage." The Commission found that the only direct contact between carrier and plaintiff occurred *after* the accident when an agent for the carrier contacted plaintiff in order to obtain a written statement. That agent later advised plaintiff that he was not covered. The carrier therefore never told plaintiff that he was covered by carrier nor took any direct action that would have caused plaintiff to believe that he had workers' compensation insurance with the carrier. However, employer routinely added subcontractors to its "Workmen's Compensation Insurance" at the time it employed plaintiff, and there is no evidence that carrier had ever prohibited that action. Carrier never asked for a hearing on the issue of whether or not plaintiff should be covered under carrier's coverage. The Industrial Commission correctly held that the defendant-carrier is estopped from denying this coverage.

(2) The carrier further alleges that it never accepted the premium deducted by employer. Carrier relies on *Moore v. Upchurch Realty Company, Inc.*, 62 N.C. App. 314, 302 S.E.2d 654 (1983), stating that this case "should control the situation now before this Court." *Moore* is distinguishable in that plaintiff in *Moore* was never told that he was covered, whereas, in the case at bar, employer agreed to provide the coverage and understood that providing the insurance

was a condition precedent to employing plaintiff. Plaintiff started working with employer on 27 April 1987, was injured only three days later on 30 April 1987 and received his first and only paycheck dated 1 May 1987 from which the 7% workers' compensation insurance premium had been deducted. There is no evidence that carrier ever received the premium which was deducted from plaintiff's paycheck. Since carrier routinely accepted premiums from employer for the coverage of subcontractors, it can be assumed that carrier would have followed that practice in this case. The carrier cannot now be allowed to object to the practice in which it had acquiesced.

(3) Finally, carrier states that employer had no authority to bind the carrier. A supervisor for employer, Stuart Crank, agreed to provide workers' compensation insurance for plaintiff when the subcontract agreement was executed and to deduct money (7%) from plaintiff's paycheck to provide that coverage. Carrier states that no agency relationship existed between Crank and carrier and that there is "no evidence of any implied authority for Crank to act on behalf of Carrier." In fact, an implied authority had existed between carrier and employer because of employer's former practice of insuring subcontractors for employer. Employer acted in conformity with that practice by promptly filing Form 19 with the Industrial Commission to report plaintiff's injury and by telling plaintiff's wife and medical providers that plaintiff was covered under employer's workers' compensation insurance. Carrier is estopped from denying coverage based on an alleged lack of authority by the employer to bind carrier.

The principle of estoppel may apply in workers' compensation cases and was properly employed in this case by the Industrial Commission. *See Aldridge v. Foil Motor Co.*, 262 N.C. 248, 136 S.E.2d 591 (1964); *Britt v. Colony Construction Co.*, 35 N.C. App. 23, 240 S.E.2d 479 (1978). The Workers' Compensation Act is to be liberally construed to effectuate its purpose to provide compensation for injured workers and its benefits should not be denied by a technical, narrow or strict construction. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972). Since the carrier routinely allowed employer to add subcontractors to their workers' compensation insurance, as long as carrier received a premium in the amount of seven percent from the subcontractor's gross wages, carrier was correctly estopped by the Industrial Commission from denying coverage for plaintiff.

Affirmed.

Judges JOHNSON and COZORT concur.

BOBBY MACBRYAN GREEN AND DANIEL JOSEPH MADDALENA, PLAINTIFFS-APPELLANTS v. BAXTER C. CRANE, JR., AND WIFE, CEANNE J. CRANE, DEFENDANTS-APPELLEES

No. 8924DC209

(Filed 4 January 1990)

1. **Mortgages and Deeds of Trust § 12.1 (NCI3d); Reformation of Instruments § 1.2 (NCI3d)— restrictive covenants—power of trustee—correction of description**

The trial court erred in a contempt proceeding to enforce a consent judgment relating to restrictive covenants by finding that defendants were in compliance with the consent judgment where the joinder agreement setting out the restrictive covenants originally did not include the six acre tract which was the subject of the original complaint; the omission of the six acre tract was rectified by rerecording the agreement with a new description; and the addition of a phrase to the description was not the correction of an obvious error. Although plaintiffs argued that the trustee lacked authority to execute the documents recorded with the register of deeds, a deed of trust to secure a debt in North Carolina passes legal title to the trustee, who therefore has authority to execute agreements. N.C.G.S. § 47-36.1.

Am Jur 2d, Mortgages §§ 16, 17.

2. **Contempt of Court § 6.2 (NCI3d)— restrictive covenants—consent judgment—scope of contempt proceeding**

The trial court erred in not allowing plaintiffs the opportunity to argue noncompliance as a basis of a contempt proceeding where the consent judgment on which the contempt proceeding was based provided that defendants bring certain real property into full compliance with restrictive covenants. Noncompliance with the restrictions was listed as a basis of the contempt proceeding "motion for show cause" and the

consent judgment stated that noncompliance was punishable as for contempt with the burden of proof upon the defendants.

Am Jur 2d, Contempt § 98.

3. Contempt of Court § 7 (NCI3d) — restrictive covenants — consent judgment — contempt proceeding — costs

The trial court did not err in a contempt proceeding arising from a consent judgment dealing with restrictive covenants by failing to tax defendants with costs. There is no authority in North Carolina to award costs to a private party in a contempt action.

Am Jur 2d, Contempt § 114.

APPEAL by plaintiffs from order entered 12 December 1988 by *Judge C. Philip Ginn* in AVERY County District Court. Heard in the Court of Appeals 20 September 1989.

This is an appeal from the district court's order finding defendants were not in contempt. Plaintiffs purchased a ten acre parcel of real property from defendants. On 5 February 1988 plaintiffs filed suit for specific performance of contract provisions by which defendants agreed to restrict the use of the balance of the tract of land from which the ten acre parcel was conveyed. The land, described in Deed Book 135, pages 677-79 and owned by defendants was to be made subject to the same restrictions as those in the "Declaration of Restrictions for Lost Cove Estates."

On 10 October 1988 the parties entered into a consent judgment which provided:

1. Defendants shall make subject to, and bring into full compliance with, the Declaration of Restrictions for Lost Cove Estates, all of the property remaining of record as of April 29, 1984, of the tract described in Deed Book 135, Pages 677 through 679, Avery County, Public Registry, prior to November 1, 1988.

2. The existing dwelling on the tract described in Deed Book 135, Pages 677 through 679, Avery County, Public Registry, is hereby exempted from Paragraph 3 (but not 3a) of the Restrictions until July 1, 1993, if and only if the waste water and septic system for such dwelling in its entirety is maintained in full, continuous, and uninterrupted nonviolation with appli-

cable Code and Health Department regulations; i.e.; if upon inspection it is determined by the appropriate govenmental [sic] inspector that the system is leaking or leaching into the creek or not functioning properly in violation of Code and Health Regulations, then Defendant shall be required to take immediate action to correct or abate such violation.

3. Initial proof that the waste water and septic system is not in violation of Code and Health Department regulations shall be filed with the Court before November 1, 1988, and subsequent proof of ongoing nonviolation shall be filed every twelve months. Proof shall consist of an official governmental inspection and written report.

4. Failure to comply with the above stipulations shall be punishable as for contempt. The burden of proof shall be upon the Defendants.

5. Immediately upon execution and filing of this Order, the Plaintiffs shall file a voluntary dismissal with prejudice of their Complaint and Amended Complaint in the subject action.

Plaintiffs filed a "Voluntary Dismissal (conditional)" on 25 October 1988. The dismissal was conditioned on defendants answering certain interrogatories and complying with paragraphs 1 and 3 of the consent judgment.

On 7 November 1988 plaintiffs filed a "Motion for Show Cause; Motion for Relief; Motion for Sanctions." Plaintiffs averred that defendants had failed to comply with the requirements of the consent judgment quoted above. On 12 December 1988, after a hearing, the trial court found that defendants were not in contempt of the consent judgment and denied plaintiffs' motions. Plaintiffs appeal.

Bobby MacBryan Green, pro se.

Daniel Joseph Maddalena, pro se.

Miller and Moseley, by Allen C. Moseley, for defendants-appellees.

EAGLES, Judge.

Plaintiffs make four arguments on appeal. First, plaintiffs assert that the documents recorded by defendants did not effectively restrict the property in question as required by paragraph 1 of the con-

sent judgment. Second, plaintiffs assert that the trial court erred in finding that an additional lawsuit would be required to force compliance with the restrictions contained in the consent judgment. Third, plaintiffs assert that the consent judgment placed the burden of proof on the defendants to show compliance with the judgment on motion of the plaintiffs. Plaintiffs argue that defendants failed to meet their burden. Finally, plaintiffs argue that the trial court erred in failing to tax defendants with costs. We agree with plaintiffs' argument that the recorded documents did not effectively restrict the six acre tract. Therefore, the judgment of the trial court is vacated and the cause is remanded.

[1] Plaintiffs argue that the documents recorded in the Avery County Register of Deeds Office were executed by the trustee under the deed of trust and did not effectively restrict the use of the property in question. Plaintiffs assert that there is no written authority for the trustee to impose restrictions on the property encumbered by the deed of trust. Additionally, plaintiffs argue that a "Joinder Agreement" as originally recorded did not include a six acre tract in the legal description of the property; the six acre tract was the subject of the original complaint. Although the joinder agreement was rerecorded and the property description amended to contain the six acre tract, plaintiffs argue that the rerecording was ineffective because the mortgagee bank (holder of the note) did not join in its execution. Plaintiffs also assert that defendants cannot declare restrictive covenants which will run with the land unless there is a delineation of dominant and servient tenements. Finally, plaintiffs argue that the legal description of the property contained in the recorded restrictive covenants is ambiguous and therefore ineffective to restrict the property.

In North Carolina a deed of trust to secure a debt passes legal title to the trustee. *See Riddick v. Davis*, 220 N.C. 120, 125, 16 S.E. 2d 662, 666 (1941). Because the trustee held legal title to the six acre tract in question, he had authority to execute the joinder agreement. Plaintiffs' arguments to the contrary are without merit. However, defendants admitted at the hearing on plaintiffs' motion that, as originally recorded, the joinder agreement did not include the six acre tract which was the subject of the original complaint. However, defendants argue that by rerecording the agreement with the new description the inadvertent omission of the six acre tract was rectified. Defendants rely on G.S. 47-36.1 which provides that

> an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument.

At the hearing defendants characterized the omission of the six acre tract as "inadvertently left out." The trial court found that the rerecorded document was sufficient. We do not agree that the rerecording corrected "an obvious typographical or other minor error." The record here shows that the description of the property in the original joinder agreement was as follows:

> Being Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Lost Cove Estates Subdivision as shown on a map and survey by Michael M. Lacey, R.L.S. No. L-1491, dated July 2, 1984, titled "Lost Cove Estates, Property of Baxter Crane," and being Surveyor's Map No. 84-7-2-136 and being recorded in Plat Book 21, Pages 30 and 31 of the Avery County Register of Deeds.

The description found in the rerecorded joinder agreement is as follows:

> *Being all of that certain tract or parcel of land more fully described in the Deed recorded in Book 135, Page 677, Avery County Registry, which property specifically includes* Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Lost Cove Estates Subdivision as shown on a map and survey by Michael M. Lacey, R.L.S. No. L-1491, dated July 2, 1984, titled "Lost Cove Estates, Property of Baxter Crane," and being Surveyor's Map No. 84-7-2-136 and being recorded in Plat Book 21, Pages 30 and 31 of the Avery County Register of Deeds. (Emphasis added.)

The addition of the first phrase above is not the correction of an obvious typographical or clerical error. Therefore, the trial court erred when it found that defendants were in compliance with the consent judgment.

[2] Plaintiffs' second argument is that the trial court erred when it stated to plaintiffs that "[i]f you think [defendants are] not in compliance with their restrictions on the property, then you're going to have to bring another lawsuit. It's not a part of this one." However, the consent judgment on which plaintiffs' contempt proceeding was based provided that "[d]efendants shall make subject to, *and bring into full compliance with*, the Declaration of Restrictions for Lost Cove Estates," the property in question [emphasis ours]. Plaintiffs listed noncompliance with the Restrictions as a basis for their "Motion for Show Cause." Therefore, the trial court erred in not allowing plaintiffs the opportunity to argue noncompliance as a basis of the contempt proceeding. The consent judgment (which the parties have agreed to) provides: "Failure to comply . . . shall be punishable as for contempt. The burden of proof shall be upon the Defendants." Once plaintiffs assert noncompliance with the requirement for recording the Restrictions, and therefore noncompliance with the consent judgment, defendants have the burden of showing compliance.

[3] Finally, plaintiffs argue that the trial court erred in failing to tax defendants with costs. Plaintiffs' argument is without merit. "A North Carolina court has no authority to award damages [in the form of costs] to a private party in a contempt proceeding." *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E. 2d 60, 63 (1985). "[C]ontempt proceedings are *sui generis* and criminal in nature. Although labeled 'civil' contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply." *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E. 2d 598, 601, *cert. denied*, 283 N.C. 666, 197 S.E. 2d 880 (1973). The trial court did not err in refusing to tax defendants with costs.

For the reasons stated, we vacate the order of the trial court and remand the case to the trial court for further proceedings to determine whether defendants should be held in contempt and if so, what sanctions, if any, are appropriate.

Vacated and remanded.

Judges PARKER and GREENE concur.

CYNTHIA BOCKWEG AND HUSBAND, GREGORY BOCKWEG, PLAINTIFFS v. STEPHEN G. ANDERSON, BONNEY H. CLARK, EXECUTRIX OF THE ESTATE OF R. PERRY B. CLARK, A. STANLEY LINK, JR., RICHARD M. HOLLAND AND LYNDHURST GYNECOLOGIC ASSOCIATES, P.A., DEFENDANTS

No. 8921SC247

(Filed 4 January 1990)

Limitation of Actions § 12.2 (NCI3d); Rules of Civil Procedure § 41.1 (NCI3d) — voluntary dismissal — refiling within one year — original suit in Federal Court

The one-year savings provision of N.C.G.S. § 1A-1, Rule 41(a) after a voluntary dismissal without prejudice applied where the original suit was brought as a diversity action in a federal court in North Carolina and dismissal was granted pursuant to N.C. Rule 41(a).

Am Jur 2d, Limitation of Actions §§ 307, 313.

Judge PHILLIPS concurring.

APPEAL by plaintiffs from Order entered 6 January 1989 in FORSYTH County Superior Court by *Judge William H. Freeman.* Heard in the Court of Appeals 12 July 1989.

Plaintiffs filed a medical malpractice suit in U.S. District Court for the Middle District of North Carolina on 4 December 1986. The action was voluntarily dismissed by stipulation on 28 October 1987. On 18 October 1988, plaintiffs filed this action in Forsyth County Superior Court. Both the federal and state actions allege a claim for damages due to loss of female reproductive organs. Defendants moved to dismiss on the basis that female plaintiff had been discharged from the care of defendants and Forsyth Memorial Hospital on 8 February 1984 and that the statute of limitations had expired under G.S. 1-15(c). The court granted the defendants' motion for summary judgment. Plaintiffs appeal.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and William R. Hamilton, for plaintiff-appellants.

Tuggle, Duggins, Meschan & Elrod, P.A., by Joseph E. Elrod III, J. Reed Johnston, Jr. and Rachel B. Hall, for defendant-appellee Link.

Petree, Stockton & Robinson, by J. Robert Elster, Stephen R. Berlin and Patrick G. Vale, for defendants' appellees Anderson, Clark, Holland and Lyndhurst Gynecologic Associates, P.A.

LEWIS, Judge.

Plaintiffs contend that the statute of limitations (G.S. 1-15(c)) was tolled by the one-year savings provision of G.S. 1A-1, Rule 41. The relevant language of Rule 41(a)(1) provides:

> If an action commenced within the time prescribed . . . is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless [the judge shall specify in his order a shorter time].

Defendants contend that the one-year savings provision does not apply since the original suit was brought in a Federal Court. They rely on *High v. Broadnax*, 271 N.C. 313, 316, 156 S.E.2d 282, 284 (1967), which ruled that the savings provision is not tolled when the suit is brought in "another jurisdiction." In *Cobb v. Clark*, 4 N.C. App. 230, 233, 166 S.E.2d 692, 694 (1969), this Court subsequently interpreted the *High* ruling to include suits originally brought in a Federal Court sitting in North Carolina.

We note that the opinion in *High* was written under G.S. 1-25, which statute was superseded by Rule 41 in 1969. Unlike G.S. 1-25, the present Rule 41 specifically holds that the savings provision applies when the voluntary dismissal was granted "under this subsection." The statute will be tolled when voluntary dismissal is granted pursuant to the North Carolina Rules of Civil Procedure, regardless of whether or not the dismissal is granted in a State court.

The one-year savings provision of N.C. Rule 41 will therefore be tolled for dismissal from a Federal Court when that dismissal was granted pursuant to N.C. Rule 41. Since the Federal Court in this case did not specify whether it granted dismissal pursuant to the North Carolina Rules of Civil Procedure, we look to federal case law for guidance. In *Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981) we find clear federal precedent which establishes that a Fourth Circuit Federal Court will dismiss pursuant to N.C. Rule 41 in like cases. The *Haislip* court, following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1938), and *Guaranty Trust Co.*

of New York v. York, 326 U.S. 99, 89 L.Ed. 2079 (1945), held that voluntary dismissal of a federal diversity action arising out of North Carolina will be granted pursuant to N.C. Rule 41 because the one-year tolling provision confers a "substantive right" and there was "no countervailing federal interest." 534 F. Supp. at 97-98.

Where the Fourth Circuit has previously established that it invokes N.C. Rule 41 in granting voluntary dismissal, we hold that dismissal has been granted "under this subsection" of N.C. Rule 41 and the one-year savings provision of 41(a) has been triggered for the purposes of refiling in state court. We distinguish the case before us from *High* and *Cobb* on the basis that the Fourth Circuit has, since those cases, stated that it dismisses pursuant to the state rule when a substantive right is to be preserved. *Haislip v. Riggs*, *id.* Where the state rule was originally applied, the voluntary dismissal was granted "under this subsection" (Rule 41) and *not* in "another jurisdiction." Where the federal court has chosen to uphold the substantive rights of our residents to avail themselves of the one-year tolling provision, we will do no less.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

Judge PHILLIPS concurring.

Even apart from the Fourth Circuit holdings referred to, the trial court and the defendants construe the phrase "under this section" too narrowly. The phrase "under this section," or one similar to it, appears in innumerable North Carolina statutes which grant rights that can be enforced in other courts. The liberal purpose of our rules leads me to believe that by the section involved our legislature intended to permit a dismissed suit to be refiled in our courts when the conditions stated in the rule are complied with, and had no rational reason to intend otherwise. In this case plaintiff's cause of action accrued under the law of North Carolina; the first suit was brought in a court with concurrent jurisdiction situated in this state; plaintiffs have met the conditions required by both the federal and state rules and are entitled to continue with their case in accordance therewith.

WILLIAM DALMAS DONALDSON v. CHARLOTTE MEMORIAL HOSPITAL & MEDICAL CENTER, INC., AND BURTON L. THOMSEN, M.D.

No. 8926SC28

(Filed 4 January 1990)

Physicians, Surgeons and Allied Professions § 11 (NCI3d) — medical malpractice — instructions on duty of care — recital of N.C.G.S. § 90-21.12 — error

There was prejudicial error in a medical malpractice action where the trial court in its instructions on the health care provider's duties of care recited N.C.G.S. § 90-21.12 verbatim. Although the trial court later instructed the jury twice that defendants would be negligent if they failed to exercise their best judgment, if they failed to use reasonable care and diligence in the application of their knowledge and skill, or if they failed to provide care in accordance with the standard of care required by law, the Court of Appeals was unable to hold that the jury could not have been confused by the earlier instruction.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 363; Trial §§ 609, 614, 615.

APPEAL by plaintiff from Order entered by *Judge J. Marlene Hyatt* on 9 September 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 29 August 1989.

Karney & Poling, P.A., by Richard D. Poling, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mark C. Kurdys, for defendant appellees.

COZORT, Judge.

The question raised by this appeal is whether the trial court committed reversible error in reciting verbatim N.C. Gen. Stat. § 90-21.12 when instructing the jury, in a medical malpractice action, on the health care provider's duties of care. We hold that the court's instructions were confusing to the jury to the prejudice of plaintiff. We therefore vacate the judgment and remand for a new trial.

Plaintiff, a fifty-five-year-old man, was admitted to Charlotte Memorial Hospital for a carotid endarterectomy to alleviate his advanced atherosclerotic disease. The surgery was performed by defendant Burton Thomsen, M.D., a resident physician in the thoracic and cardiovascular surgery program, under the supervision of Dr. Frederick Taylor. At the time of plaintiff's admission to the recovery room at 4:30 p.m., he was in stable condition and exhibited normal neurologic and physical signs and responses. At 6:00 a.m. the following day, Dr. Thomsen checked plaintiff and found that a hematoma, or blood clot, had formed at the surgical site. At 10:00 a.m. another resident physician, Dr. Edmundson, noted the hematoma and described it as extending to plaintiff's chin. Dr. Edmundson testified that he was concerned that the hematoma could cause tracheal obstruction and respiratory arrest, and he advised the nurse attending plaintiff to notify the thoracic surgery resident about the hematoma. The nurse testified that she did not attempt to page the surgical resident or any staff doctor until after 11:50 a.m.

At 11:50 a.m., plaintiff began to experience respiratory distress and complained of an inability to breathe. The attending nurses were unable to insert a nasogastric suction tube into plaintiff and could not locate Dr. Thomsen or Dr. Taylor. By 11:55 a.m., plaintiff was cyanotic, and a Code Alpha was initiated. Plaintiff's breathing stopped, and he went into cardiac arrest. A surgical resident then removed the sutures from the operative site and removed a "huge dark clot." Intubation was then accomplished, and plaintiff was taken to an operating room, where Dr. Thomsen removed the remainder of the hematoma and repaired a bleeding needle hole in the carotid artery.

As a result of the tracheal compression which caused the respiratory arrest, there was a period of inadequate oxygen supply to plaintiff's brain, and he sustained permanent brain damage and a seizure disorder. Since his discharge from the hospital, plaintiff has lived with and has been cared for by his family. He is confined to a bed or wheelchair.

The jury reached a verdict in favor of defendants on the first issue of negligence. The trial court entered judgment accordingly and thereafter denied plaintiff's motion for a new trial.

On appeal plaintiff assigns error to the trial court's instructions to the jury on the issue of negligence. The trial court's instructions tracked those set forth in North Carolina Pattern Jury Instruc-

tion—Civil 809.00, with one exception: the court included a substantially verbatim reading of N.C. Gen. Stat. § 90-21.12. In its first statement of defendants' duties to plaintiff, the court instructed the jury as follows:

> In this case these duties are:
>
> First, a duty to exercise its best judgment in the care and treatment of his patient;
>
> Second, a duty to use reasonable care and diligence in the application of his knowledge and skill to his patient's care;
>
> Third, a duty to provide care in accordance with the standard of health care required by law.
>
> North Carolina General Statute 90-21.12 provides: "In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant *shall not be liable* for the payment of damages *unless* the trier of fact is satisfied, by the greater weight of the evidence, that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience, situated in the same or similar community at the time of the alleged act, giving rise to the cause of action."
>
> A violation of any one of these duties is negligence. (Emphasis added.)

Plaintiff contends that, by quoting the statutory language "shall not be liable . . . unless," the jury was in effect told that defendants could be liable only for a breach of the duty to provide care in accordance with the standard of health care required by law. Alternatively, plaintiff argues that the inclusion of the statutory language was at best confusing and misleading. We agree that the instruction may have confused the jury.

It is true, as defendants have emphasized, that the trial court later instructed the jury twice that defendants would be negligent if they failed to exercise their best judgment, or if they failed to use reasonable care and diligence in the application of their knowledge and skill, or if they failed to provide care in accordance with the standard of health care required by law. Yet defendant conceded in oral argument that, if the disputed instruction had

been the sole instruction given, then it would have been confusing. Although the trial court's charge is to be "considered contextually as a whole," *Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 404, 267 S.E.2d 409, 415 (1980), we are unable to hold that the jury could not have been confused by the earlier instruction. Plaintiff is entitled to a

New trial.

Judges ARNOLD and BECTON concur.

ETR CORPORATION v. WILSON WELDING SERVICE, INC.

No. 8918SC675

(Filed 4 January 1990)

1. **Process § 14.3 (NCI3d)— foreign corporation—in personam jurisdiction—contact sufficient**

The contacts of a Georgia corporation with North Carolina were sufficient to constitute substantial activity for purposes of invoking in personam jurisdiction under N.C.G.S. 1-75.4(1)d where there were telephone conversations between plaintiff's representatives in High Point and defendant's representatives in Georgia; an invoice was mailed from Georgia to North Carolina and a check from North Carolina to Georgia; defendant made a service call for boiler repairs in Canton, North Carolina for another company; and defendant delivered boiler parts to Oxford Industries in Burgaw, North Carolina.

Am Jur 2d, Foreign Corporations §§ 329, 330, 344, 345, 350.

2. **Process § 9.1 (NCI3d)— jurisdiction over nonresident defendant—money as thing of value**

The requirements for obtaining long-arm jurisdiction under N.C.G.S. 1-75.4(5)d were met when defendant sent a bill from Georgia to High Point, North Carolina and plaintiff then sent a check from High Point to Georgia. *Pope v. Pope*, 38 N.C. App. 328, held that payments are a thing of value within

N.C.G.S. 1-75.4(5)c, and the same construction applies to N.C.G.S. 1-75.4(5)d.

Am Jur 2d, Foreign Corporations §§ 365, 368.

3. Process § 14.3 (NCI3d); Constitutional Law § 24.7 (NCI3d)— foreign corporation—minimum contacts—evidence sufficient

A defendant corporation had sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction without violating due process where defendant engaged in several North Carolina business arrangements and on three occasions entered the state and conducted relations with North Carolina businesses.

Am Jur 2d, Foreign Corporations §§ 318, 329.

APPEAL by defendant from Order entered 4 April 1989 by *Judge Russell G. Walker, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 6 December 1989.

Defendant is a Georgia Corporation. In 1987, the defendant contracted to do certain work in Ballground, Georgia for the Gold Kist Corporation. Plaintiff, a North Carolina Corporation also had contractual relations with the Gold Kist Corporation on the same job. Defendant agreed with Gold Kist that it would deliver and install at the job site a Cyclotherm boiler. Defendant was instructed to invoice the boiler to plaintiff corporation. Subsequently, there were telephone communications between representatives of the defendant in Georgia and plaintiff in North Carolina concerning the price of the boiler. A bill was sent to ETR Corporation from defendant's office in Georgia on 31 March 1987; and in April, 1987 a check drawn on plaintiff's North Carolina bank was mailed to defendant in Georgia and negotiated by defendant through its Georgia bank.

On 24 March 1988, plaintiff filed suit in North Carolina against the defendant alleging breach of contract. On 25 May 1988, defendant filed a motion to dismiss plaintiff's complaint on the grounds that the North Carolina court does not have jurisdiction over the person of the defendant. On 4 April 1989, defendant's motion was denied. On 12 April 1989, defendant filed notice of appeal to this Court.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke, for plaintiff-appellee.

James W. Workman, Jr., for defendant-appellant.

LEWIS, Judge.

The issue before this Court is whether the trial court erred in denying defendant's motion to dismiss based upon lack of personal jurisdiction. Resolution of the question of *in personam* jurisdiction over a foreign corporation involves a two pronged test: (1) Whether North Carolina's "long-arm" statute permits courts in this jurisdiction to entertain the action; and (2) whether exercise of this jurisdictional power comports with due process of law. *Miller v. Kite*, 313 N.C. 474, 476, 329 S.E.2d 663, 665 (1985).

I.

[1] Plaintiff asserts jurisdiction under G.S. Section 1-75.4(1)d which states that the court has jurisdiction over the person of a party defendant when that defendant is "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." We find that the defendant has engaged in "substantial" activities within this state. Defendant's contacts with our state in connection with this cause of action were: (1) telephone conversations between defendant's representatives located in the state of Georgia and plaintiff's representatives located in High Point, North Carolina; (2) an invoice mailed by defendant from Georgia to plaintiff in North Carolina and payment of this invoice by a check mailed from North Carolina to defendant in Georgia.

Other activities not related directly to this particular action in which defendant engaged in North Carolina were: (1) a service call on 11 October 1988 to perform emergency boiler repairs in Canton, North Carolina for another company; (2) the delivery of boiler parts by defendant to Oxford Industries in Burgaw, North Carolina. We hold that these contacts with the state are sufficient to constitute "substantial" activity for purposes of invoking the court's *in personam* jurisdiction under G.S. Section 1-75.4(1)d.

[2] Plaintiff has also alleged that it has jurisdiction under G.S. Section 1-75.4(5)d. This statute provides for jurisdiction "in any action which relates to goods, documents of title or other things of value shipped from this State by the plaintiff to the defend-

ant on his order or direction." Plaintiff argues that its shipment of a check to defendant was at defendant's "order" and amounts to a "thing of value" for purposes of our statute. In *Pope v. Pope*, 38 N.C. App. 328, 331, 248 S.E.2d 260, 262 (1978), our Court held that money payments are a "thing of value" within G.S. Section 1-75.4(5)c. This same construction applies to G.S. Section 1-75.4(5)d. Therefore, we conclude that this case does meet the requirements of the long-arm statute for personal jurisdiction.

II.

[3] 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 contact 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 relationship among the parties, the cause of action, and the forum state. *Id.* It must be shown that the defendant has had "minimum contacts" with our state that satisfy "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (*quoting* from *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)). In the present case, defendant has engaged in several North Carolina business arrangements. On three occasions the defendant has entered the state and conducted relations with North Carolina businesses. It is generally conceded that a state has a "manifest interest" in providing its residents with a convenient forum for addressing injuries inflicted by out-of-state actions. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L.Ed.2d 528, 541 (1985). Defendant has failed to demonstrate any reason why the exercise of jurisdiction over it would be unfair. North Carolina is as convenient a forum as any to resolve this dispute. We find the defendant has had sufficient minimum contacts with this state to justify the exercise of personal jurisdiction over it without violating the due process clause.

Affirmed.

Judges JOHNSON and COZORT concur.

DOROTHY D. GOODWIN, PLAINTIFF v. WALTER H. ZEYDEL, DEFENDANT

No. 8928DC616

(Filed 4 January 1990)

Divorce and Alimony § 21.9 (NCI3d)— equitable distribution— not sufficiently pled

The trial court did not err by denying defendant's motion to amend his answer to a divorce complaint to assert a claim for equitable distribution where defendant's answer had asserted a claim to an interest in a specific piece of property or to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property. Even under the most liberal interpretation of the rules of pleadings, defendant's answer did not contain materials or statements sufficient to put plaintiff on notice that defendant was asserting a claim for equitable distribution under N.C.G.S. § 50-20 (1987).

Am Jur 2d, Divorce and Separation §§ 301, 952.

APPEAL by defendant from *Roda, Peter L., Judge.* Order entered 27 January 1989 in BUNCOMBE County District Court. Heard in the Court of Appeals 12 December 1989.

In October 1987, plaintiff instituted an action for absolute divorce. In her complaint, plaintiff alleged that she and defendant were married on 31 December 1975, were separated on 1 April 1986, and had lived continuously separate and apart since that time. In Paragraph 1 of a *pro se* answer, defendant admitted the allegations in plaintiff's complaint. Defendant's answer also contained the following paragraphs:

. . .

2. Defendant, however, objects to the dissolution of the bonds of matrimony unless all property claims between the parties are settled judicially or extrajudicially.

3. Defendant has a claim against Plaintiff for the proceeds of the sale of a cooperative apartment unit located at 4000 Cathedral Avenue, N.W., Washington, D.C.

4. The above mentioned property was purchased by Plaintiff and Defendant in April 1976, to which Defendant contributed

$20,000.00 towards the down payment. Plaintiff sold the same property in 1978 and the proceeds thereof reinvested to purchase a condominium unit at 1800 Old Meadow Road, McLean, Virginia. The latter property was then sold in 1982 and the proceeds thereof used to purchase another condominium unit at 8350 Greensboro Drive, McLean, Virginia, which was then sold on December 13, 1985 for approximately $164,000.00. Plaintiff did not reimburse Defendant for his $20,000.00 contribution nor distribute to Defendant any share of the profits from the said sale.

On 19 November 1987, plaintiff filed a motion in which she sought an order of the Court "severing the divorce complaint from the trial of the other issues in [the] case" and to allow plaintiff to obtain her divorce. Defendant did not respond to that motion, and on 9 December 1987, the Court entered judgment granting plaintiff an absolute divorce from defendant. The decretal section of that judgment contained the following paragraph:

2. That the issue relative to property claims is hereby specifically retained by the Court to be heard at a later time.

On 21 December 1988, defendant, through counsel, filed a motion in which he asserted that his answer reasonably raised the issue of equitable distribution. In the motion, defendant also requested that he be allowed to amend his answer to assert a *counterclaim* (emphasis supplied) for equitable distribution.

On 27 January 1989, the trial court entered an order denying defendant's motion to amend. That order contained a finding of fact, which we deem to be a conclusion of law, that defendant's answer did not raise the issue of equitable distribution. The order also contained the following conclusion of law:

2. [As] a matter of law the Defendant may not now amend his Answer to assert a claim for Equitable Distribution, same not being within the discretion of the trial court.

Defendant has appealed from the 27 January 1989 order.

Gum & Hillier, P.A., by Howard L. Gum, for plaintiff-appellee.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by James J. Hugenschmidt and Barry L. Master, for defendant-appellant.

WELLS, Judge.

Ordinarily, an order denying a motion to amend is interlocutory and not immediately appealable. However, both N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1989) allow for an appeal as a matter of right from an interlocutory order which affects a substantial right. In this case, the trial court's order of 27 January 1989 had the effect of forever barring defendant from asserting a claim for equitable distribution, and thus affected a substantial right.

The dispositive question in this case is whether defendant's answer sufficiently asserted a claim for equitable distribution. We agree with the trial court and hold that it did not.

Since our Supreme Court's decision in *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970), our appellate courts have consistently and repeatedly stated that pleadings must be liberally construed, but we have also adhered to the rule stated in *Sutton* that complaints (and thus counterclaims) must be sufficient to give the adverse party notice of the nature and basis of a claim in order to enable the adverse party to respond and prepare for trial.

In this case, defendant's answer asserted a claim to an interest in a specific piece of property, or, to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property. Even under the most liberal interpretation of the rules of pleadings, we cannot agree that defendant's answer contained materials or statements sufficient to put plaintiff on notice that he was asserting a claim for equitable distribution under N.C. Gen. Stat. § 50-20 (1987).

In contending that his answer was sufficient to assert a claim for equitable distribution, defendant relies on the statement of our Supreme Court in *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) that: "There is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution." We do not interpret the foregoing statement so broadly as to save defendant's claim under his answer in this case.

The trial court, having properly concluded that defendant's answer did not sufficiently assert a claim for equitable distribution, was required to deny defendant's motion to amend his answer to assert such a claim. N.C. Gen. Stat. § 50-11 (1987) in pertinent part provides:

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce. . . .

For the reasons stated, the judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

UNIVERSITY OF NORTH CAROLINA A/K/A THE NORTH CAROLINA MEMORIAL HOSPITAL, AND THE UNIVERSITY OF NORTH CAROLINA A/K/A THE MEDICAL FACULTY PRACTICE PLAN OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL'S SCHOOL OF MEDICINE, PLAINTIFFS v. DONALD W. HILL, JR. AND ALAMANCE COUNTY, DEFENDANTS

No. 8915SC140

(Filed 4 January 1990)

Jails and Jailers § 1 (NCI3d)— release of unconscious prisoner— county's liability for emergency medical care

A county could not avoid its statutory obligation to provide and pay for emergency medical care for a prisoner confined in the county jail by releasing the prisoner while he was unconscious and in need of emergency care. However, the trial court on remand must determine which services rendered in the treatment of the prisoner's spinal meningitis were emergency in nature and which were for treatment after the emergency had passed. N.C.G.S. §§ 153A-224(b), 153A-225(a).

Am Jur 2d, Penal and Correctional Institutions § 96.

APPEAL by plaintiffs from judgment of *Judge Donald W. Stephens* entered 9 November 1988 in ALAMANCE County Superior Court. Heard in the Court of Appeals 13 September 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for plaintiff appellants.

County Attorney S. C. Kitchen and Human Resources Attorney Carol V. Miller for defendant appellee, Alamance County.

James B. Blackburn, III, for N.C. Association of County Commissioners and N.C. Sheriff's Association, amici curiae.

COZORT, Judge.

Plaintiffs brought suit to recover the costs of medical treatment rendered to defendant Hill (not a party to this appeal), who had become ill while confined in Alamance County jail. The trial court granted plaintiffs' motion for summary judgment against defendant Hill, denied plaintiffs' motion for partial summary judgment against defendant Alamance County, and granted Alamance County's motion for summary judgment. We reverse the order of summary judgment in favor of Alamance County and remand for further proceedings.

On 19 November 1985, Hill was arrested and thereafter incarcerated in Alamance County jail for failing to appear for trial on a charge of failure to comply with a child support order. He was ordered held on a $1,500.00 secured bond. While in the jail, Hill became ill and was seen by a physician at the jail. The following day, he became worse and was transported to Alamance County Hospital by ambulance. An Alamance County deputy sheriff followed the ambulance to the hospital. After a physician at the hospital diagnosed Hill as having spinal meningitis and ordered him transferred to plaintiff North Carolina Memorial Hospital in Chapel Hill, the deputy telephoned the sheriff's department for instructions. An Alamance County magistrate telephoned Judge J. Kent Washburn, a District Court Judge in Alamance County, who ordered Hill released on a $1,500.00 unsecured bond. Upon being informed that Hill was unconscious and unable to sign the bond, Judge Washburn ordered Hill released without the necessity of signing bond. The deputy then informed the emergency room physician that Hill had been released from custody. Hill was thereafter taken to plaintiff hospital, where he was hospitalized from 28 November 1985 until 9 January 1986. His medical bills incurred while in plaintiffs' care totaled $99,783.56.

Plaintiffs moved for summary judgment against Hill and a partial summary judgment against Alamance County. Alamance County moved for summary judgment against plaintiffs. The trial court granted plaintiffs' motion as to defendant Hill, denied plaintiffs' motion as to Alamance County, and granted Alamance County's motion.

On appeal, plaintiffs contend that the trial court erred in granting the County's motion for summary judgment, because (1) the County is liable by statute for the costs of Hill's emergency medical treatment, and (2) there remain genuine issues of material fact, thus precluding summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. We agree.

N.C. Gen. Stat. § 153A-225 provides, in pertinent part, as follows:

> (a) Each unit that operates a local confinement facility shall develop a plan for providing medical care for prisoners in the facility. The plan
>
> (1) Shall be designed to protect the health and welfare of the prisoners and to avoid the spread of contagious disease;
>
> (2) Shall provide for medical supervision of prisoners and emergency medical care for prisoners to the extent necessary for their health and welfare . . . .

N.C. Gen. Stat. § 153A-224(b) provides:

> In a medical emergency, the custodial personnel shall secure emergency medical care from a licensed physician according to the unit's plan for medical care. If a physician designated in the plan is not available, the personnel shall secure medical services from any licensed physician who is available. *The unit operating the facility shall pay the cost of emergency medical services.* (Emphasis added.)

These statutes require that a county provide emergency medical services to prisoners incarcerated in the county's jail and to pay for such services. There is no dispute that Hill was incarcerated in Alamance County jail when he became ill and required emergency medical treatment. The County argues, however, that, once Hill was released from its custody, it was no longer obligated under the statute to secure or to pay for emergency medical services.

We find nothing in the statutes to support Alamance County's argument that the General Assembly intended that a county operating a local confinement facility could avoid its statutory obligations by releasing from its custody an unconscious prisoner in need of emergency care. We therefore hold that Alamance County remained duty bound to secure and pay for emergency medical care rendered by plaintiffs to Hill. We further hold that there remains

a genuine issue of fact as to how much of plaintiffs' services were "emergency" in nature.

Plaintiffs offered the affidavit of Dr. David E. Tomaszek, expressing Dr. Tomaszek's opinion that all of the care was emergency medical care. Defendant offered the affidavit of Dr. Robert E. Price, Jr., who opined that not all of the services were for emergency medical care. On remand, the trial court must receive evidence of the nature of the services rendered to Hill so that it can be determined which medical services were emergency in nature and which were for treatment of Hill after the emergency had passed.

The trial court's order of summary judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

JERRY L. HOWELL AND CHERYLE SIGMON HOWELL AND C & J HOWELL, D/B/A THE DETAIL CENTER v. PIEDMONT LEASE AND RENTAL, A NORTH CAROLINA PARTNERSHIP

No. 8919SC500

(Filed 4 January 1990)

Landlord and Tenant § 5 (NCI3d)— lease of cleaning equipment— failure of lessor's supplier to deliver to lessee—responsibility for rent

Where defendant lessor agreed to purchase cleaning equipment and lease it to plaintiffs, the lease agreement provided that the lessor was not responsible for delay or failure of its supplier to deliver the equipment to plaintiff and that all rental payments were to be paid by plaintiffs irrespective of claims they may have against the supplier, and the lessor ordered and paid for the equipment and directed the supplier to deliver it to plaintiffs, plaintiffs were obligated to make the lease payments even though the supplier has not delivered the leased equipment to them.

Am Jur 2d, Bailments §§ 66, 67, 73, 133, 134, 240.

APPEAL by plaintiffs from *Helms, Judge.* Order entered 8 March 1989 in Superior Court, CABARRUS County. Heard in the Court of Appeals 8 November 1989.

William F. Rogers, Jr. for plaintiff appellants.

Roberson, Haworth and Reese, by William P. Miller, for defendant appellee.

PHILLIPS, Judge.

Plaintiffs, who have a cleaning business in Concord, sued defendant for failing to deliver certain equipment leased to them and defendant counterclaimed for payments due under the lease. Following discovery an order of summary judgment was entered dismissing plaintiffs' complaint and granting judgment for defendant on the counterclaim. The pleadings, depositions, affidavits, and other materials before the court establish the following facts without contradiction: In September, 1987 plaintiffs desired to purchase a steam cleaning machine, a carpet cleaner, and other cleaning equipment from North American Cleaning Systems in Landis. After examining the equipment and ascertaining its price, plaintiffs contacted defendant leasing company in High Point about acquiring the machines from North American and leasing them to plaintiffs for thirty-six months with an option to purchase them. Pursuant thereto the parties entered into the lease agreement sued upon; defendant ordered and paid for the articles involved and directed North American to send them to plaintiffs. Plaintiffs did not receive certain of the articles and after several months stopped making the payments called for and suit eventually followed.

The following provisions of the lease agreement are decisive of the case:

> 1. PURCHASE AND ACCEPTANCE: No Warranties by Lessor: Lessee requests Lessor to purchase the Equipment from a supplier . . . and arrange for delivery to Lessee . . . Lessor shall have no responsibility for delay or failure of Supplier to fill the order for the Equipment . . . .
>
> * * *
>
> 4. NON-CANCELLABLE LEASE: This lease cannot be cancelled or terminated except as expressly provided herein. Lessee understands and agrees that . . . all rental payments shall

> be paid by Lessee irrespective of any set-off, counterclaim, recoupment defense or other right which Lessee may have against the Supplier of the equipment . . . .

These terms make clear that defendant is not responsible for the leased machines not being delivered to plaintiffs if they have not; and that plaintiffs are obliged to make the payments called for whether the machines have been delivered or not. Having so contracted plaintiffs are bound thereby, and no issue of fact material to the case remains to be litigated, as the court ruled. Plaintiffs' further argument that the lease terms are unconscionable and disapproved by our law has no merit, as a lease with similar provisions was upheld in *Falco Corp. v. Hood*, 7 N.C. App. 717, 173 S.E.2d 578 (1970).

Affirmed.

Judges BECTON and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 DECEMBER 1989

AURGEMMA v. AAMCO TRANSMISSIONS No. 895DC643	New Hanover (88CVD3472)	Judgment as to AAMCO is affirmed; judgment as to Williams is reversed
CLOUD v. MILLER No. 8926DC397	Mecklenburg (85CVD8704)	No Error
DEPT. OF TRANSPORTATION v. SEABOARD SYSTEM RAILROAD No. 8812SC1268	Cumberland (84CVS3367)	Affirmed
E. J. SMITH & SONS CO. v. SMITH TURF & IRRIGATION No. 8926SC190	Mecklenburg (86CVS8770)	No Error
FATER v. FATER No. 8926DC474	Mecklenburg (87CVD7201)	Affirmed in part, vacated in part & remanded
GARRETT v. AMERICAN MODERN HOME INS. CO. No. 895SC327	New Hanover (88CVS3783)	Reversed & remanded
GORDOS v. IMPERIAL HOMES No. 8928DC486	Buncombe (87CVD3853)	Vacated & remanded
HILLIARD v. KELLY No. 889SC1205	Vance (85CVS754)	Affirmed
IN RE McMILLAN No. 8930DC631	Graham (88J59)	Affirmed
IN RE PYATT No. 8919DC685	Randolph (86J103) (86J104) (86J105)	Affirmed
JONES v. DAVIS No. 8913DC195	Brunswick (80CVD793)	Affirmed
MACE v. MACE No. 8929DC622	McDowell (87CVD9)	Affirmed

MILLER v. MILLER No. 8925DC539	Burke (84CVD454)	Affirmed
RAYNOR v. CORNELIA NIXON DAVIS NURSING HOME No. 895DC829	New Hanover (87CVD1720)	Reversed & remanded
SAWYER v. WICKER No. 891SC368	Pasquotank (88CVS151)	Vacated & remanded
STATE v. BRANCH No. 8912SC725	Cumberland (87CRS11327)	No Error
STATE v. BYRD No. 8826SC1191	Mecklenburg (87CRS18443) (87CRS18444)	Affirmed
STATE v. CLONTZ No. 8919SC726	Cabarrus (82CRS1110) (82CRS1111) (82CRS1260) (82CRS1580)	Affirmed
STATE v. HILL No. 893SC707	Carteret (88CRS4548) (88CRS4549)	No Error
STATE v. HOOPER No. 895SC697	New Hanover (88CRS24395) (88CRS24396)	No Error
STATE v. JORGENSEN No. 8926SC831	Mecklenburg (88CRS045474)	No Error
STATE v. LAVISCOUNT No. 8910SC706	Wake (88CRS50196)	No Error
STATE v. McKINNEY No. 898SC653	Wayne (88CRS9512) (88CRS12638)	No Error
STATE v. MOORE No. 892SC609	Washington (88CRS635)	No Error
STATE v. NELSON No. 895SC741	New Hanover (89CRS2591) (89CRS2592) (89CRS2593)	No Error
STATE v. O'NEIL No. 8829SC1220	Rutherford (88CRS0032)	The decision of the trial court is therefore reversed & the case against the defendant is dismissed

STATE v. RICE No. 8911SC718	Harnett (88CRS9893)	No error in trial; remanded for resentencing
STATE v. SLAUGHTER No. 896SC136	Hertford (88CRS1853)	No Error
STATE v. SOLOMON No. 8913SC132	Columbus (88CRS491)	No Error
SUGGS v. McMASTERS No. 8919SC673	Randolph (88CVS547)	Dismissed
SWOFFORD v. GRIGGS No. 8930DC318	Cherokee (84CVD307)	Vacated & remanded
TAYLOR v. SINCLAIR No. 8920DC717	Anson (87CVD121)	Affirmed
UNBEHAGEN v. GREAT ATLANTIC AND PACIFIC TEA CO. No. 8912SC716	Cumberland (87CVS5613)	No Error
WOODRUFF v. WOODRUFF No. 8925DC585	Caldwell (86CVD625) (86CVD616)	Dismissed

FILED 4 JANUARY 1990

LEADINGHAM v. DORSCHEL No. 8926SC477	Mecklenburg (88CVS9907)	Affirmed
PEGRAM-WEST, INC. v. STRICKLER No. 8918SC343	Guilford (88CVS6953)	Affirmed
STATE v. WOOD No. 887SC1421	Nash (88CRS4598) (88CRS4599) (88CRS4600)	Affirmed
WEATHERLY v. DEPT. OF CRIME CONTROL & PUBLIC SAFETY No. 8918SC378	Guilford (86CVS6210)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

§ 1 (NCI3d). Nature and Essentials of Agreement

In an action to recover over $40,000 for services rendered by plaintiff to her sister prior to the sister's death, a check for $133.72 tendered by defendant administrator of the sister's estate and cashed by plaintiff did not constitute an accord and satisfaction of all debts the sister owed plaintiff at the time of her death. *Snow v. East*, 59.

ADMINISTRATIVE LAW

§ 4 (NCI3d). Procedure, Hearings, and Orders of Administrative Boards and Agencies

The Private Protective Services Board erred in failing to consider petitioner's experience as a bail bondsman's runner as investigative work in determining whether to issue petitioner a license as a private investigator. *Boston v. N.C. Private Protective Services Bd.*, 204.

ADVERSE POSSESSION

§ 4 (NCI3d). Adverse Possession of Lappage in Descriptions of Deeds of Opposing Parties

When a junior grant laps on a superior title, title to the junior grant will mature if there is an adverse and exclusive possession of the lappage. *Willis v. Mann*, 450.

§ 7 (NCI3d). Hostile Character of Possession by One Tenant in Common against other Tenants in Common

Evidence was sufficient to demonstrate an actual ouster of one tenant in common by another. *Willis v. Mann*, 450.

§ 19 (NCI3d). Time from which Statute of Limitations Runs

The mere institution of a Torrens proceeding did not break the continuity of defendants' color of title, and the effect of plaintiffs' voluntary dismissal of the Torrens proceeding was to toll the limitations period on defendants' adverse claim for the subsequent twelve months, and when plaintiffs failed to bring a new action within that period, the limitations period continued to run from the point at which it had been tolled. *Willis v. Mann*, 450.

ANIMALS

§ 2.1 (NCI3d). Liability of Owner for Injuries Caused by Dogs

The trial court erred by granting a directed verdict for defendant in a personal injury action in which plaintiff alleged that she had been injured when falling off her bicycle after defendant's unrestrained dog ran at her. *Dyson v. Stonestreet*, 564.

§ 3 (NCI3d). Injury Caused by Animals Roaming at Large

The trial court erred by granting a directed verdict for defendant on the issue of negligence per se in a personal injury action in which plaintiff alleged that defendant's dog knocked her over as she bicycled down the street in front of defendant's house. *Dyson v. Stonestreet*, 564.

APPEAL AND ERROR

ASSAULT AND BATTERY

ASSAULT AND BATTERY — Continued

§ 15 (NCI3d). Instructions

The trial court did not err in a prosecution for assault by pointing a gun by omitting "without legal justification" from its statement to the jury of the charge against defendant and its instructions. *S. v. Gullie*, 366.

ATTORNEYS AT LAW

§ 5.1 (NCI3d). Liability for Malpractice

Summary judgment should not have been granted for defendant on a negligence claim in a legal malpractice action. *Bamberger v. Bernholz*, 555.

The trial court erred by granting summary judgment for defendants on a breach of contract claim in a legal malpractice action. *Ibid.*

§ 5.2 (NCI3d). Liability for Fraud

The trial court erred by granting summary judgment for defendants on a claim for breach of fiduciary duty and fraud in a legal malpractice action. *Bamberger v. Bernholz*, 555.

§ 7.3 (NCI3d). Compensation in Condemnation Proceedings

Attorney fees may be awarded when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and the verdict demonstrates that the jury awarded compensation for that taking. *City of Raleigh v. Hollingsworth*, 260.

§ 7.5 (NCI3d). Allowance of Fees as Part of Costs

The trial court erred in awarding defendant attorney fees under G.S. 6-21.5 where plaintiff's claim to a lien having priority over defendant's lien was not an action completely void of a justiciable issue. *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 474.

AUTOMOBILES AND OTHER VEHICLES

§ 2.7 (NCI3d). Suspension and Revocation of Driver's License; Proceedings Based on Failure to Comply with Financial Responsibility Laws

The trial court erred by failing to dismiss the charge of operating a motor vehicle without financial responsibility in that the State failed to adequately prove that defendant owned the vehicle in question. *S. v. Harrell*, 426.

§ 3.4 (NCI3d). Offense of Driving without Valid License; Sufficiency of Evidence

The evidence was insufficient to convict defendant of driving while his license was revoked where it failed to show that defendant was notified that his license had been revoked. *S. v. Richardson*, 270.

§ 57.4 (NCI3d). Negligent Operation of Motor Vehicles; Failing to Yield Right of Way to Emergency Vehicle at Intersection

Summary judgment was improperly entered for the driver of a fire truck in an action to recover for injuries sustained in an intersection collision with the fire truck. *Lopez v. Snowden*, 480.

§ 91.3 (NCI3d). Jury Instructions; Issues as to Willful and Wanton Conduct

The trial court erred in directing verdict for defendant on plaintiff's punitive damages claim arising from injuries sustained in an automobile accident. *Marsh v. Trotman*, 578.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 110 (NCI3d). Assault and Homicide; Culpable Negligence

It was error to sentence defendant for both felony death by vehicle and the lesser offense of driving while impaired. *S. v. Richardson*, 270.

§ 126.1 (NCI3d). Driving While Impaired; Opinion of Witness as to Defendant's Condition at Time of Offense

The trial court did not err in a prosecution for driving while impaired by sustaining the State's objection to the arresting officer's opinion of the legal definition of operate and drive while impaired. *S. v. Harrell*, 426.

§ 126.3 (NCI3d). Driving While Impaired; Breathalyzer Test; Manner and Time of Administration

Petitioner's failure to indicate at the time he refused to take a breathalyzer test that he desired to have a witness present constituted a waiver of his statutory right to delay the test until after his witness arrived even if the witness arrived within the allowable 30 minute period, and petitioner's refusal was thus willful. *McDaniel v. Division of Motor Vehicles*, 495.

§ 126.5 (NCI3d). Driving While Impaired; Statements of Defendant

There was no prejudicial error in a prosecution for driving while impaired in allowing the arresting officer to testify as to a telephone conversation with defendant in which defendant admitted to driving the vehicle and to being an alcoholic. *S. v. Harrell*, 426.

§ 127.2 (NCI3d). Driving While Impaired; Evidence of Identity of Defendant as Driver

There was sufficient evidence of driving while impaired to submit the charge to the jury where defendant argued that the State failed to provide more than a scintilla of evidence that he was driving the vehicle or that he was driving it while intoxicated. *S. v. Harrell*, 426.

§ 140 (NCI3d). Displaying Expired License Plate

There was sufficient evidence to support defendant's conviction for willfully displaying an expired license plate on a vehicle. *S. v. Harrell*, 426.

AVIATION

§ 3.1 (NCI3d). Injury to Persons in Flight; Actions

The trial court in an action to recover for injuries sustained in a plane crash properly excluded from evidence the NTSB Factual Report. *Bolick v. Sunbird Airlines, Inc.*, 443.

The trial court did not err in failing to instruct the jury on negligence per se in a pilot's violation of a federal regulation by missing the touchdown zone of the runway and failing to execute a missed approach procedure. *Ibid.*

The trial court properly instructed the jury on the doctrine of sudden emergency in an action to recover for injuries sustained in a plane crash when the pilot overshot the runway and did not abort the landing. *Ibid.*

BILLS OF DISCOVERY

§ 6 (NCI3d). Compelling Discovery; Sanctions Available

The trial court did not abuse its discretion in a wrongful death action arising from alleged medical malpractice by limiting the number of expert witnesses defendants could use at trial as a sanction for failure to timely respond to interrogatories. *Segrest v. Gillette*, 435.

BROKERS AND FACTORS

§ 6.1 (NCI3d). Right to Commissions; What Constitutes Procuring Cause of Purchase

The trial court correctly denied defendants' motions for directed verdict or judgment n.o.v. in an action to collect a real estate commission where plaintiff and defendants had agreed that the commission would be paid by the purchaser, plaintiff succeeded in getting all the owners of the property to sign a sales contract, defendants executed the contract and paid an earnest money deposit, and defendants then elected not to purchase the property. *Davis and Davis Realty Co. v. Rodgers*, 306.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1 (NCI3d). Definition

The G.S. 20-107 crime of willful injury to or removing parts from a vehicle without the consent of the owner is not a lesser included offense of G.S. 14-56, which prohibits the breaking or entering of any motor vehicle with intent to commit a felony therein. *S. v. Carver*, 230.

§ 4 (NCI3d). Competency of Evidence

The trial court did not improperly permit the victim of a break-in to give his opinion as to who committed the crime. *S. v. Barnette*, 199.

§ 5.1 (NCI3d). Sufficiency of Evidence; Identification of Defendant as Perpetrator

Evidence that defendant was observed on the victim's front porch and that his fingerprints were found on the frame of the victim's broken kitchen window was sufficient to support defendant's conviction of felonious breaking or entering. *S. v. Barnette*, 199.

§ 5.7 (NCI3d). Sufficiency of Evidence of Breaking and Entering and Larceny Generally

A prosecution for breaking or entering a motor vehicle was not subject to dismissal on the ground the State failed to present evidence of lack of consent since lack of consent is not an element of the offense, and evidence that the car door was locked showed a lack of consent. *S. v. Carver*, 230.

CONCEALED WEAPONS

§ 1 (NCI3d). Elements of the Offense

The trial court erred by not dismissing a petition alleging that respondent was a delinquent juvenile for carrying a concealed weapon while off his own premises where the weapon in question was an ordinary pocketknife. *In re Dale B.*, 375.

CONSPIRACY

§ 2 (NCI3d). Elements of Civil Conspiracy

Plaintiff's complaint was insufficient to state a claim for civil conspiracy arising out of his discharge from employment by defendants. *Privette v. University of North Carolina*, 124.

§ 6 (NCI3d). Sufficiency of Evidence

The evidence was sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with another in the robbery with each having preassigned roles, and that he and the other person conspired to commit the robbery. *S. v. Ayudkya*, 606.

CONSTITUTIONAL LAW

§ 17 (NCI3d). Personal and Civil Rights Generally

Plaintiff's allegation that defendants, acting under color of State law, harassed and terminated plaintiff as a research technician for a lab at UNC-CH because of plaintiff's association with an out-of-favor member of the research faculty was insufficient to state a claim under 42 U.S.C. § 1983 for a violation of his right to freedom of expressive association. *Privette v. University of North Carolina*, 124.

Plaintiff's allegation that his dismissal as a research technician at UNC-CH affected his "right to seek and be considered for admission into the University's Medical School" failed to state a claim under 42 U.S.C. § 1983 based on a property interest protected by procedural due process. *Ibid.*

Assuming that plaintiff sufficiently alleged that defendants dismissed him as a research technician at UNC-CH on the basis of an unsupported charge which could wrongfully injure plaintiff's reputation so that he was entitled to a hearing after his dismissal, plaintiff's complaint was insufficient to state a claim under 42 U.S.C. § 1983 for a violation of his procedural due process rights where it contained only a conclusory allegation that the UNC Grievance Procedure was inadequate to provide sufficient redress for him *Ibid.*

§ 20.1 (NCI3d). Equal Protection; Actions Affecting Businesses and Professions

The denial of a franchise tax deduction for patronage capital to an electric membership corporation was not a violation of equal protection. *Four County Electric Membership Corp. v. Powers*, 417.

§ 24.7 (NCI3d). Service of Process on Foreign Corporations

A defendant corporation had sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction without violating due process. *ETR Corporation v. Wilson Welding Service*, 666.

§ 26 (NCI3d). Full Faith and Credit to Foreign Judgments Generally

The trial court had jurisdiction over defendant under the full faith and credit clause based on three money judgments against defendant in Florida in 1976. *Fraser v. Littlejohn*, 377.

§ 28 (NCI3d). Due Process and Equal Protection Generally in Criminal Proceedings

The trial court did not err by denying defendant tax protestor's motion to dismiss tax related charges on the grounds of selective prosecution or as attempts to suppress his right to free speech. *S. v. Davis*, 545.

CONSTITUTIONAL LAW — Continued

§ 34 (NCI3d). Double Jeopardy

The trial court erred in a prosecution for driving while impaired where defendant appeared when scheduled, requested a continuance when the prosecutor called the docket, that motion was denied, the case was called for trial shortly after 5:00 that afternoon, the charges were read and defendant pled not guilty, the prosecutor moved for a continuance because essential State witnesses were not present, the trial judge denied the motion, the District Attorney dismissed the case and immediately had new warrants issued for the same charges, defendant moved to dismiss the new charges on grounds of double jeopardy, that motion was denied and defendant was convicted, defendant appealed to superior court where his double jeopardy motion was granted, and the State appealed. *S. v. Brunson*, 347.

§ 51 (NCI3d). Speedy Trial; Delays in Arrest, Issuing Warrant, and Indictment

The trial court did not err by denying defendant's motion to dismiss charges of assault with a deadly weapon inflicting serious injury on constitutional speedy trial grounds. *S. v. Everhardt*, 1.

CONTEMPT OF COURT

§ 6.2 (NCI3d). Hearings on Orders to Show Cause; Burden of Proof; Sufficiency of Evidence

The trial court erred in not allowing plaintiffs the opportunity to argue noncompliance as a basis of a contempt proceeding where the consent judgment on which the contempt proceeding was based provided that defendants bring certain real property into full compliance with restrictive covenants. *Green v. Crane*, 654.

§ 7 (NCI3d). Punishment for Contempt

The trial court did not err in a contempt proceeding arising from a consent judgment dealing with restrictive covenants by failing to tax defendants with costs. *Green v. Crane*, 654.

CONTRACTS

§ 10 (NCI3d). Contracts Limiting Liability for Negligence

A clause in an indemnity provision in a construction contract which violated G.S. 22B-1 was severable. *International Paper Co. v. Corporex Constructors, Inc.*, 312.

Two indemnity clauses in a construction contract were not in conflict where the meaning of each clause was clear and it was reasonable to conclude that one extended the indemnity clause of the other. *Ibid.*

§ 34 (NCI3d). Actions for Interference; Sufficiency of Evidence

Summary judgment was appropriate for defendant in an action for malicious interference with a contract arising from a DMV investigation of automobile dealers. *Murray v. Justice*, 169.

CORPORATIONS

§ 1.1 (NCI3d). Disregarding Corporate Entity

A Florida corporation was the alter ego of its nonresident parent corporation and the nonresident individual defendants, and defendants were therefore sub-

CRIMINAL LAW — Continued

§ 50 (NCI3d). Expert and Opinion Testimony in General

The trial court did not abuse its discretion in a prosecution for tax related charges by failing to recognize a witness as an expert. *S. v. Davis*, 545.

§ 50.1 (NCI3d). Admissibility of Expert Opinion Testimony

A clinical psychologist's testimony that an alleged rape victim did not fake her responses to tests administered to her and did not exaggerate the symptoms of PTSD and the witness's extensive testimony on the long term effect of PTSD was admissible as expert testimony on the credibility of psychological tests and as the basis for her diagnosis of the victim. *S. v. Strickland*, 642.

§ 51.1 (NCI3d). Qualification of Experts; Showing Required; Sufficiency

The trial court did not err in qualifying a child sexual abuse counselor and a social worker as experts in child sexual abuse and in admitting their testimony. *S. v. Parks*, 589.

The trial court did not err in qualifying a witness as an expert in clinical psychology and in the specific area of behavior and treatment of sexual assault victims. *S. v. Strickland*, 642.

§ 66.16 (NCI3d). Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

A rape victim's in-court identification was based solely upon her observation of defendant at the time of the crime and was not tainted by any pretrial identification procedure. *S. v. Grimes*, 489.

§ 70 (NCI3d). Tape Recordings

The trial court did not err in the admission of tape-recorded conversations and transcripts thereof where the court conducted a voir dire and made findings of fact, and the record on appeal did not contain the tapes or the transcripts. *S. v. Carter*, 611.

§ 71 (NCI4th). Concurrent Venue

Wake and Franklin counties had concurrent venue for a charge of conspiracy to traffic in cocaine where the indictment alleged that the offense occurred in both counties, and even if an indictment for trafficking in cocaine failed to name Wake County as a county in which the offense occurred and venue was technically incorrect in Wake County, the Wake County Superior Court had jurisdiction to try the offense. *S. v. Carter*, 611.

§ 73 (NCI3d). Hearsay Testimony in General

Summaries by an undercover officer of alleged drug transactions with defendant were hearsay and inadmissible as substantive evidence. *S. v. Harper*, 36.

§ 73.2 (NCI3d). Statements not within Hearsay Rule

Statements of third persons in an officer's written notes summarizing alleged drug transactions with defendant were not objectionable as hearsay. *S. v. Harper*, 36.

The trial court did not err in a prosecution for taking indecent liberties with a minor by admitting a number of out-of-court statements made by the victim's older brother and others. *S. v. Gilbert*, 363.

CRIMINAL LAW — Continued

§ 75.7 (NCI3d). Admissibility of Confession; Requirement that Defendant Be Warned of Constitutional Rights

A trial court order suppressing statements made to officers prior to defendant's arrest for driving while impaired was erroneous. *S. v. Seagle*, 318.

§ 75.10 (NCI3d). Admissibility of Confession; Waiver of Constitutional Rights

The State's cross-examination of defendant regarding his comprehension of his Miranda rights did not violate his constitutional right to remain silent. *S. v. Dalton*, 65.

§ 86.3 (NCI3d). Impeachment of Defendant; Prior Convictions; Effect of Defendant's Answer; Further Cross-Examination of Defendant

The State's use of defendant's prior convictions was not improper because the State did not establish that the convictions were punishable by more than sixty days' confinement. *S. v. Dalton*, 65.

A witness's denial of a prior conviction on cross-examination may be contradicted by introduction of the record of the prior conviction. *Ibid.*

§ 87.1 (NCI3d). Leading Questions

The trial court did not err in allowing the State to ask leading questions of the fifteen-year-old prosecuting witness in a trial for rape and taking indecent liberties. *S. v. Dalton*, 65.

§ 89.3 (NCI3d). Corroboration of Witness; Prior Statements

Testimony which essentially corroborated statements made by the prosecutrix was properly admitted even though some of the testimony went beyond the prosecutrix's testimony. *S. v. Maxwell*, 19.

The trial court in a robbery prosecution did not err in allowing into evidence a witness's prior statement to "corroborate or impeach, whatever happens." *S. v. Ayudkya*, 606.

§ 146.2 (NCI3d). Appeal Limited to Questions Properly Presented and Argued on Appeal; Defects in Jurisdiction

Defendant's failure to make a motion to dismiss for lack of jurisdiction or improper venue waived his right to appeal the constitutionality of the statute giving a Wake County trial court subject matter jurisdiction over the charges against defendant. *S. v. Strickland*, 642.

§ 146.5 (NCI3d). Appeal from Sentence Imposed on Guilty Plea

The State's motion to dismiss as untimely defendant's appeal from a guilty plea to possession of marijuana with intent to sell or deliver was denied. *S. v. Christie*, 178.

A defendant who is charged with a traffic infraction and admits responsibility in the district court has no right to appeal for a trial de novo in superior court. *S. v. Richardson*, 508.

§ 162 NCI3d). Objections, Exceptions, and Assignments of Error to Evidence

Defendant was precluded from asserting error in the testimony of two State's witnesses which impeached a defense witness where defendant objected only to the presence of the two witnesses in the courtroom during testimony by the defense witness. *S. v. Strickland*, 642.

CRIMINAL LAW — Continued

§ 188 (NCI4th). Motions in General; Filing of Motions

The State was precluded from arguing on appeal in a prosecution for driving while impaired that defendant's motion to suppress statements made prior to his arrest was untimely or improper where the State neither objected to nor excepted to defendant's oral motion to suppress. *S. v. Seagle*, 318.

§ 224 (NCI4th). Speedy Trial; Excludable Periods of Delay; Continuance Granted

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by denying defendant's motion to dismiss under the Speedy Trial Act. *S. v. Everhardt*, 1.

§ 412 (NCI4th). Argument and Conduct of Counsel in Opening Remarks

The trial court properly denied defendant's motion for a mistrial in an arson prosecution where the prosecutor referred to a prior conviction in opening remarks but defendant did not raise the issue until after closing arguments had been made, after the court had instructed the jury, and after the jury had retired for deliberations. *S. v. Smith*, 352.

§ 536 (NCI4th). Circumstances in which Mistrial May Be Ordered; Misconduct of Persons Present at Trial at Defendant's Behest

Defendant was not entitled to a mistrial because of his own intemperate and profane outburst. *S. v. Marino*, 506.

§ 786 (NCI4th). Instructions on Duress Generally

The evidence in a prosecution for breaking or entering a motor vehicle did not require the trial court to instruct on compulsion, duress, or coercion. *S. v. Carver*, 230.

§ 813 (NCI4th). Instructions on Character Evidence Generally

The trial court's failure to instruct the jury on the character trait that defendant was a good father was not plain error. *S. v. Parks*, 589.

§ 874 (NCI4th). Requests for Additional Instructions; Particular Instructions Found not Erroneous or Prejudicial

The trial judge did not abuse his discretion in refusing to repeat instructions on burden of proof in response to a question raised by the jury during deliberations. *S. v. Harper*, 36.

§ 1068 (NCI4th). Evidence at Sentencing Hearing; Incompetent or Hearsay Evidence

The trial judge erred in permitting the district attorney to express at the sentencing hearing his opinion regarding the reputation of the boarding house where defendant lived as a place where drugs were available. *S. v. Harper*, 36.

§ 1079 (NCI4th). Sentencing; Consideration of Aggravating and Mitigating Circumstances; Discretion of Trial Court

The trial court in a prosecution for taking indecent liberties with a child did not err in finding defendant's honorable discharge from military service and his character at work as mitigating factors, finding defendant's prior convictions as aggravating factors, and imposing a sentence in excess of the presumptive term. *S. v. Dalton*, 65.

CRIMINAL LAW — Continued

§ 1227 (NCI4th). Sentencing; Mitigating Factor of Drug Addiction or Use

Evidence that defendant had a drug habit requiring him to steal in order to support the habit and that he had endocarditis did not require the trial court to find as a statutory mitigating factor that defendant was suffering from a mental or physical condition which reduced his culpability. *S. v. Marino*, 506.

§ 1347 (NCI4th). Instructions on Particular Aggravating Circumstances; Murder as Course of Conduct

There was no merit to defendant's contention that the cumulative effect of the consecutive sentences was disproportionate to his crimes. *S. v. Harper*, 36.

DAMAGES

§ 12.1 (NCI3d). Pleading Punitive Damages

Plaintiff's claim for punitive damages was properly dismissed where the underlying claims were not enforceable as stated. *Privette v. University of North Carolina*, 124.

Plaintiff's complaint was sufficient to state a claim for punitive damages based on tortious conduct by defendant insurer in failing promptly to settle a claim for damages to plaintiff's mobile home. *Smith v. Nationwide Mutual Fire Insurance Co.*, 215.

DEATH

§ 4 (NCI3d). Time within which Wrongful Death Action Must Be Instituted

The trial court did not err by granting defendant's Rule 12(b)(6) motions to dismiss a wrongful death action arising from medical malpractice. *King v. Cape Fear Mem. Hosp.*, 338.

DECLARATORY JUDGMENT ACT

§ 3 (NCI3d). Requirement of Actual Justiciable Controversy

The record showed an actual controversy between the parties as to the validity of a covenant not to compete. *Stevenson v. Parsons*, 93.

DEEDS

§ 19.3 (NCI3d). Restrictive Covenants; Real Covenants

A duly adopted declaration amendment restricting the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted as well as upon owners who bought subsequent to the amendment. *McElveen-Hunter v. Fountain Manor Assn.*, 627.

§ 20.3 (NCI3d). Restrictive Covenants in Subdivisions; Restrictions against Mobile Homes

The trial court properly granted summary judgment for plaintiffs in an action to require defendants to remove a structure from their lot in a subdivision on the grounds that the structure violated subdivision restrictive covenants against trailers or mobile homes. *Starr v. Thompson*, 369.

DESCENT AND DISTRIBUTION

§ 6 (NCI3d). Wrongful Act Causing Death as Precluding Inheritance

The trial court erred by granting summary judgment for defendants in a declaratory judgment action to determine the interest of plaintiff administrator's sons in the estates of their mother, their maternal grandparents, and their great-grandmother where their mother was alleged to have acted in concert with others to have intentionally killed or to have been culpably negligent in causing the deaths of her sons and the children were alleged to have survived their mother. *Lynch v. Newsom*, 53.

DIVORCE AND ALIMONY

§ 21.9 (NCI3d). Equitable Distribution of Marital Property

The trial court did not err by denying defendant's motion to amend his answer to a divorce complaint to assert a claim for equitable distribution where, even under the most liberal interpretation of the rules of pleadings, defendant's answer did not contain statements sufficient to put plaintiff on notice that defendant was asserting a claim for equitable distribution. *Goodwin v. Zeydel*, 670.

§ 24.4 (NCI3d). Enforcement of Child Support Orders

The trial court improperly applied equitable estoppel as a bar to child support arrearages. *Griffin v. Griffin*, 324.

§ 26.1 (NCI3d). Modification of Foreign Child Support and Custody Orders

A child support order issued by an Indiana court was entitled to full faith and credit in this state. *Lynch v. Lynch*, 601.

§ 26.4 (NCI3d). Modification of Child Support and Custody Orders where Foreign Court Has Power to Modify

The trial court erred in exercising jurisdiction in a child custody proceeding where a custody proceeding was pending in Indiana and the child had lived in that state for over six years. *Lynch v. Lynch*, 601.

§ 30 (NCI3d). Distribution of Marital Property in Divorce Action

The trial court in an equitable distribution proceeding properly failed to find as marital property money which was allegedly in a safe in the parties' house five months before they separated and properly failed to consider defendant's contention that he supported the parties' minor children for two years after the date of the separation, but the judgment is vacated where it failed to list all of the parties' properties and make appropriate findings with respect to them. *Bowman v. Bowman*, 253.

The evidence in an equitable distribution proceeding was sufficient to support the trial court's award of the marital home to defendant. *Hendricks v. Hendricks*, 462.

The trial court erred in failing to credit plaintiff with paying the entire mortgage debt on the marital home after the parties' separation. *Ibid.*

The trial court erred by including the gross fair market value of certain marital properties which had an outstanding Mastercard balance and then failing to credit plaintiff for the debt. *Ibid.*

The trial court erred in dismissing defendant's claim for equitable distribution where another district court judge had previously entered an order of absolute divorce and reserved the issue of equitable distribution for hearing by the court at a later date. *Stone v. Stone*, 633.

EASEMENTS

§ 6.1 (NCI3d). Creation of Easements by Prescription; Burden of Proof, Evidence

The absence of evidence showing the hostile character of plaintiffs' use of a pathway on defendant's land entitled defendant to judgment as a matter of law in plaintiffs' action to establish a prescriptive easement. *Johnson v. Stanley*, 72.

§ 11 (NCI3d). Termination of Easements

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of the grantor or his heirs, who retain fee title to the soil, and the record owners of lots in the subdivision, who have user rights in the easement. *Rice v. Randolph*, 112.

ELECTION OF REMEDIES

§ 4 (NCI3d). Acts Constituting Election and Effect of Election

Plaintiffs' participation in a declaratory judgment action to determine distribution pursuant to a codicil and ultimate settlement of their claim against the estate were made necessary by the actions of others and were not an election of remedies, and plaintiffs thus were free to pursue their legal malpractice claim against attorneys who represented them as defendants in a prior caveat proceeding which declared the codicil to be valid. *King v. Cranford, Whitaker & Dickens*, 245.

EMINENT DOMAIN

§ 13 (NCI3d). Actions by Owner for Compensation or Damages

Attorney fees may be awarded when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and the verdict demonstrates that the jury awarded compensation for that taking. *City of Raleigh v. Hollingsworth*, 260.

EVIDENCE

§ 33 (NCI3d). Hearsay Evidence in General; Rule of Inadmissibility

A child's statement was not admissible under the Rule 803(24) residual hearsay exception where the notice requirements of the Rule were not complied with. *In re Hayden*, 77.

§ 33.2 (NCI3d). Examples of Hearsay Testimony

A child's hearsay statement which pertained to her memory of the previous day's events and was offered solely for the purpose of proving such events was inadmissible under Rule of Evidence 803(3). *In re Hayden*, 77.

§ 50.2 (NCI3d). Testimony by Medical Experts as to Cause of Injury or Disease

The trial court properly admitted opinion testimony of the examining physician that burns on a child were not the result of an accident. *In re Hayden*, 77.

EXECUTION

§ 5 (NCI3d). Lien and Priorities

Where one creditor's lien perfection was based only on possession of the collateral, and there was no exception to the trial court's adjudication that a sheriff's

HUSBAND AND WIFE — Continued

§ 12 (NCI3d). Separation Agreements; Revocation and Rescission; Resumption of Marital Relationship

Acts of sexual intercourse between the parties at different times after they executed a separation agreement and property settlement rendered the unperformed obligations of the agreement void where G.S. 52-10.2 did not become effective until more than two years after the acts occurred. *Moser v. Moser*, 273.

INSANE PERSONS

§ 2.2 (NCI3d). Inquisition of Lunacy; Appointment of Guardian

The trial court in an action for divorce and equitable distribution lacked jurisdiction to make a determination with respect to defendant's competency. *Culton v. Culton*, 620.

INSURANCE

§ 150 (NCI3d). Professional Liability Insurance

Summary judgment was properly granted for plaintiff in an action to recover damages for defendant's refusal to provide liability coverage and legal defense under a general liability insurance policy which contained an exclusion for the rendering of professional services. *Duke University v. St. Paul Fire and Marine Ins. Co.*, 635.

JAILS AND JAILERS

§ 1 (NCI3d). Generally

A county could not avoid its statutory obligation to provide and pay for emergency medical care for a prisoner confined in the county jail by releasing the prisoner while he was unconscious and in need of emergency care. *University of North Carolina v. Hill*, 673.

JUDGMENTS

§ 36.1 (NCI3d). Conclusiveness of Judgments as Estoppel; Parties Concluded; Persons Regarded as Parties

An action to recover for birth injuries by a minor through his guardian, his mother, was not barred by res judicata or collateral estoppel in that an earlier action by the mother ended with the verdict of no negligence on the part of defendants. *York v. Northern Hospital District*, 456.

§ 37.5 (NCI3d). Preclusion or Relitigation of Judgments in Proceedings Involving Real Property Rights

Judgment entered in plaintiffs' prior trespass action against defendants based on title to land acquired by warranty deeds in 1947 and 1948 or title by adverse possession was res judicata in plaintiffs' second trespass action based on title to the same land acquired by quitclaim deeds in 1984 and 1985. *Ballance v. Dunn*, 286.

KIDNAPPING

§ 2 (NCI3d). Punishment

A defendant cannot be convicted of both first degree rape and first degree kidnapping when the rape is used to prove an element of the kidnapping, and the trial court corrected this error by arresting judgment on the first degree kidnapping conviction and entering judgment for second degree kidnapping. *S. v. Grimes*, 489.

LABORERS' AND MATERIALMEN'S LIENS

§ 9 (NCI3d). Priorities

Plaintiff's asserted lien for work performed to enforce protective covenants was not entitled to priority over defendant's deed of trust lien which was recorded a year before plaintiff first furnished labor or materials. *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 474.

LANDLORD AND TENANT

§ 5 (NCI3d). Lease of Personal Property

Plaintiff lessees were obligated to make lease payments for cleaning equipment even though the lessor's supplier had not delivered the leased equipment to them. *Howell v. Piedmont Lease and Rental*, 676.

LARCENY

§ 7.2 (NCI3d). Sufficiency of Evidence; Identity of Property Stolen; Value

The trial court in a felonious larceny case did not err in failing to submit the lesser included offense of misdemeanor larceny where the testimony by the owner as to the value of stolen tools was based upon his knowledge of prices paid for used tools in the construction industry. *S. v. Haire*, 209.

LIMITATION OF ACTIONS

§ 4 (NCI3d). Accrual of Right of Action and Time from which Statute Begins to Run in General

A claim for unfair trade practices arising from the termination of a contract for pharmaceutical supplies between plaintiff and defendant was most closely analogous to an action for breach of contract and accrued on the day the contract terminated. *Ring Drug Co. v. Carolina Medicorp Enterprises*, 277.

§ 7 (NCI3d). Accrual of Action to Declare Constructive Trust

The three-year limitation of G.S. 1-52 rather than the ten-year limitation of G.S. 1-56 applied to plaintiff's action to establish a constructive trust based on defendants' unjust enrichment from fraud or mistake in the sale of common stock. *J. Lee Peeler & Co. v. Makepeace*, 118.

§ 12.2 (NCI3d). Commencement of Proceedings Generally; New Action after Failure of Original Suit; Original Action Filed in another State or in Federal Court

The one-year savings provision of Rule 41(a) after a voluntary dismissal without prejudice applies where the original suit was brought in a federal court in North Carolina and dismissal was granted pursuant to N.C. Rule 41(a). *Bockweg v. Anderson*, 660.

LIMITATION OF ACTIONS — Continued

§ 12.3 (NCI3d). Commencement of Proceedings; Amendment of Process and New Parties

The trial court correctly ruled in an action for unfair trade practices arising from the termination of a contract to supply pharmaceuticals that relation back occurred as to one defendant but not to another. *Ring Drug Co. v. Carolina Medicorp Enterprises*, 277.

MALICIOUS PROSECUTION

§ 13 (NCI3d). Sufficiency of Evidence

Summary judgment was properly granted for defendant in a malicious prosecution action arising from a Department of Motor Vehicles investigation into the violations of licensing laws. *Murray v. Justice*, 169.

MASTER AND SERVANT

§ 10 (NCI3d). Duration and Termination of Contract of Employment

An at-will employee had no property interest in continued employment cognizable under the due process clause and thus was not entitled to a hearing before being discharged. *Privette v. University of North Carolina*, 124.

§ 10.2 (NCI3d). Actions for Wrongful Discharge

Plaintiff's allegation that he was discharged without just cause was insufficient to state a claim against UNC-CH for breach of an employment contract where plaintiff failed to allege that his employment was for a definite period. *Privette v. University of North Carolina*, 124.

Plaintiff's allegation that UNC-CH discharged him because he associated with an out-of-favor member of the UNC-CH research faculty failed to state a claim for wrongful discharge of an employee at will. *Ibid.*

§ 11.1 (NCI3d). Covenants not to Compete

Summary judgment for plaintiff declaring invalid a covenant not to compete was improper. *Stevenson v. Parson*, 93.

A covenant not to compete was unenforceable because its territory was unnecessarily broad. *Triangle Leasing Co. v. McMahon*, 140.

A time restriction of two years in a covenant not to compete was unenforceable in light of an overbroad territorial restraint. *Ibid.*

A covenant not to compete was not enforceable where the focus of the restraint was not on the employee's competition for the company's customers but on the employee's association with another company which may be linked with plaintiff company's competitors by any slender thread. *Electrical South, Inc. v. Lewis*, 160.

Defendant had no right to appeal a preliminary injunction prohibiting him from participating in any employment which competed with plaintiff's business in certain cities and counties. *Automated Data Systems v. Myers*, 624.

§ 13 (NCI3d). Interference with Contract of Employment by Third Persons

Plaintiff's complaint was insufficient to state a claim against the individual defendants for tortious interference with plaintiff's contract of employment as a research technician for the lab at the UNC-CH Center for Alcoholic Studies where it showed on its face that both defendants had a legitimate professional inter-

est in plaintiff's performance of his duties and thus had a proper motive for their actions. *Privette v. University of North Carolina*, 124.

§ 67 (NCI3d). Workers' Compensation; Heart Failure

The Industrial Commission erred by concluding that decedent's fatal heart attack was not the result of an injury by accident where decedent was a truck driver engaged in unloading a truck. *Cody v. Snider Lumber Co.*, 293.

§ 68 (NCI3d). Workers' Compensation; Occupational Diseases

The Industrial Commission did not err in a workers' compensation action arising from a police officer's suicide by finding that factors other than deceased's occupation produced his depression and ultimate death; the Industrial Commission is not limited to the consideration of expert testimony in cases involving complex medical issues. *Harvey v. Raleigh Police Dept.*, 28.

§ 77.1 (NCI3d). Workers' Compensation; Modification of Award; Grounds; Change of Conditions or Circumstances

The Industrial Commission properly found in a workers' compensation action that plaintiff was totally permanently disabled where two physicians who first observed plaintiff after an initial award testified that her physical condition was worse and her original treating physician testified that she was completely disabled at both times. *Styron v. Duke University Hospital*, 356.

§ 80 (NCI3d). Workers' Compensation; Rates and Regulations of Compensation Insurers

The Commissioner of Insurance was not required to take into account the volatility of unearned premium, loss, and loss expense reserve funds in setting workers' compensation rates, but the Commissioner erred in relying on the Commission's expert witness who failed to recognize that a reasonable margin for deviations and dividends must be calculated into the underwriting profit provision, and the Commissioner must clarify the evidence upon which he relied to reach a 19.5% provision for production cost and general expenses. *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 220.

§ 81 (NCI3d). Workers' Compensation; Construction of Policy as to Coverage

An employer's workers' compensation carrier was estopped to deny coverage for plaintiff although plaintiff was an independent contractor in performing carpentry work on a house the employer was building. *Carroll v. Daniels and Daniels Construction Co.*, 649.

§ 89.4 (NCI3d). Workers' Compensation; Distribution of Recovery of Damages at Common Law

The Industrial Commission erred in allowing defendant employer a credit against workers' compensation for asbestosis for an amount recovered by plaintiff in a third party action against several asbestos manufacturers and suppliers where the employer had not previously made any payment to plaintiff. *Davis v. Weyerhaeuser Co.*, 584.

§ 99 (NCI3d). Workers' Compensation; Appeal and Review of Award; Costs and Attorneys' Fees

The Industrial Commission did not abuse its discretion in denying attorney fees to plaintiff in a workers' compensation proceeding. *Davis v. Weyerhaeuser Co.*, 584.

MASTER AND SERVANT — Continued

§ 108.1 (NCI3d). Right to Unemployment Compensation; Effect of Misconduct

A former state trooper's violation of a departmental rule by selling an automobile and car rack to a person whom he knew to be a convicted drug dealer and by associating with other known felons did not constitute substantial fault which would disqualify him from receiving unemployment benefits absent his repetition of the violation after a warning. *In re Dept. of Crime Control and Public Safety v. Featherston*, 102.

MORTGAGES AND DEEDS OF TRUST

§ 12.1 (NCI3d). Powers and Duties of Trustees

The trial court erred in a contempt proceeding to enforce a consent judgment relating to restrictive covenants by finding that defendants were in compliance with the consent judgment where the agreement setting out the restrictive covenants originally did not include the six acre tract which was the subject of the original complaint, the omission of the six acre tract was rectified by rerecording the agreement, and the addition of a phrase to the description was not the correction of an obvious error. *Green v. Crane*, 654.

MUNICIPAL CORPORATIONS

§ 30.2 (NCI3d). Zoning Ordinances; Extraterritoriality

Plaintiff town's extraterritorial zoning ordinance was void because of plaintiff's failure to comply with statutory notice requirements and to record a boundary description. *Town of Swansboro v. Odum*, 115.

§ 30.13 (NCI3d). Zoning Ordinances; Billboards and Outdoor Advertising Signs

The fact that defendant did not adopt a countywide zoning ordinance did not preclude it from regulating outdoor advertising under the statute conferring general police power upon cities and towns. *Summey Outdoor Advertising v. County of Henderson*, 533.

A sign control ordinance involving an off-premises/on-premise classification provided a constitutionally valid basis for regulation of outdoor advertising signs, and the ordinance did not violate due process because the objective stated in the ordinance was within the scope of the police power. *Ibid.*

Amortization provisions in a sign control ordinance were valid and did not constitute a taking of plaintiff's property without compensation. *Ibid.*

NARCOTICS

§ 1.3 (NCI3d). Elements of Offenses

Dismissal of sale and delivery charges would not require dismissal of a charge of possession with intent to sell or deliver. *S. v. Wall*, 45.

Evidence that defendant was backing his truck containing cocaine out of his driveway when officers stopped him was sufficient to support defendant's conviction of felonious transportation of more than 28 grams of cocaine. *S. v. Outlaw*, 192.

§ 2 (NCI3d). Indictment

There was a fatal variance between an indictment alleging sale and delivery of cocaine to an undercover officer and evidence showing sale and delivery of cocaine to another person. *S. v. Wall*, 45.

NARCOTICS — Continued

§ 4 (NCI3d). Sufficiency of Evidence

The State's evidence was sufficient to support defendant's conviction of felonious manufacture of cocaine where packaged cocaine was found in a toolbox in a truck defendant was backing out of his driveway, and packaging materials were found in defendant's residence and garage. *S. v. Outlaw*, 192.

The evidence supported an inference that scales found in the trunk of defendant's car were drug paraphernalia so that the trial court properly submitted the issue of defendant's possession of drug paraphernalia to the jury. *S. v. Jones*, 389.

§ 4.5 (NCI3d). Instructions

The trial court sufficiently informed the jury of their options in finding defendant guilty or not guilty of each of three narcotics offenses. *S. v. Jones*, 389.

§ 4.6 (NCI3d). Instructions as to Possession

Reversal of defendant's conviction was not required where the court instructed on the possible verdict of guilty of possession of cocaine with intent to sell or deliver and the indictment charged possession with intent to sell and deliver. *S. v. Wall*, 45.

NEGLIGENCE

§ 29.2 (NCI3d). Sufficiency of Evidence of Negligence; Duty of Care; Warnings

Summary judgment was improperly granted for defendant in a wrongful death action arising from the collapse of a wall during construction of a log home kit. *Tompkins v. Log Systems, Inc.*, 333.

PARENT AND CHILD

§ 2.3 (NCI3d). Child Neglect

Social workers were properly permitted to testify concerning statements by respondent's wife that respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior. *In re Hayden*, 77.

A child's hearsay statement which pertained to her memory of the previous day's events and was offered solely for the purpose of proving such events was inadmissible under Rule of Evidence 803(3). *Ibid.*

The trial court properly admitted opinion testimony of the examining physician that burns on a child were not the result of an accident. *Ibid.*

The court's finding that a child was abused and neglected was supported by evidence that the child suffered multiple burns while in respondent's sole care and that the burns were not accidental. *Ibid.*

§ 10 (NCI3d). Uniform Reciprocal Enforcement of Support Act

Although the name of the mother was improperly substituted for that of the Virginia District Division of Child Support Enforcement when the action was docketed, it was not necessary to dismiss the appeal because the action was prosecuted on behalf of the real party in interest. *Reynolds v. Motley*, 299.

The Virginia District Division of Child Support Enforcement had standing to bring a URESA action even though it did not have custody of the children. *Ibid.*

RAPE AND ALLIED OFFENSES — Continued

§ 4.1 (NCI3d). Evidence of other Acts and Crimes

Evidence of defendant's frequent nudity, frequent fondling of himself, and adulterous affair was inadmissible to show plan or scheme in a prosecution for statutory rape and taking indecent liberties with a minor. *S. v. Maxwell*, 19.

§ 5 (NCI3d). Sufficiency of Evidence

The victim's testimony that defendant had sexual intercourse with her was sufficient to allow the jury to infer that defendant had vaginal intercourse with the victim, and the victim's testimony that defendant threatened her with an open knife which she saw was sufficient to establish that defendant employed or displayed a dangerous or deadly weapon. *S. v. Grimes*, 489.

There was sufficient evidence of threats and displays of force by defendant for the purpose of compelling the victim's submission to sexual intercourse to constitute constructive force within the meaning of G.S. § 14-27.3. *S. v. Parks*, 589.

§ 6.1 (NCI3d). Instructions on Lesser Degrees of Crime

The evidence in a first degree rape case did not require the trial court to submit the lesser included offense of second degree rape. *S. v. Grimes*, 489.

RETIREMENT SYSTEMS

§ 2 (NCI3d). Creation, Nature, and Existence

Defendant city's decision to terminate the Asheville Policemen's Pension and Disability Fund in favor of participation in the State Retirement System was sanctioned by statute, and plaintiffs had no right to an injunction to prevent the transfer of assets of the Fund into the State System. *Mathews v. Bd. of Trustees of Asheville Policemen's Fund*, 186.

RULES OF CIVIL PROCEDURE

§ 12 (NCI3d). Defenses and Objections

The trial court was not required to convert defendants' Rule 12(b)(6) motion to dismiss into one for summary judgment where the court considered only the complaint, memoranda and arguments of counsel. *Privette v. University of North Carolina*, 124.

§ 12.1 (NCI3d). Defenses and Objections; When and How Presented

The trial court did not erroneously refuse to consider several affidavits offered by plaintiff in her response to defendants' motions to dismiss. *King v. Cape Fear Mem. Hosp.*, 338.

§ 41.1 (NCI3d). Voluntary Dismissal

The trial judge in a wrongful death action arising from the collapse of a log home kit was not foreclosed from considering defendant's summary judgment motion where another judge had denied defendant's summary judgment motion in the initial action, plaintiff took a voluntary dismissal without prejudice of that action, and plaintiff refiled his claim within the one-year time limit. *Tompkins v. Log Systems, Inc.*, 333.

The one-year savings provision of Rule 41(a) after a voluntary dismissal without prejudice applied where the original suit was brought in a federal court in North

Carolina and dismissal was granted pursuant to N.C. Rule 41(a). *Bockweg v. Anderson*, 660.

§ 60.1 (NCI3d). Relief from Judgment or Order; Timeliness of Motion; Notice

The trial court properly denied defendants' Rule 60(b) motion to set aside a judgment against them on the ground they relied on their Pennsylvania attorney to obtain counsel to represent them in this state but that he failed to do so where their motion was made more than one year after entry of the judgment. *Bruton v. Sea Captain Properties*, 485.

§ 60.2 (NCI3d). Grounds for Relief from Judgment or Order

The trial court properly refused to set aside an order granting summary judgment for plaintiff where defendants failed to show that they were prejudiced by their attorney's failure to appear at the summary judgment hearing and failed to show a meritorious defense. *PYA/Monarch, Inc. v. Ray Lackey Enterprises*, 225.

SALES

§ 22.2 (NCI3d). Action for Personal Injuries Based upon Defective Goods; Sufficiency of Evidence

In an action to recover for injuries received by plaintiff while operating a cardboard box baler designed and manufactured by defendant, plaintiff was not contributorily negligent as a matter of law under G.S. 99B-4(1) in failing to obey a warning attached to the baler to keep his hands clear of the machine while it was in operation; nor did plaintiff fail to exercise reasonable care under the circumstances in violation of G.S. 99B-4(3) as a matter of law when he reached into the baler to retrieve a knife while the platen was descending. *Smith v. Selco Products, Inc.*, 151.

SCHOOLS

§ 4.1 (NCI3d). Board of Education; Powers and Duties in General

A school principal's alleged assaults on a student were not imputed to defendant school board. *Medlin v. Bass*, 410.

§ 12.1 (NCI3d). Superintendent

The trial court properly entered summary judgment for a superintendent and an assistant superintendent of schools in plaintiff's action based on negligent investigation, hiring, and supervision of a principal who allegedly assaulted a student. *Medlin v. Bass*, 410.

§ 13 (NCI3d). Principals and Teachers

The trial court properly granted summary judgment for defendant truant officer on plaintiff's claim of negligence in performance of his duty to investigate a child's truancy problems and on plaintiff's claim of intentional infliction of emotional distress by filing a juvenile petition against the child because of her truancy problems. *Medlin v. Bass*, 410.

SEARCHES AND SEIZURES

§ 1 (NCI3d). What Constitutes Search or Seizure; Scope of Protection Generally

The trial court did not err in the prosecution of a tax protestor by denying his motion to suppress wage and exemption information obtained from his former employer pursuant to an administrative summons. *S. v. Davis*, 545.

§ 3 (NCI3d). Searches at Particular Places

Defendant was not seized within the meaning of the Fourth Amendment when officers boarded a bus on which he was a passenger or when they began questioning defendant. *S. v. Christie*, 178.

§ 8 (NCI3d). Search and Seizure Incident to Warrantless Arrest

An officer's entry into defendant's motel room and his warrantless arrest of defendant for robbery and kidnapping were based upon probable cause and exigent circumstances, and property was lawfully seized pursuant to a protective search and as an incident to a lawful arrest. *S. v. Smith*, 235.

§ 12 (NCI3d). Stop and Frisk Procedures

An officer's stop of the car in which defendant was a passenger to investigate the driver's impairment was lawful, and the officer did not exceed the permissible scope of the initial stop because his investigation extended beyond his suspicion of the driver's impairment. *S. v. Jones*, 389.

§ 18 (NCI3d). Consent to Search; Consent Given by Owner of Vehicle

Where defendant passenger gave the trooper who stopped his car for suspicion of impaired driving permission to search the entire contents of his suitcase, the trooper had defendant's consent to open a package found in the suitcase, and drugs found in the package were properly admitted into evidence. *S. v. Jones*, 389.

§ 26 (NCI3d). Application for Warrant; Necessity and Sufficiency of Showing Probable Cause; Cases where Evidence Is Insufficient; Information from Informers

An affidavit did not provide a substantial basis for a finding of probable cause for issuance of a warrant to search defendants' home for narcotics. *S. v. Riggs*, 595.

§ 43 (NCI3d). Motions to Suppress Evidence

Defendant waived his right to contest on appeal the admission of evidence on statutory or constitutional grounds where he failed to make a timely motion to suppress in accordance with G.S. § 15A-977. *S. v. Golden*, 249.

TAXATION

§ 22.1 (NCI3d). Exemption for Property of Charitable Institutions; Particular Properties and Uses

The Property Tax Commission erred in concluding that an outpatient surgical center was not a hospital and that it was not operated exclusively for a charitable purpose so as to exempt its property from ad valorem taxes. *In re Appeal of Foundation Health Systems Corp.*, 571.

§ 26.1 (NCI3d). Franchise and License Taxes; Particular Enterprises

The superior court correctly granted summary judgment for defendant Secretary of Revenue in an action for a refund of franchise taxes. *Four County Electric Membership Corp. v. Powers*, 417.

TAXATION — Continued

§ 28 (NCI3d). Individual Income Tax

The trial court did not err by failing to dismiss charges of tax evasion on the ground that the State did not prove that defendant owed taxes for the years in question or by failing to instruct the jury that the State must show that a tax is due. *S. v. Davis*, 545.

The trial court did not err in the prosecution of a tax protestor by not instructing the jury that defendant's subjective good faith belief that he did not owe the taxes was a defense. *Ibid.*

§ 28.5 (NCI3d). Assessment of Additional Individual Income Tax

The trial court did not err by denying defendant's motion to dismiss tax related charges based upon the State's failure to give notice of assessment of taxes. *S. v. Davis*, 545.

§ 29 (NCI3d). Corporate Income Tax

The Department of Revenue improperly required a manufacturer to pay interest on additional State income tax for the year 1983 which it paid to the Department in 1985 after an appellate court ruled that county property tax assessments against the manufacturer were invalid and the manufacturer recomputed the income tax credit previously taken for the property taxes. *In re Assessment Against Reynolds Tobacco Co.*, 267.

TRESPASS

§ 2 (NCI3d). Forcible Trespass and Trespass to the Person

Summary judgment was properly granted for defendant in an action for intentional infliction of emotional distress arising from a DMV investigation of automobile dealers. *Murray v. Justice*, 169.

The trial court did not err by granting defendants' motion for a Rule 12(b)(6) dismissal of an action for intentional infliction of mental distress arising from medical malpractice. *King v. Cape Fear Mem. Hosp.*, 338.

TRIAL

§ 52.1 (NCI3d). Setting Aside Verdict for Excessive or Inadequate Award; Particular Cases

The trial court erred in failing to set aside as inadequate compensatory damages of $4,500 awarded plaintiff in an action to recover for injuries sustained in an automobile accident. *Marsh v. Trotman*, 578.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair Trade Practices in General

The trial court did not err by entering summary judgment as to some defendants in an action for unfair trade practices arising from the termination of a contract for pharmaceutical supplies. *Ring Drug Co. v. Carolina Medicorp Enterprises*, 277.

The statute of limitations did not begin to run until the date of actual notice of a violation to plaintiff by the FCC in an action for unfair trade practices arising from the termination of plaintiff's FCC license and electronic paging business. *Nash v. Motorola Communications and Electronics*, 329.

UNFAIR COMPETITION — Continued

The trial court erred by granting defendants' motion for a Rule 12(b)(6) dismissal in an action arising from the purchase and sale of a house by a pastor. *Adams v. Moore*, 359.

UNIFORM COMMERCIAL CODE

§ 46 (NCI3d). Default and Enforcement of Security Interest; Public Sale of Collateral

A lender who repossesses a car and transfers it to a dealer under a repurchase agreement is not liable for the dealer's failure to sell the car within ninety days of repossession as required by statute. *Brooks v. Wachovia Bank & Trust Co.*, 89.

WATERS AND WATERCOURSES

§ 7 (NCI3d). Marsh and Tidelands

The evidence supported a finding that petitioner's unlawful filling of estuarine waters with sediment laden water for nineteen days after notification that it was in violation of the Coastal Area Management Act constituted a willful violation of the Act. *In re Appeal of Coastal Resources Commission Decision*, 468.

WILLS

§ 28.3 (NCI3d). Intention of Testator Generally

Testator's devise to his wife of "my residence at 2615 Cooleeme Street" was latently ambiguous where it was not clear whether testator intended to include an adjacent vacant lot as a part of his residence, and the court erred in excluding defendant's affidavit that testator made statements that he considered the lots separate properties. *Britt v. Upchurch*, 257.

WITNESSES

§ 1.2 (NCI3d). Competency of Children as Witnesses

There was no prejudicial error in a prosecution for taking indecent liberties with a minor where the trial judge allowed the six-year-old victim to testify without a voir dire to determine competency. *S. v. Gilbert*, 363.

WORD AND PHRASE INDEX

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