NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 97

16 JANUARY 1990

20 MARCH 1990

RALEIGH
1990

CITE THIS VOLUME

97 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

R. A. HEDRICK

Judges

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

Retired Judges

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

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

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

Second Division

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

Third Division

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

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

SPECIAL JUDGES

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

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
JOHN R. FRIDAY	Lincolnton

DISTRICT	JUDGES	ADDRESS
	D. MARSH MCLELLAND	Graham
	EDWARD K. WASHINGTON	High Point
	L. BRADFORD TILLERY	Wilmington
	ROBERT A. COLLIER, JR.	Statesville
	THOMAS H. LEE	Durham

1. Appointed 18 June 1990 to replace W. Terry Sherrill who resigned 19 March 1990.

DISTRICT COURT DIVISION

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

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

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

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

1. Appointed 29 June 1990.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General
JOHN D. SIMMONS III

Deputy Attorney General for Policy and Planning
ALAN D. BRIGGS

Deputy Attorney General for Training and Standards
PHILLIP J. LYONS

Chief Deputy Attorney General
ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

H. AL COLE, JR.
JAMES J. COMAN
ANN REED DUNN
EUGENE A. SMITH
EDWIN M. SPEAS, JR.
REGINALD L. WATKINS

Special Deputy Attorneys General

ISAAC T. AVERY III
DAVID R. BLACKWELL
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
STEVEN F. BRYANT
ELISHA H. BUNTING, JR.
JOAN H. BYERS
LUCIEN CAPONE III
JOHN R. CORNE
T. BUIE COSTEN
FRANCIS W. CRAWLEY
JAMES P. ERWIN, JR.
WILLIAM N. FARRELL, JR.
JANE P. GRAY
JAMES C. GULICK
NORMA S. HARRELL
WILLIAM P. HART
RALF F. HASKELL
CHARLES M. HENSEY
ALAN S. HIRSCH
I. B. HUDSON, JR.
J. ALLEN JERNIGAN
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
BARRY S. MCNEILL
GAYL M. MANTHEI
THOMAS R. MILLER
CHARLES J. MURRAY
DAVID M. PARKER
JAMES B. RICHMOND
HENRY T. ROSSER
JACOB L. SAFRON
JO ANNE SANFORD
TIARE B. SMILEY
JAMES PEELER SMITH
RALPH B. STRICKLAND, JR.
PHILIP A. TELFER
JAMES M. WALLACE, JR.
ROBERT G. WEBB
JAMES A. WELLONS
THOMAS J. ZIKO

Assistant Attorneys General

ARCHIE W. ANDERS
VALERIE L. BATEMAN
ROBERT J. BLUM
WILLIAM H. BORDEN
WILLIAM F. BRILEY
MABEL Y. BULLOCK
KATHRYN J. COOPER
KIMBERLY L. CRAMER
LAURA E. CRUMPLER
CLARENCE J. DELFORGE III
JANE T. FRIEDENSEN
DEBRA K. GILCHRIST
ROY A. GILES, JR.
MICHAEL D. GORDON
L. DARLENE GRAHAM
JEFFREY P. GRAY
RICHARD L. GRIFFIN
P. BLY HALL
JENNIE J. HAYMAN
EDMUND B. HAYWOOD
HOWARD E. HILL
CHARLES H. HOBGOOD
DAVID F. HOKE
DORIS A. HOLTON
LAVEE H. JACKSON
DOUGLAS A. JOHNSTON
LORINZO L. JOYNER
GRAYSON G. KELLEY
DAVID N. KIRKMAN
DONALD W. LATON
M. JILL LEDFORD
PHILIP A. LEHMAN
FLOYD M. LEWIS
KAREN E. LONG
ELIZABETH G. MCCRODDEN
J. BRUCE MCKINNEY
RODNEY S. MADDOX
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINA M. MALETTO
THOMAS L. MALLONEE, JR.
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
D. SIGGSBEE MILLER
DAVID R. MINGES
VICTOR H. E. MORGAN, JR.
LINDA A. MORRIS
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
PATRICIA F. PADGETT
J. MARK PAYNE
ROBIN P. PENDERGRAFT
MEG S. PHIPPS
NEWTON G. PRITCHETT, JR.
WILLIAM B. RAY
GRAYSON L. REEVES, JR.
JULIA F. RENFROW
NANCY E. SCOTT
ELLEN B. SCOUTEN
BARBARA A. SHAW
ROBIN W. SMITH
T. BYRON SMITH
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
KIP D. STURGIS
SUEANNA P. SUMPTER
W. DALE TALBERT
SYLVIA H. THIBAUT
JANE R. THOMPSON
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN C. WALDRUP
MARTHA K. WALSTON
JOHN H. WATTERS
TERESA L. WHITE
THOMAS B. WOOD
THOMAS D. ZWEIGART

DISTRICT ATTORNEYS

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

PUBLIC DEFENDERS

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

CASES REPORTED WITHOUT PUBLISHED OPINION

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

KWAN-SA YOU, PLAINTIFF v. CHARLES R. ROE, SAMUEL L. KATZ, DOROTHY A. BYRD, CORINNE A. HOUPT, JEFFREY L. HOUPT, ALAN STOUDEMIRE AND DUKE UNIVERSITY, DEFENDANTS

No. 8914SC316

(Filed 16 January 1990)

1. **Appeal and Error § 6.2 (NCI3d) — partial summary judgment — substantial right affected — appealable**

Entry of summary judgment on all but three of plaintiff's claims in an action arising from the termination of his employment and his involuntary commitment affected a substantial right and the orders were therefore appealable prior to the final adjudication of the remaining claims.

Am Jur 2d, Appeal and Error § 104.

2. **Appeal and Error § 6.2 (NCI3d) — discovery orders — interlocutory**

Orders regarding discovery were interlocutory, plaintiff conceded that appropriate notice had not been given and that the issues were not ripe for appeal, and their merits were not discussed by the Court of Appeals.

Am Jur 2d, Appeal and Error §§ 79, 80.

3. Contracts § 27.2 (NCI3d) — termination of employment — breach of contract — summary judgment for defendant proper

Summary judgment was properly granted in favor of defendant Duke University on plaintiff's breach of contract claim arising from the denial of his access to laboratory space in a specific building where laboratory space in a specific area was not a term of plaintiff's contract.

Am Jur 2d, Master and Servant §§ 27, 43, 49.

4. Contracts § 34 (NCI3d) — termination of employment — malicious interference with contract — summary judgment for defendant proper

Summary judgment was properly granted in favor of defendant Roe on a claim for malicious interference with contract arising from the termination of plaintiff's employment where plaintiff was an assistant professor of pediatrics in the Pediatric Metabolism Laboratory at Duke University; defendant Roe, as director of the Pediatric Metabolism Laboratory, recommended that plaintiff be terminated; and, although the record is replete with allegations of defendant Roe's motives, there is no evidence that defendant's actions were outside the scope of his authority as Director of the Pediatric Metabolism Laboratory and therefore were not legally malicious.

Am Jur 2d, Master and Servant §§ 27, 43, 49.

5. Libel and Slander § 16 (NCI3d) — termination of employment — allegations of moral turpitude — summary judgment for defendants

Summary judgment was properly granted for defendants in a slander action arising from the termination of plaintiff's employment and from his involuntary commitment where the record showed that the statements made by defendants were true.

Am Jur 2d, Libel and Slander §§ 201, 266, 279, 322, 323, 398.

6. Libel and Slander § 16 (NCI3d) — employment termination letter — libel — qualified privilege — good faith

Summary judgment should not have been granted for defendant Roe on a claim for libel per se arising from the termination of plaintiff's employment where plaintiff raised genuine issues of fact regarding the defense of qualified privilege and

defendant's good faith. A statement libelous per se raises the presumption of malice, which may be rebutted by qualified privilege; plaintiff must then prove actual malice, which may be proven by evidence of ill-will or personal hostility, or by showing that declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity. The evidence here was sufficient to raise a genuine issue of material fact as to whether defendant Roe's statements were made without good faith or probable cause and therefore constituted actual malice.

Am Jur 2d, Libel and Slander §§ 201, 266, 279, 322, 323, 398.

7. Libel and Slander § 16 (NCI3d)— employment termination letter—liability of university under respondeat superior—summary judgment for defendant—improper

Summary judgment should not have been granted for defendant Duke University in a libel action arising from an employment termination letter where plaintiff alleged that Duke University was responsible under the theory of respondeat superior. There was an issue of fact as to whether the author of the letter, defendant Roe, was acting in furtherance of Duke University and for purposes of accomplishing the duties of his employment when he wrote the termination letter.

Am Jur 2d, Libel and Slander §§ 201, 266, 279, 322, 323, 398.

8. Rules of Civil Procedure § 15 (NCI3d)— medical malpractice against hospital—amendment of complaint—relation back

The trial court erred by granting summary judgment in favor of defendant Duke University on the ground of the statute of limitations on a claim for medical malpractice arising from plaintiff's involuntary commitment where plaintiff had filed an amended complaint, there were no contradictory allegations in the amended complaint, and the allegations in the amended complaint were based on the same transaction or occurrence (defendant's involuntary commitment of plaintiff) as the original complaint. N.C.G.S. § 1A-1, Rule 15(c).

Am Jur 2d, Hospitals and Asylums § 38; Pleadings §§ 320, 337.

9. False Imprisonment § 2.1 (NCI3d) — involuntary commitment — false imprisonment — summary judgment for Duke University improper

The trial court erred by granting summary judgment in favor of Duke University on the issue of false imprisonment arising from plaintiff's involuntary commitment where Duke University admitted that its security officers, acting in the course and scope of their employment, escorted plaintiff to Meyer Ward, the psychiatric wing of Duke University Hospital, plaintiff asserted that he went against his will, and there was evidence that no magistrate had signed a commitment order. There was a genuine issue of material fact as to whether plaintiff was falsely imprisoned by the acts of the officers.

Am Jur 2d, False Imprisonment §§ 10, 51, 56, 130.

10. Malicious Prosecution § 13.2 (NCI3d) — involuntary commitment — probable cause — summary judgment for defendant proper

Summary judgment was properly granted for defendant Stoudemire on a malicious prosecution claim arising from plaintiff's involuntary commitment where defendant Stoudemire exercised his professional judgment in executing the petition for commitment based on the information brought to his attention by other defendants in this case and his perceptions of plaintiff after two interviews. There were no facts to support plaintiff's claim that Dr. Stoudemire acted without probable cause.

Am Jur 2d, Malicious Prosecution §§ 71, 72.

11. Process § 19 (NCI3d) — abuse of process — involuntary commitment — summary judgment for defendant proper

The trial court properly granted summary judgment for defendant Dr. Stoudemire in a claim for abuse of process arising from plaintiff's involuntary commitment where plaintiff failed to raise an issue of fact regarding ulterior motive or an act in the use of process that would be the basis of a claim.

Am Jur 2d, Abuse of Process §§ 4, 12, 22.

Judge GREENE concurs in the result.

APPEAL by plaintiff from orders entered 30 November 1984 by *Judge Thomas H. Lee*, 5 February 1986 by *Judge D. B. Herring, Jr.*, 21 September 1988 by *Judge Anthony M. Brannon*, and 20 September 1988 and 11 October 1988 by *Judge Henry W. Hight, Jr.*, in DURHAM County Superior Court. Heard in the Court of Appeals 13 October 1989.

This is an action in tort arising out of plaintiff's termination from employment and his involuntary commitment. The following facts do not appear to be disputed. In 1977 plaintiff began working as assistant professor of pediatrics in the Pediatric Metabolism Laboratory at Duke University. Plaintiff had been hired for the position by Dr. Charles R. Roe, director of the laboratory and one of the defendants here. On 24 May 1982 defendant Roe sent a letter to plaintiff purporting to dismiss him as of 1 April 1983; a copy of this letter was sent to Dr. Katz, Chairman of the Department of Pediatrics. Pursuant to an administrative appeal plaintiff's employment was extended until 1 October 1983.

Plaintiff alleges that in the interim several meetings and discussions about plaintiff took place with and among the various defendants. On 3 September 1982 plaintiff met with Dr. Roe to discuss the letter of termination. Defendant Byrd, Administrative Assistant to the Division of Pediatric Metabolism, was also in attendance and took the minutes of the 3 September 1982 meeting. During the meeting Dr. Roe accused plaintiff of failing to divulge certain reagent recipes used in the laboratory. Plaintiff denied these allegations. Dr. Roe informed plaintiff that if he did not comply with the request to turn over these recipes and train technical personnel to make the reagents by 7 September 1982 plaintiff's privileges in the Pediatric Metabolism Laboratory would be terminated.

On 23 September 1982 plaintiff met with Dr. Roe and Robert Metcalf, an administrator of Duke University. This meeting was to "explore the options available to Dr. You." Ms. Byrd took the minutes of this meeting also. It is apparent from the record that plaintiff had been offered laboratory space by a Dr. Clark and that during this meeting plaintiff refused to say whether he would accept the offer. Dr. Roe was adamant that plaintiff would not be allowed to use laboratory space and facilities in the Pediatric Metabolism Laboratory. However, he allowed plaintiff to remain on the premises through 29 September 1982 when plaintiff was scheduled to meet with Dr. Katz.

Plaintiff alleges that at approximately 1:00 p.m. on 30 September 1982 he arrived at his office and found a locksmith changing the locks on his office door as well as the other doors in the laboratory. Later that afternoon Dr. Katz told plaintiff to remove his materials from his office. Plaintiff also alleges that on or about 28 October 1982 Dr. Katz wrote plaintiff a letter informing him that he no longer had any duties in or access to the Pediatric Metabolism Laboratory.

Plaintiff also alleges that on or about 30 September 1982 defendants Roe, Katz, Byrd, Corinne Houpt, Jeffrey Houpt and Stoudemire made false and slanderous statements concerning plaintiff's mental condition. Plaintiff alleges that these statements were all "maliciously or willfully, wantonly and recklessly made." Plaintiff alleges he was involuntarily committed as a result of these statements and that his professional reputation was damaged. Plaintiff also asserted claims for breach of employment contract, conversion of personal property, civil conspiracy, false imprisonment, negligence and intentional infliction of emotional distress. Plaintiff sued Dr. Stoudemire for negligent and intentional abuse of the commitment process and for medical malpractice. Plaintiff amended his complaint to allege that he was falsely imprisoned by Duke when university security officers escorted him to the psychiatric ward of Duke University Hospital. Plaintiff also alleged that he was held in the psychiatric ward beyond the period allowed by statute and in violation of statutory safeguards. Plaintiff's claims against Duke University are based on *respondeat superior.*

At various times throughout pretrial discovery, plaintiff requested certain information that defendants asserted was protected by the attorney-client privilege. Plaintiff's various motions to compel discovery of this information were denied by the trial court (orders filed 5 July 1984, 30 November 1984 and 5 February 1986). The trial court entered summary judgment in favor of defendants Roe, Katz, C. Houpt, J. Houpt and Byrd on all claims and in favor of Duke University on all claims except false imprisonment and medical malpractice (order filed 20 September 1988). The trial court also entered summary judgment in favor of Duke University on medical malpractice, false imprisonment and violation of Art. 5A, Ch. 122 (recodified as Ch. 122C, part 7) (order filed 21 September 1988). Later the trial court granted summary judgment in favor of defendant Stoudemire on all claims except medical malpractice, false imprisonment and violation of Art. 5A, Ch. 122 (order filed

11 October 1988). These latter claims against Dr. Stoudemire are the only claims remaining. Plaintiff appeals from the above orders.

Grover C. McCain, Jr. and Phyllis Moore for plaintiff-appellant.

Moore & Van Allen, by N. A. Ciompi, Charles R. Holton and Barry L. Creech, for defendants-appellees, Roe, Katz, Byrd, C. Houpt, J. Houpt, and Duke University.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Alene M. Mercer and Susan K. Burkhart, for defendant-appellee Stoudemire.

EAGLES, Judge.

[1] Where a motion for summary judgment is granted, the critical questions for determination on appeal are whether, on the basis of materials presented to the trial court, there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E.2d 399 (1980), *cert. denied*, 276 S.E.2d 283 (1981). Here the trial court entered summary judgment on all of plaintiff's claims against all defendants except medical malpractice, false imprisonment and violation of Art. 5A, Ch. 122 (recodified as Ch. 122C, part 7) against Dr. Stoudemire. It is well recognized that an appeal normally does not lie from an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). An interlocutory order is an order made during the pendency of the case which adjudicates the rights and liabilities of fewer than all the parties, or adjudicates fewer than all claims in the action. *Id.* at 362, 57 S.E.2d at 381. However, where "partial summary judgment is final as to the matters adjudicated therein, or if it affects a substantial right, it is immediately appealable." *Beck v. American Bankers Life Assurance Co.*, 36 N.C. App. 218, 220, 243 S.E.2d 414, 416 (1978). Entry of summary judgment against plaintiff on all of his claims except the three listed above affects a substantial right of plaintiff. The orders are therefore appealable prior to final adjudication of the remaining claims.

After careful consideration of the record on appeal and plaintiff's arguments, we affirm the trial courts' orders granting summary judgment on the issues of breach of contract, malicious interference with contract, slander, malicious prosecution and abuse of process in favor of defendants. However, we vacate the trial

courts' orders on the issues of libel, medical malpractice by Duke University and false imprisonment and remand the case for further proceedings.

I. Discovery Orders.

[2] Plaintiff's first two assignments of error relate to the denial of his motions to compel discovery. Plaintiff concedes in his brief that orders regarding discovery are interlocutory and "appropriate notice has not been given." Therefore, plaintiff asserts that these two assignments of error are not ripe for appeal. We decline to discuss their merits.

II. Breach of Contract, Malicious Interference with Contract, Defamation and Conspiracy.

Plaintiff argues that the trial court erred in granting partial summary judgment on the issues of breach of contract, malicious interference with contract and defamation. Plaintiff has abandoned his claim for civil conspiracy.

A. Breach of Contract.

[3] Plaintiff alleges that he was denied access to laboratory space for one year during his employment and he asserts that access to laboratory space was part of his employment contract with Duke University. Duke asserts that the record shows plaintiff was offered alternative laboratory space but plaintiff refused the offer. Plaintiff relies on Dr. Katz's letter of appointment (addressed to the Dean of Medical and Allied Health Education, not plaintiff) which states that:

> Dr. You will work on a full time 12 month basis and will be entitled to the fringe benefits described in the faculty package for those at his rank. His office and laboratory space will be located in Dr. Roe's area on the second floor of the Bell Building.

Plaintiff asserts that laboratory space in this specific building and area was a term of his employment contract. We cannot agree and therefore we find that, on this record, laboratory space in a specific area was not a term of plaintiff's contract. The trial court correctly granted summary judgment in favor of Duke University on plaintiff's breach of contract claim.

B. Malicious Interference with Contract.

[4] Plaintiff also alleges that Dr. Roe maliciously interfered with his employment contract by recommending that plaintiff be terminated. Plaintiff asserts that there is a genuine issue of fact whether Dr. Roe acted with malice. Dr. Roe asserts that since he was not an "outsider" to the employment contract he cannot be liable for malicious interference with that contract. Although we do not agree with defendant Roe's argument as to the significance of not being an outsider to the contract, the trial court was correct in granting summary judgment on this issue.

Under North Carolina law, a third party who induces one party to terminate or fail to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification. "Recent cases hold that one need not be an outsider in order to be held liable for malicious interference with contract." *Murphy v. McIntyre*, 69 N.C. App. 323, 329, 317 S.E.2d 397, 401 (1984). In order to establish the tort of malicious interference with a contract right, the plaintiff must prove:

> First, that a valid contract existed between the plaintiff and a third person. . . . Second, that the outsider had knowledge of the plaintiff's contract with the third person. Third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. Fourth, that in so doing the outsider acted without justification. Fifth, that the outsider's act caused the plaintiff actual damages.

Smith v. Ford Motor Co., 289 N.C. 71, 84-85, 221 S.E.2d 282, 290 (1976). Plaintiff contends that the existence of his contract, defendant Roe's knowledge of that contract and Roe's role in inducing the contract's termination have all been established. Plaintiff argues that the materials before the court raise a genuine issue on the element of justification. Plaintiff asserts that a forecast of evidence of legal malice will rebut a showing by defendant of justification for his actions. See *Ramsey v. Rudd*, 49 N.C. App. 670, 673, 272 S.E.2d 162, 164 (1980), *disc. rev. denied*, 302 N.C. 220, 276 S.E.2d 917 (1981). Legal malice means

> intentionally doing a wrongful act or exceeding one's legal right or authority in order to prevent the making of a contract between two parties. The action must be taken with the de-

> sign of injuring one of the parties to the contract or of gaining some advantage at the expense of a party. Plaintiff's evidence must show that defendant had no *legal* justification for his action; proof of actual malice is not sufficient.

Murphy, 69 N.C. App. at 328-29, 317 S.E.2d at 401 (citations omitted).

The record is replete with allegations of defendant Roe's motives. However, there is no evidence that defendant's actions were outside the scope of his authority as Director of the Pediatric Metabolism Laboratory. Therefore, defendant Roe's actions were not legally malicious. There is no genuine issue of fact on this issue and summary judgment was properly granted in favor of defendant.

C. Defamation.

(1) Slander.

[5] Plaintiff also alleges that statements made by various defendants were false, and were maliciously made to discredit plaintiff. Specifically, plaintiff argues that defendants Roe, Katz and Byrd made the following "untrue and defamatory statements" about him:

> 1. He was threatening staff members of the Pediatric Metabolism Laboratory with acids;
>
> 2. He was making bombs in the laboratory;
>
> 3. He had a history of violently abusing his wife; [and]
>
> 4. He wrote letters to his wife threatening to kill her and the children.

Plaintiff argues that these statements constitute slander per se because they involve allegations of moral turpitude. The defendants have asserted in defense the truth of the statements and a qualified privilege in making the statements. Plaintiff asserts that the facts before the trial court raised a genuine issue regarding the truth of the statements and the declarants' actual malice.

The record before us shows that the statements related above were true. There is evidence that plaintiff acted peculiarly on two occasions when in the laboratory, mixing acid and another substance together and placing the hot and smoking flask in the employees' hands. These instances were the basis of the statement that plaintiff was threatening employees with acid. The statement regard-

ing a bomb also has a basis in fact. Although the facts tend to show that the statement was a misunderstanding of what plaintiff meant, there is no dispute that plaintiff stated that "the bomb has been dropped" and the "wires are burning." The statements regarding plaintiff's abuse of his wife and threats to her and their children are also based on fact. There is plenary evidence in the record to support the statements that plaintiff had abused his wife physically and had written threatening letters to her while she was out of the country. Because we find no facts that raise a genuine issue regarding the statements' truthfulness, we need not discuss defendants' assertion of a qualified privilege and plaintiff's assertion of actual malice.

(2) Libel.

[6] Plaintiff argues in his brief that the termination letter written by Dr. Roe constituted libel per se because it tended to impeach plaintiff in his trade or profession. The letter stated that plaintiff was being terminated because he abandoned his responsibilities as assistant director of the clinical laboratory, he was reluctant to push himself toward grant deadlines and he was unwilling to provide recipes of ingredients to the technical staff. Plaintiff has alleged that Dr. Roe maliciously communicated these false charges to Dr. Katz to justify plaintiff's termination. Defendant Roe asserted as his defense the truth of the matters asserted and that his statements were protected by a qualified privilege. Plaintiff argues that actual malice on defendant's part defeats the defense of qualified privilege.

Plaintiff has raised a genuine issue of fact on the defense of qualified privilege.

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communica-

tion concerning a matter in which the parties have an interest or duty.

Pressley v. Continental Can Co., 39 N.C. App. 467, 469-70, 250 S.E.2d 676, 678, *disc. rev. denied*, 297 N.C. 177, 254 S.E.2d 37-38 (1979). Plaintiff has raised an issue of Dr. Roe's good faith. Where a statement is libel per se, that is, "a false written statement which on its face is defamatory," *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 393, 159 S.E.2d 896, 899 (1968), there is a presumption of malice. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971). However, a finding of qualified privilege rebuts the inference of malice and makes it necessary for the plaintiff to prove actual malice before he can recover. *Id.* at 285, 182 S.E.2d at 414-15.

Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant, see *Ponder v. Cobb*, 257 N.C. 281, 294, 126 S.E.2d 67, 76 (1962), or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity. *Ward v. Turcotte*, 79 N.C. App. 458, 460, 339 S.E.2d 444, 446-47 (1986). Here there is also an issue of fact whether there was personal hostility between plaintiff and Dr. Roe. Plaintiff alleges and asserts in his deposition that Dr. Roe and he had been "at odds" for some time prior to receiving the letter of termination. Plaintiff alleges that this personal hostility was the basis for his termination. However, plaintiff also argues that Dr. Roe wanted to change the focus of research in the laboratory and for that reason Dr. Roe wanted to terminate plaintiff. This evidence is sufficient to raise a genuine issue of material fact whether Dr. Roe's statements were made without good faith or probable cause and therefore constituted actual malice. For this reason we hold that summary judgment was improvidently granted on this issue.

[7] We note that plaintiff has asserted that Duke University is liable for the statements of Dr. Roe on the theory of *respondeat superior*. To be liable on the theory of *respondeat superior*, the employee must be acting in furtherance of the principal's business and for the purposes of accomplishing the duties of his employment at the time of the incident. *See 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 140-41 (1986). If an employee departs from that

purpose to accomplish a purpose of his own, the principal is not liable. *Id.* If Dr. Roe's statements are found to be in furtherance of a malicious purpose of his own, they are outside the scope of his employment and Duke University cannot be held liable. Because there is an issue of fact as to whether Dr. Roe was acting in furtherance of the business of Duke University and for purposes of accomplishing the duties of his employment when he wrote the termination letter, summary judgment for Duke University on the libel issue was also improvidently granted.

III. Medical Malpractice of Duke University.

[8] Plaintiff argues that the trial court erred in granting summary judgment in favor of Duke University on the issue of medical malpractice. Plaintiff's original complaint, filed 23 May 1983, asserted causes of action against Duke based on the actions of Roe, Katz, Byrd, C. Houpt, J. Houpt and Stoudemire. Plaintiff's original complaint also alleged that:

> 11. . . . plaintiff was taken into custody by employees and agents of Duke University at approximately 10:15 a.m. on October 1, 1982 and plaintiff was held involuntarily against his will and in deprivation of his freedom and civil rights, until he was discharged approximately 70 hours later, having been found not to be a threat or dangerous to himself or others.
>
> * * *
>
> 21. As a result of the negligence and intentional abuse of the commitment process, plaintiff was caused to be deprived of his liberty, freedom and civil rights and suffered extreme embarrassment, mental suffering and damage to his professional reputation. As a result of these acts, plaintiff will also suffer a permanent diminishment of income and wages.

On 29 October 1985 plaintiff moved to amend his complaint. Plaintiff's motion was allowed and the trial court reserved judgment on whether the allegations in the amended complaint would "relate back" to the filing date of the original complaint. On 5 December 1985 plaintiff filed his amended complaint which included the allegations that:

> 43. Defendant Stoudemire, as well as other employees and agents of Duke University, were negligent in, but not limited to, the following particulars:
>
> * * *

(c) Dr. Mary Catherine Wimer, Dr. David Winecoff, and Dr. Noni Wiencrot were also negligent. They failed to apply that degree of professional knowledge, skill, and training which similarly situated psychiatrists employ, in their treatment of Plaintiff. These psychiatrists failed in their duty to familiarize themselves thoroughly with Plaintiff's case. They, as well as Dr. Stoudemire, had a duty to corroborate the second-hand information which served as a basis for Plaintiff's commitment. They also failed in their duty to make an on-going assessment and re-assessment of Plaintiff and have him released anytime it appeared he was not dangerous.

These psychiatrists did not check in on the Plaintiff adequately during his confinement. Dr. Wimer did not check on Plaintiff after her initial meeting with him on his first day of confinement on October 1, 1982, until the morning of his discharge, October 4, 1982. According to the nurses' notes, Dr. Wiencrot made one brief visit to the Plaintiff's room during his confinement between 1:00 and 1:30 on Saturday, October 2, 1982. There is no evidence of Dr. Winecoff ever checking on the Plaintiff.

Additionally, these psychiatrists failed in their duty to communicate with Dr. Stoudemire concerning the Plaintiff's condition.

(d) The nursing staff on the Meyer Ward at Duke University Hospital was negligent in failing to apply that degree of professional knowledge, skill, and training which similarly situated nurses employ. Although they kept noting Plaintiff's behavior as "appropriate," they failed to assess that Plaintiff was not dangerous and call it to the attention of their supervisors.

Plaintiff argues that the amended complaint relates back to the original complaint and the additional allegations are therefore timely. Duke asserts that the original complaint did not give notice of the transactions or occurrences that were the basis of plaintiff's claim of medical malpractice against Duke; the only claims made against Duke were grounded in intentional tort and defamation.

Rule 15(c) of the North Carolina Rules of Civil Procedure provides 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.

G.S. 1A-1, Rule 15(c). As our Supreme Court has stated, "[w]hether an amended complaint will relate back to the original complaint does not depend upon whether it states a new cause of action but instead upon whether the original pleading gave defendants sufficient notice of the proposed amended claim." *Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). "[T]he decisive test for relation back remains *notice* in the original pleading of the transactions or occurrences to be proved pursuant to the amended pleading." *Estrada v. Jaques*, 70 N.C. App. 627, 633, 321 S.E.2d 240, 245 (1984).

Duke University's reliance on *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), is misplaced. In *Henry*, the court held that the trial court did not abuse its discretion in denying the plaintiff's motion to amend his complaint where the amended complaint included allegations that were directly contrary to those in the original complaint. *Id.* at 84, 310 S.E.2d at 332. This type of "ambush" was not allowed. Here, however, there are no contradictory allegations. Additionally, the allegations of the amended complaint are based on the same transaction or occurrence (i.e., defendants' involuntary commitment of plaintiff) as the original complaint. Therefore, pursuant to Rule 15(c), plaintiff's amended complaint should be deemed to relate back to the filing date of the original complaint. The trial court erred in granting summary judgment in favor of Duke University on this claim.

IV. False Imprisonment by Duke University.

[9] Plaintiff argues that the trial court erred in granting Duke University summary judgment on the issue of false imprisonment. Plaintiff asserts that when the officers took him from Dr. Stoudemire's office to Meyer Ward they falsely imprisoned him. Plaintiff alleges that he did not consent to being taken to Meyer Ward, the officers had no order for his commitment and did not take him before a magistrate to obtain a commitment order as required by statute. Plaintiff alleges that the actions of the Public Safety Officers are imputed to Duke University.

Duke University relies on *Sumblin v. Craven County Hospital Corp.*, 86 N.C. App. 358, 357 S.E.2d 376 (1987), to argue that it cannot be liable for the acts of a person's private physician in committing that person involuntarily. Defendant's reliance is misplaced. Although plaintiff may have complained of false imprisonment based on his term of involuntary hospitalization, in his brief he only argues that he was falsely imprisoned when the Duke University security officers escorted him to Meyer Ward. Any other bases for plaintiff's false imprisonment claim have been abandoned for failure to argue them in his brief. N.C. App. R. 28(a). Therefore, the only issue properly before this court on plaintiff's false imprisonment claim is plaintiff's assertion that by escorting him to Meyer Ward the University's Public Safety Officers falsely imprisoned him.

Plaintiff asserts that he was entitled to summary judgment on this issue since, in its answer, Duke University admitted that "the officers of the Duke Public Safety Department, acting in the course and scope of their employment and duties, escorted the Plaintiff to Meyer Ward, the psychiatry wing at Duke University Hospital."

False imprisonment is the illegal restraint of a person. While actual force is not required, there must be an implied threat of force which compels a person to remain where he does not wish to remain or go where he does not wish to go. *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E.2d 199 (1964). Indeed, we have specifically held that:

> Force is essential only in the sense of imposing restraint. . . . If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.

Hales v. McCrory-McLellan Corp., 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963). Plaintiff alleged that "[F]our Duke University security officers took him into custody and escorted him to Meyer Ward, the psychiatry wing of the Duke University Hospital." Defendant answered saying that "the officers of the Duke Public Safety Department, acting in the course and scope of their employment and duties, escorted the plaintiff to Meyer Ward, the psychiatry wing at Duke University Hospital." Because Duke admitted that its security officers, acting in the course and scope of their em-

ployment with Duke, escorted plaintiff to Meyer Ward and plaintiff asserts he went against his will, there is a genuine issue of fact whether plaintiff was falsely imprisoned by the acts of these officers. There is also evidence that at the time the security officers escorted plaintiff from Dr. Stoudemire's office, no magistrate had signed a commitment order. Therefore, summary judgment in favor of Duke on the issue of false imprisonment must be vacated.

V. Summary Judgment in Favor of Dr. Stoudemire.

Plaintiff also argues that the trial court erred in granting summary judgment in favor of Dr. Stoudemire on the issues of malicious prosecution and abuse of process. Plaintiff has abandoned his appeal on the issues of defamation and civil conspiracy. We affirm the entry of summary judgment in favor of Dr. Stoudemire on the issues of malicious prosecution and abuse of process.

A. Malicious Prosecution.

[10] Plaintiff asserts that the institution of involuntary commitment proceedings was sufficient to show malicious prosecution because there is evidence that Dr. Stoudemire acted on secondhand information that could have been investigated prior to plaintiff's commitment. Dr. Stoudemire asserts that summary judgment was appropriate because the commitment of plaintiff was not wrongful. Dr. Stoudemire had probable cause to find that plaintiff was mentally ill and dangerous to himself and others. Dr. Stoudemire also argues that if the commitment was wrongful, he did not institute the proceedings, but was a mere witness to those proceedings.

In an action for malicious prosecution the plaintiff must show that the defendant initiated an earlier proceeding, maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor. *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). "Additionally, in malicious prosecution cases based on underlying civil actions, the plaintiff must prove special damages." *U v. Duke University*, 91 N.C. App. 171, 177, 371 S.E.2d 701, 706 (1988).

We find no facts that would support plaintiff's claim that Dr. Stoudemire acted without probable cause. Dr. Stoudemire testified in his deposition that while he was talking to plaintiff the second time he concluded that plaintiff should be involuntarily committed. Based on the information brought to his attention by other defendants in this case and his perceptions of plaintiff after two

interviews, Dr. Stoudemire exercised his professional judgment in executing the petition for commitment. These facts do not raise a genuine issue of fact on plaintiff's claim of malicious prosecution. Accordingly, summary judgment was appropriately granted.

B. Abuse of Process.

[11] Plaintiff argues that his involuntary commitment for 72 hours constituted an abuse of process since the statutes then effective provided for only 24 hours of "observation" before an involuntarily committed person must be released. Defendant argues that plaintiff has not raised a genuine issue regarding an act that would sustain the charge of abuse of process.

"There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding." *Ellis v. Wellons*, 224 N.C. 269, 271, 29 S.E.2d 884, 885 (1944). "[T]he gravamen of a cause of action for abuse of process is the improper use of the process after it has been issued." *Petrou v. Hale*, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979), *disc. rev. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980). Plaintiff has failed to raise an issue of fact regarding Dr. Stoudemire's ulterior motive. Additionally, plaintiff has not raised an issue of fact regarding "an act in the use of the process" that would be the basis of an abuse of process claim. Therefore, summary judgment in favor of Dr. Stoudemire was properly granted.

In summary, the orders of the trial court granting summary judgment on the issues of breach of contract, malicious interference with contract, slander, malicious prosecution and abuse of process are affirmed. Plaintiff has failed to assign as error or brief the trial court's action on his claim for conversion. It is deemed abandoned. N.C. App. R. 10(c); N.C. App. R. 28(a). However, those portions of the orders that grant summary judgment in favor of the various defendants on the claims based on libel, medical malpractice and false imprisonment are vacated and the cause is remanded for further proceedings in the trial court. All other assignments of error have been abandoned by plaintiff.

Affirmed in part, vacated in part and remanded.

Judge PARKER concurs.

Judge GREENE concurs in the result.

STATE OF NORTH CAROLINA v. DANNY KEITH MARTIN

No. 896SC160

(Filed 16 January 1990)

1. **Criminal Law § 67 (NCI4th)— misdemeanor tried in superior court—no jurisdiction—judgment arrested**

Defendant's conviction of misdemeanor possession of drug paraphernalia must be arrested where the record showed that defendant was tried in superior court upon a warrant charging him with misdemeanor possession of drug paraphernalia; the record did not show that defendant was ever tried in district court on that charge; and the record failed to show that this misdemeanor charge was sufficient to give rise to the superior court's exercise of derivative jurisdiction.

Am Jur 2d, Criminal Law § 358.

2. **Receiving Stolen Goods § 2 (NCI3d)— felonious possession of stolen property—indictment—language regarding dishonest purpose not required**

There was no merit to defendant's contention that an indictment charging him with felonious possession of stolen property improperly omitted language regarding "dishonest purpose" and that judgment must therefore be arrested, since defendant was tried and convicted pursuant to N.C.G.S. § 14-71.1, and the words "dishonest purpose" did not appear in the statute and thus were not considered material words of the statute which must be used in the indictment.

Am Jur 2d, Receiving Stolen Property §§ 10, 17.

3. **Receiving Stolen Goods § 5.1 (NCI3d)— felonious possession of stolen property—sufficiency of evidence**

In a prosecution of defendant for felonious possession of stolen property, evidence was sufficient to be submitted to the jury where it tended to show that the pattern of silver shown to an officer by the victim's daughter was identical to the pattern of the silver found on the same day in defendant's car trunk; the victim's daughter testified that she checked on her parents' home, discovered that the house had been broken into, and found the silver was missing; the missing silver had an approximate value of $3,000; and defendant's

knowledge that the silver was stolen could be inferred from evidence that defendant told the investigating officer that he would disclose where he got the silver and get it back if all charges were dropped; he further stated that he dealt in stolen goods but that he would not have taken the silver if he had known where it had come from; and defendant admittedly accepted stolen property as payment for cocaine and stated that the victim's son owed him $200 for cocaine.

Am Jur 2d, Receiving Stolen Property §§ 20, 21, 23, 25, 27, 29, 30.

4. **Searches and Seizures § 9 (NCI3d)— car stopped for traffic violation—officer's observation of vials—probable cause to search trunk and contents**

An officer had probable cause to search defendant's car trunk and its contents where the officer stopped the vehicle in which defendant was a passenger for a routine traffic violation and the officer, upon approaching the car, noticed empty vials which he recognized as items used in the trafficking of drugs.

Am Jur 2d, Searches and Seizures § 39.

5. **Narcotics § 3.3 (NCI3d)— vials in defendant's car—officer's testimony as to use admissible**

An officer could properly testify as to the use of vials found in defendant's car as drug trafficking devices.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

6. **Receiving Stolen Goods § 4 (NCI3d)— felonious possession of stolen property—testimony admissible to show motive**

In a prosecution of defendant for felonious possession of stolen property, the trial court did not err in admitting the testimony of the son of the owner of the stolen property that he, the son, was indebted to defendant, since the evidence was properly admitted to illustrate a possible motive.

Am Jur 2d, Receiving Stolen Property § 10.

APPEAL by defendant from judgment entered 9 November 1988 by *Judge Samuel T. Currin* in HERTFORD County Superior Court. Heard in the Court of Appeals 1 September 1989.

Defendant was tried and convicted of felonious possession of stolen property (case No. 82CRS810) and possession of drug parapher-

nalia (case No. 88CRS815). From a judgment imposing an active sentence of ten years for felonious possession of stolen property and a suspended sentence of two years for possession of drug paraphernalia, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General John R. Corne and Melissa L. Trippe, for the State.

McMillan, Kimzey & Smith, by Katherine E. Jean, for defendant-appellant.

JOHNSON, Judge.

The facts in the case are as follows: On March 2, 1988, Officer Tim McKibben of the Murfreesboro Police Department stopped a vehicle for a routine traffic violation. As he (Officer McKibben) approached the car to ask for the driver's license, empty vials were spotted between the driver and passenger seats. Officer McKibben had seen similar vials used in the sale of cocaine. Upon informing the defendant, the registered owner and passenger of the car, that he (Officer McKibben) had probable cause to search the entire car, no protest ensued.

A search of the trunk revealed a dark reddish wooden box with velvet lining which contained silver knives, forks, spoons and serving pieces. Defendant thereafter informed Officer McKibben that the silver belonged to his first wife. Finding no cause to detain the defendant, he was released and the silver was not seized.

Later that evening, Officer McKibben learned of a breaking and entering at the home of G.B. and Jeanette Warren and offered assistance to the Northampton County Police. While at the Warren house, Officer McKibben was informed by Alice Shackleford, Mr. Warren's daughter, that her stepmother's (Jeanette Warren) silver had been taken. After explaining that her father and stepmother were in Florida and that she was looking after the house in their absence, Mrs. Shackleford showed the officer a piece of silver which remained at the house. Officer McKibben later testified that the pattern of the silver shown to him by Mrs. Shackleford was identical to the pattern of the silver found earlier in defendant's car trunk.

An arrest warrant for possession of stolen property was obtained by Officer McKibben and defendant was arrested on March 16, 1988.

While executing the arrest warrant, a loaded gun and some empty vials were found on defendant's person. Defendant was taken to the Murfreesboro Police Department and advised of his constitutional rights. Defendant asserted full understanding of his rights and declined to make a written statement. He did, however, sign the Miranda form above the waiver of rights and initiated a conversation with Officer McKibben.

During the conversation, defendant told Officer McKibben that he would disclose where he got the silver from and would get it back if all charges were dropped. Defendant also proclaimed that he did not break into homes, but merely accepted some items for cocaine and, on occasion, bought goods cheap. In addition, defendant told the officer that Darrin Bridgers (Jeanette Warren's son) owed him $200.00 for cocaine he had purchased from defendant prior to March 2, 1988.

At trial, defendant presented no evidence.

On appeal, defendant brings forth sixteen questions for the Court's review. Defendant's sixteen assignments of error relate to both the felonious possession of stolen property and the misdemeanor possession of drug paraphernalia charges of which he was convicted. This Court will first address the questions relating to the misdemeanor possession of drug paraphernalia.

Defendant, by his third, fifteenth and sixteenth Assignments of Error, presents the questions of whether the trial court erred in: (1) submitting the misdemeanor possession of drug paraphernalia charge to the jury, (2) imposing a two-year suspended sentence upon the defendant's misdemeanor conviction, and (3) placing a burdensome condition on the defendant's suspended sentence. We find these assignments of error to have merit.

[1] We first note that the Hertford County Superior Court lacked proper jurisdiction over the misdemeanor possession of drug paraphernalia charge. "Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina. The jurisdiction of the superior court . . . [over] a misdemeanor, unless a circumstance enumerated in G.S. 7A-271(a) arises, is a derivative and arises only upon appeal from a conviction of the misdemeanor in district court." *State v. Felmet*, 302 N.C. 173, 174-75, 273 S.E.2d 708, 710 (1980); *see also* G.S. sec. 7A-271 and G.S. sec. 7A-272. Generally, the superior court has no jurisdiction to try a defendant

on a misdemeanor charge unless he was first tried, convicted and sentenced in district court and then appeals the judgment for a trial *de novo* in superior court. *State v. Hall*, 240 N.C. 109, 81 S.E.2d 189 (1954). As a general rule, "when the record shows lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Felmet, supra*, at 176, 273 S.E.2d at 711.

In the case before us, the record shows that defendant was tried in the Hertford County Superior Court upon a warrant charging him with misdemeanor possession of drug paraphernalia. The record does not show, however, that defendant was ever tried in district court on this charge. The record also fails to show that this misdemeanor charge is sufficient to give rise to the Hertford County Superior Court exercising derivative jurisdiction. The defendant's conviction of misdemeanor possession of drug paraphernalia must therefore be arrested.

Turning now to defendant's assignments of error regarding his conviction of felonious possession of stolen property, we find no error.

[2] Defendant's Assignment of Error number one challenges the validity of the indictment charging him with felonious possession of stolen property. We have reviewed the indictment and find defendant's contention that the judgment must be arrested because the indictment omitted language regarding "dishonest purpose" is without merit. This Court has previously held that

> [t]he purpose of an indictment is (1) to give the defendant notice of the charge against him in plain intelligible and explicit language so that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; and (2) to enable the court to pronounce judgment in the event of a conviction.

State v. Blythe, 85 N.C. App. 341, 343, 354 S.E.2d 889, 890 (1987). Possession of stolen property is an offense created and governed by statute. "Where the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, so as to bring it

within all the *material words* of the statute." (Emphasis added.) *Id.* at 344, 354 S.E.2d at 891.

Defendant was tried and convicted pursuant to G.S. sec. 14-71.1 which provides:

> [i]f any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense.

The words "dishonest purpose" do not appear in the statute and thus are not considered "material words of the statute" which must be used in the indictment. This assignment of error is therefore overruled.

[3] By Assignment of Error number two, defendant contends that the evidence presented at trial was insufficient to support his conviction of felonious possession of stolen property, and therefore, the trial court erred by denying his motion to dismiss.

We first note that "when a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged . . . and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). Substantial evidence is any relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

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).

The State has the burden of proving, beyond a reasonable doubt, every essential element of the charge of felonious possession of stolen property. G.S. secs. 14-71.1 and 14-72 articulate the essential elements which must be proven. These elements are: (1) possession of personal property; (2) having a value in excess of $400.00; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose. *See also* N.C.P.I.—Crim. sec. 216.47.

In applying the foregoing elements which must be proved to sustain a charge of felonious possession of stolen property to the facts in this case, this Court finds no error in the trial court's denial of defendant's motion to dismiss at the close of all evidence. Utilizing the standard referred to in *Thompson, supra*, the State's evidence, when it is viewed in a favorable light and when every reasonable inference is given, tends to prove the requisite elements of felonious possession of stolen property. The evidence also tends to prove that the defendant, in fact, committed the crime.

The following facts clearly illustrate and support the trial court's finding that sufficient evidence was presented to sustain a G.S. sec. 14-71.1 violation.

Officer McKibben testified that the pattern of the silver shown to him by Mrs. Shackleford was identical to the pattern of the silver found on the same day in defendant's car trunk. Testimony elicited from Mrs. Shackleford established that she checked on her parent's home; discovered that the house had been broken into; and found the silver was missing. This evidence clearly tends to prove defendant had possession of the Warren's personal property (the silver) and such possession was without permission.

Testimonial evidence presented at trial also established that the missing silver had an approximate value of $3,000.00. Thus, this evidence satisfies that statutory requirement that the personal property have a value in excess of $400.00.

With respect to the third element requiring the possessor to know or have reasonable grounds to believe the property was stolen,

defendant told Officer McKibben that he would disclose where he got the silver from and get it back if all charges were dropped. He further stated that he dealt in stolen goods, but that he would not have taken it (the silver) if he had known where it had come from. Admittedly, defendant accepted stolen property as payment for cocaine and that Darrin Bridgers (Jeanette Warren's son) owed him $200.00. Since the State is entitled to every reasonable inference to be drawn from the evidence, we are of the opinion that the facts provide reasonable grounds to believe defendant knew the silver was stolen.

Lastly, with respect to the statutory elements, the State presented sufficient evidence to support a finding that defendant was acting with a dishonest purpose. Among the factors we considered in making this determination were the defendant's: (1) acknowledgment of dealing in stolen property, (2) acceptance of stolen property for cocaine, and (3) statements that he would disclose where he got the silver from and would get it back if all charges were dropped.

Thus, substantial evidence was presented to support the charge of felonious possession of stolen property and the contention that defendant committed the crime.

Defendant's Assignments of Error numbered four, five, six, seven and eight basically challenge the *voir dire* examination concerning defendant's in-custody statement and the manner in which it was conducted. We have reviewed the *voir dire* examination and find that defendant's in-custody statements were properly admitted since they were freely and voluntarily made.

Because we have previously addressed these matters, we feel they do not necessitate an exhaustive discussion. However, we are compelled to set out the established principles surrounding the admissibility of in-custody statements following a *voir dire* examination.

We note on the outset that *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), points out the rules governing the admissibility of in-custody statements made by an accused. These rules provide that an accused must be advised

> (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer

with him during interrogation; (4) that if he is an indigent a lawyer will be appointed to represent him; and (5) that if he at any time prior to or during questioning indicates that he wishes to stop answering questions or to consult with an attorney before speaking further, the interrogation must cease.

State v. Riddick, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976). A statement will be rendered incompetent if involuntarily made. *Id.*

"When the admissibility of an in-custody confession is challenged[,] the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met and whether the confession was in fact voluntarily made." *Id.* "At the conclusion of the hearing, the trial judge should make findings of fact setting out the basis for his ruling." *State v. White*, 298 N.C. 430, 436, 259 S.E.2d 281, 285 (1979). Where the trial judge finds upon competent evidence that defendant's statements were made freely and voluntarily after having been fully advised of his constitutional rights, such a finding is conclusive and will not be disturbed on appeal. *Id.* at 436-37, 259 S.E.2d at 285.

Upon conducting a *voir dire*, the burden of proof is always placed on the State. "Ordinarily the party with the burden of persuasion is required to present evidence first, but the trial court in its discretion may depart from this general rule if the court 'considers it necessary to promote justice.' (citation omitted). Such a departure is not grounds for reversal unless the court abuses its discretion and the defendant establishes he was prejudiced thereby. (citation omitted)." *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 637 (1983).

Our Supreme Court has held that the requiring of a "defendant to present his evidence first . . . [is] not prejudicial error when neither the burden of persuasion nor the burden of going forward with the evidence . . . was placed on defendant." *Id.*

Finding that all of these well-settled principles were both implemented and the bases of the trial judge's decision to admit defendant's in-custody statements, we find no further need for discussion.

[4] By Assignment of Error number nine, defendant contends that the admission of Officer McKibben's testimony as to the silver he found in defendant's car trunk violated his constitutional rights since the search was unlawful.

"Automobiles . . . may be searched without a warrant . . . and a police officer in the exercise of his duties, may search an automobile . . . without a search warrant where existing facts and circumstances are sufficient to support a reasonable belief that the automobile . . . carries contraband materials." *State v. Simmons*, 278 N.C. 468, 471, 180 S.E.2d 97, 99 (1971).

> If [a] search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

United States v. Ross, 456 U.S. 798, 805, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982) (*quoting Carroll v. United States*, 267 U.S. 132, 149, 69 L.Ed. 543, 45 S.Ct. 280 (1921)).

In analyzing the scope of a warrantless search of a vehicle when an officer has probable cause that contraband is secreted, the U.S. Supreme Court stated that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part* of the vehicle and its contents that may conceal the object of the search." *See id.* at 825, 72 L.Ed.2d 572, 102 S.Ct. 2157. (Emphasis added.)

In viewing the "totality of the circumstances" to question the reasonableness of the seizure, we weigh the officer'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).

In the case at bar, Officer McKibben stopped the vehicle in which defendant was a passenger for a routine traffic violation. Upon approaching the car and noticing empty vials, which were recognized as being used for trafficking drugs, Officer McKibben informed defendant that he had probable cause to search the car. Pursuant to *Ross*, the probable cause here, which developed following a lawful vehicle stop, justifies the search of defendant's car trunk and its contents. We therefore find no error.

[5] In his tenth Assignment of Error, defendant contends that the admission of Officer McKibben's testimony as to the use of the vials as drug trafficking devices was in error and such testimony was inadmissible as lay opinion. We disagree.

It is appropriate for law enforcement officers to testify as to various customs and practices observed by them in the exercise of their duties as officers. *Simmons, supra,* at 468, 180 S.E.2d at 90. The subsequent testimony of Officer McKibben concerning the general use of the vials he spotted in the car was therefore properly admitted.

Defendant's next argument that the trial court erred in admitting evidence that the defendant was in possession of a loaded handgun at the time of arrest is meritless and no discussion is needed. Suffice it to say that when evidence has been admitted without objection, the benefit of later objections is ordinarily lost. *State v. Murray,* 310 N.C. 541, 545, 313 S.E.2d 523, 527 (1984).

[6] The last of the defendant's questions that this Court will address is whether the trial court erred in admitting the testimony of Darrin Bridgers.

We must disagree with defendant's interpretation of G.S. sec. 8C-1, Rule 403 and Rule 404(b). Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 404(b) provides that

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

The testimony of Darrin Bridgers that he was indebted to the defendant was properly admitted to illustrate a possible motive. A weighing of the testimonial evidence and a following of the mandates of Rule 403 establishes that the probative value of Darrin Bridgers' debt to the defendant substantially outweighs the danger of unfair prejudice against the defendant. We therefore hold that the trial court did not commit error in admitting the testimony of Darrin Bridgers.

In light of defendant's other assignments of error and our holdings, we have considered, but found no merit to his contention that the trial court erred in instructing the jury on the doctrine of recent possession. Assignment of Error numbered thirteen is therefore not discussed.

In summary,

Case No. 88CRS810—no error.

Case No. 88CRS815—judgment arrested.

No error in part; judgment arrested in part.

Judges EAGLES and GREENE concur.

SCREAMING EAGLE AIR, LTD. v. AIRPORT COMMISSION OF FORSYTH COUNTY

No. 8821SC583

(Filed 16 January 1990)

1. **Negligence § 52.1 (NCI3d)— airport accident—owner of leased aircraft—invitee**

In a negligence action arising from an airplane crash after the airplane struck a dog during takeoff, the trial court did not err by holding that plaintiff was an invitee even though plaintiff did not pay a fee directly to the airport. Plaintiff leased its airplane to Piedmont Aviation, which paid rent to defendant airport commission to operate its business on the airport property. This arrangement was to the benefit of both plaintiff and defendant, even though payment by plaintiff went through a middleman.

Am Jur 2d, Aviation §§ 87, 102.

2. **Negligence § 53.1 (NCI3d)— airport accident—dog on runway—degree of care owed invitee**

The trial court correctly denied defendant's motion for a directed verdict in an action arising from an airplane crash caused by a dog on the runway. Although defendant contended that plaintiff failed to prove how this specific dog got on the runway on the night in question, the evidence was sufficient for the jury to find that defendant's failure to maintain an adequate fence around the property was a lack of reasonable care in keeping the premises in a reasonably safe condition. Furthermore, the evidence was sufficient for the jury to con-

clude that defendant's lack of prudent conduct resulted in dogs getting on the property and that one of those dogs being on the runway at the time the aircraft was taking off was the proximate cause of the damages to plaintiff's aircraft.

Am Jur 2d, Aviation §§ 87, 102.

3. Negligence § 13 (NCI3d)— airport accident—dog on runway—contributory negligence

The trial court properly denied defendant's motion for a directed verdict based on contributory negligence in an action arising from an airplane crash caused by a dog on a runway where the evidence of defendant's knowledge of the problems the dogs presented at the airport was overwhelming and evidence of knowledge attributable to plaintiff was insufficient to show that plaintiff's president or employees were on notice of the danger.

Am Jur 2d, Aviation § 105.

4. Evidence § 28 (NCI3d)— airport accident—dogs on runway—FAA daily logs

The trial court did not err in a negligence action arising from an airplane crash caused by dogs on a runway by admitting daily logs maintained by air traffic controllers at the airport. The evidence was relevant in that the number of dogs or other animals seen on or near the runway in the year preceding the incident in question would have a tendency to prove a dangerous situation existed, and there was nothing unfair about the admission of the logs because there was nothing which would confuse or mislead the jury or tend to suggest a decision on an emotional or other improper basis.

Am Jur 2d, Aviation §§ 144, 145.

5. Evidence § 19.1 (NCI3d)— airport accident—dogs on runway—number of animal sightings in prior years

The trial court did not err in a negligence action arising from an airplane crash caused by a dog on a runway in 1985 by admitting evidence which showed the number of animal sightings made by airport personnel during the period from 1978 through 1983. Remoteness in time generally goes to the

weight of the evidence and not to its admissibility and this evidence was clearly relevant to the foreseeability issue.

Am Jur 2d, Aviation §§ 144, 145.

APPEAL by defendant from judgment of *Judge William H. Freeman* entered 17 December 1987 in FORSYTH County Superior Court. Heard in the Court of Appeals 9 December 1988.

Allman Spry Humphreys Leggett & Howington, P.A., by William D. Spry, Jr., and David C. Smith, for plaintiff appellee.

Roy G. Hall, Jr., for defendant appellant.

COZORT, Judge.

In this case the owner of an airplane sued the Airport Commission of Forsyth County, claiming that the airport was negligent in not preventing dogs from entering the runway area of the airport. Plaintiff's airplane was damaged when the landing gear collapsed after allegedly striking a dog during an aborted takeoff. The jury awarded plaintiff over $100,000 in damages, the amount necessary to repair the airplane. The primary issue to be considered on appeal is whether the trial court erred in denying defendant's motion for a directed verdict. We find the evidence was sufficient to take the case to the jury, and we find no error in the trial below. The pertinent facts follow.

Screaming Eagle Air, Ltd., hereinafter "Screaming Eagle" or "plaintiff," was the owner of a 1973 Beechcraft King Air C-90. The airplane was leased to Piedmont Aviation, Inc., which kept the airplane at its facility at Smith Reynolds Airport, which was operated by the defendant Airport Commission of Forsyth County. Piedmont Aviation served as the exclusive agent for Screaming Eagle for the purpose of leasing the use of plaintiff's aircraft.

On 6 January 1985, Dr. Thomas Simpson rented plaintiff's aircraft for the purpose of practicing instrument approaches. He began using the plane at approximately 5:50 p.m. Dr. Simpson completed a couple of successful practice landings. At approximately 6:00 p.m., he was preparing to take off for another practice landing. As the aircraft was leaving the ground after going down the runway, Dr. Simpson heard a loud noise. He reduced the engine power to abort the takeoff. The nose gear collapsed and the aircraft skidded on its nose, damaging the plane. A short time after the accident,

Dr. Simpson walked back down the runway to see what he might have struck. He found a large, dead dog on the runway. There was blood around the dog.

Jerry May, an employee of Screaming Eagle, testified that he had been flying airplanes for 23 years and had flown in and out of airports all over the country. He had seen more dogs at Smith Reynolds than any other airport.

Plaintiff also presented evidence of the number of animals seen by airport employees at Smith Reynolds Airport in recent years. That evidence showed that in 1979, 80 animals were sighted; in 1980, 91 animals; in 1981, 70 animals; in 1982, 56 animals; and in 1983, 26 animals. In 1984, 91 animals were sighted on or near the runways at the airport. On several occasions, the arrival or departure of aircraft was delayed because of dogs on the runways. Employees of the Airport Commission were authorized to shoot and kill dogs on airport property. Airport employees estimated that 80 to 100 dogs a year were killed on airport property.

The outer perimeter of the airport covered a distance of approximately five miles. Most of the outer perimeter was enclosed with a chain link fence. For a distance of about 800 feet, there was no fence at all. Along a stretch of about 4,000 feet, the fencing consisted of four or five strands of barbed wire, which would not prevent dogs or other small animals from getting onto the airport property. Dogs had been observed coming through the barbed wire portions of the fence. There were also openings under portions of the chain link fence and culverts under the fencing large enough for dogs to get through.

Defendant's evidence showed that Richard Maxey, president of Screaming Eagle, had on two occasions seen dogs at Smith Reynolds Airport.

The jury returned a verdict finding that Screaming Eagle was damaged by the negligence of defendant Airport Commission. The jury awarded Screaming Eagle $109,000 in damages.

Defendant Airport Commission has argued 15 assignments of error on appeal. The assignments of error can be grouped into three categories: (1) whether the trial court erred in failing to grant defendant's motion for directed verdict either on the basis of insufficiency of evidence of negligence, or on the basis of plaintiff being contributorily negligent as a matter of law; (2) whether the

trial court erred in various evidentiary rulings made during the course of the trial; and (3) whether the trial court erred in the issues submitted and the instructions given to the jury. We first address whether the trial court erred in denying defendant's motion for a directed verdict.

[1] In considering whether plaintiff's evidence was sufficient to survive defendant's motion for directed verdict, the test is whether plaintiff's evidence, viewed in the light most favorable to plaintiff and giving plaintiff every reasonable inference therefrom, is sufficient to support a verdict in plaintiff's favor. *Bullins v. Schmidt*, 322 N.C. 580, 583-84, 369 S.E.2d 601, 603 (1988).

> To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.

Bolkhir v. N.C. State Univ., 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

We must first examine the status of plaintiff and defendant and the appropriate legal duty owed to plaintiff. At the trial below, the trial court determined that the status of plaintiff, as a matter of law, was that of an invitee, and the trial court instructed the jury accordingly. Defendant objected to the trial court's ruling and argued that the question of whether plaintiff was a licensee or an invitee was a question of fact to be determined by the jury. We find the trial court did not err in holding that plaintiff was, as a matter of law, an invitee.

> "The distinction between a licensee and an invitee does not depend upon whether there is an 'invitation' to come on the premises, but is determined by the nature of the business bringing him to the premises, an invitee being a person who goes upon the premises for the mutual benefit of himself and the person in possession, whose visit is of interest or advantage to the invitor, while a licensee is one who goes upon the premises for his own interest, convenience, or gratification, with the consent of the person in possession . . . ." 6 Strong, N.C. Index 2d, Negligence, § 59; *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E.2d 408.

Quinn v. P & Q Supermarket, Inc., 6 N.C. App. 696, 699, 171 S.E.2d 70, 72 (1969).

Defendant contends that plaintiff is not an invitee because plaintiff did not pay a rental fee or use fee directly to defendant Airport Commission. We disagree. In *Pasour v. Pierce*, 76 N.C. App. 364, 333 S.E.2d 314 (1985), *disc. rev. denied*, 315 N.C. 589, 341 S.E.2d 28 (1986), this Court held that a person who entered an office building for an interview with a tenant in that building was an invitee of the owner of the building, even though there was no direct monetary benefit to the owner of the building.

We find the logic in *Pasour* controlling in this case. Plaintiff does not have to show the payment of a fee directly to the airport. Plaintiff leased its plane to Piedmont Aviation who paid rent to defendant to operate its business on the airport property. This arrangement was to the benefit of both plaintiff and defendant, even though any payments made by plaintiff went through a middleman, Piedmont Aviation, before reaching defendant. The trial court correctly found plaintiff was an invitee.

[2] The duty of an airport to an invitee has been clearly stated by this Court:

> An aircraft landing field operator owes a duty to persons landing thereon by invitation to maintain the premises in reasonably safe condition for contemplated use, and he must use reasonable care to keep premises in reasonably safe condition so that a person landing his aircraft there will not be unreasonably exposed to any danger. 65 C.J.S., Negligence, § 63 (133), p. 913; *Plewes v. Lancaster*, 171 Pa. Super. 312, 90 A. 2d 279. The rule is identical to the general rule governing the duty owed by the owner or operator of any place of business to an invitee entering the premises. "The owner or proprietor of premises is not an insurer of the safety of his invitees. But he is under a duty to exercise ordinary care to keep that portion of his premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, (but not that portion reserved for himself and his employees), and to give warning of hidden dangers or unsafe conditions of which he has knowledge, express or implied." 6 Strong, N.C. Index 2d, Negligence, § 53, pp. 108-109, and cases therein cited.

McElduff v. McCord, 10 N.C. App. 80, 82, 178 S.E.2d 15, 17 (1970).

Thus, to get by defendant's motion for directed verdict, plaintiff must show that defendant failed to use reasonable care to keep the airport premises in reasonably safe condition so that a person landing his aircraft there would not be unreasonably exposed to any danger. In the first portion of its argument concerning the trial court's denial of the motion for directed verdict, defendant contends that plaintiff's evidence does not show that the dog got on the airport through defendant's negligence. Central to defendant's argument is its contention that plaintiff failed to prove how this specific dog, the one struck by plaintiff's aircraft, got on the runway on the night in question. Defendant's contention is a misapprehension of the law of proximate cause and foreseeability. Our Supreme Court has stated:

> While this Court has repeatedly said that foreseeability of injury is an element of proximate cause, it is clear that it is not necessary that the defendant should have been able to foresee the precise injury which resulted from this conduct. *Williams v. Boulerice*, 268 N.C. 62, 149 S.E.2d 590; *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E.2d 292. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected.' " *Hart v. Curry, supra; White v. Dickerson, Inc.*, 248 N.C. 723, 105 S.E.2d 51.

Johnson v. Lamb, 273 N.C. 701, 710, 161 S.E.2d 131, 139 (1968).

The plaintiff's evidence showed that the fence around the airport was not sufficient to prevent dogs or other animals from getting onto the airport property. Dogs had been frequently observed coming through the fence onto the property. Animal sightings on the airport were frequent, and airport employees estimated that 80 to 100 dogs a year were killed on the airport. We hold the evidence was sufficient for the jury to find that defendant's failure to maintain an adequate fence around the property was a lack of reasonable care in keeping the premises in a reasonably safe condition. Further, the evidence was sufficient for the jury to infer that defendant's lack of prudent conduct resulted in dogs getting on the property and that one of those dogs being on the

runway at the time plaintiff's aircraft was taking off was the proximate cause of the damages to plaintiff's aircraft.

[3] The second part of defendant's argument on the trial court's denial of defendant's motion for directed verdict is defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. Defendant contends that plaintiff's failure to remove its aircraft from the airport, when it was foreseeable that the aircraft might hit a dog, constituted contributory negligence as a matter of law. We disagree. The rules of contributory negligence are well defined:

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. *Chaffin v. Brame*, 233 N.C. 377, 64 S.E.2d 276; *Manheim v. Blue Bird Taxi Corporation*, 214 N.C. 689, 200 S.E. 382; 65 C.J.S., Negligence, § 118, a, b.
>
> Plaintiff is subject to this universal rule, but his conduct on this occasion "must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame, supra.*

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

In determining whether plaintiff is guilty of contributory negligence as a matter of law, the question is whether the evidence establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. The pivotal question is whether the evidence, when viewed in the light most favorable to Screaming Eagle, permits no other reasonable inference except that plaintiff failed to exercise such care for the safety of its aircraft as a reasonably careful and prudent person would have used un-

der similar circumstances. *Allen v. Pullen*, 82 N.C. App. 61, 65, 345 S.E.2d 469, 472 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E.2d 738 (1987).

The evidence, so viewed, tends to show that plaintiff's president had once seen two dogs fifty feet from a runway and, on another occasion, saw a dog in a hangar. He had also heard from others that there had been animals near the runway. A pilot who worked for plaintiff had seen "a number of dogs" at the airport. He had seen "more dogs at Smith Reynolds than at other airports."

We hold that this evidence is insufficient to support a finding that plaintiff was contributorily negligent, and it thus falls far short of the evidence necessary to compel a finding that plaintiff was contributorily negligent as a matter of law. The evidence of defendant's knowledge of the problems the dogs presented at the airport was overwhelming. The number of dog sightings by airport personnel averaged 69 per year for the six years immediately preceding the accident. For the calendar year 1984, 91 animals were sighted by airport personnel near the runway. Airport personnel shot 80 to 100 dogs a year. Airport employees were well aware that a substantial portion, 800 feet, of the outer perimeter had no fence at all, while an additional 4,000 feet had fencing insufficient to keep animals out. Dogs and other animals were frequently observed coming through the open portion of the fence.

The evidence of knowledge attributable to plaintiff, on the other hand, was insufficient to show that plaintiff's president or employees were on notice of the danger presented by the animals present on airport property. Plaintiff's president had seen dogs on airport property on only two occasions; there is no evidence he had ever seen a dog on a runway. Plaintiff's pilot testified that he had seen "a number of dogs," more than at other airports. Plaintiff's pilot testified that he thought the airport was totally enclosed by fencing. There is no evidence to show plaintiff's pilot was aware of the number of animals sighted and the severity of the problem. This evidence is not sufficient to raise an inference of contributory negligence; consequently, it falls short of the evidence necessary to find plaintiff was contributorily negligent as a matter of law. The trial court did not err in denying defendant's motion for a directed verdict.

[4] We now consider defendant's assignments of error dealing with alleged errors on evidentiary questions. Defendant first con-

tends that the trial court erred in admitting evidence from plaintiff of daily logs maintained by air traffic controllers at the airport. Those daily logs revealed that dogs or other animals were seen on or near airport runways on 37 different days during 1984. The logs were compiled and maintained by personnel from the Federal Aviation Administration who were not employees of defendant Airport Commission. Defendant contends that the logs were not relevant to the issue of negligence. Defendant further contends that, even if relevant, the evidence should have been excluded by the trial judge as being unfairly prejudicial to defendant. We find no merit to defendant's argument.

N.C. Gen. Stat. § 8C-1, Rule 401, defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In proving that defendant was negligent, plaintiff had to prove that it was foreseeable that an insecure fence around the airport would expose to danger a person landing an aircraft at the airport. The number of dogs or other animals seen on or near the runway in the year preceding the incident in question would have a tendency to prove that a dangerous situation existed. In fact, it is difficult to imagine how plaintiff could have proved the seriousness of the problem without showing how often animals had been seen on or near the runway.

There is also no merit to defendant's contention that the evidence was unfairly prejudicial, in violation of N.C. Gen. Stat. § 8C-1, Rule 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We do not find the evidence in question to be unfairly prejudicial. "We note at the outset that all evidence favorable to plaintiff will be, by definition, prejudicial to defendants. The test under Rule 403 is whether that prejudice to defendants is unfair." *Matthew v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987), *disc. rev. denied*, 322 N.C. 112, 367 S.E.2d 913 (1988). We find nothing unfair about the admission of the logs kept by Federal Aviation Administration personnel. There is nothing in that evi-

dence which would confuse or mislead the jury or tend to suggest a decision on an emotional or other improper basis. This assignment of error is overruled.

[5] Defendant next contends that it was error to admit plaintiff's evidence which showed the number of animal sightings made by airport personnel during the period 1978 through 1983. Defendant argues that the evidence was too remote in time to be probative of the issues in this case. We disagree. Remoteness in time generally goes to the weight of the evidence and not to its admissibility. *State v. Schultz*, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857, *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). Furthermore, it is clearly relevant to the foreseeability issue for plaintiff to show the frequency of dog and other animal sightings for each and every year from 1978 up to the date of the accident. There is no merit to this assignment of error. We have examined defendant's other assignments of error dealing with evidentiary questions, and we find no prejudicial error was committed.

Finally, we consider defendant's assignments of error relating to the submission of issues to the jury and the trial court's instructions to the jury. We first consider defendant's contention that the trial court erred in not submitting to the jury an issue of whether plaintiff was contributorily negligent. In an earlier part of this opinion, we held the trial court correctly denied defendant's motion for directed verdict on the ground that plaintiff was contributorily negligent as a matter of law. In that discussion, we further held that the evidence cited by defendant was insufficient to raise an inference that plaintiff was contributorily negligent. We thus hold that the trial court did not err in failing to submit to the jury an issue of contributory negligence.

Defendant has also contended that the trial court erred in not submitting a factual issue to the jury on whether plaintiff was an invitee or a licensee, an issue which would impose different duties upon defendant. In an earlier portion of this opinion, we held the trial court did not err in finding that plaintiff was an invitee as a matter of law. There was thus no error in refusing to submit a factual issue to the jury on the status of plaintiff.

We have reviewed defendant's remaining assignments of error relating to the charge to the jury, and we find no prejudicial error.

In summary, in the trial below, we find

No error.

Judges PHILLIPS and GREENE concur.

CELIA McNEILL, CHARLES L. McNEILL, OBIE L. McLEAN, EUNICE M. MATTHEWS, GENEVIEVE BRYANT, RONALD BRYANT, ETHEARL MORRIS, JOSEPH MORRIS, HENRY SMITH, GENETTE SMITH, ESTERBELLE McALISTER, LOIS MORRIS, AND DELLA RAY, PLAINTIFFS v. HARNETT COUNTY; THE HARNETT COUNTY BOARD OF COMMISSIONERS; BILL SHAW, LLOYD G. STEWART, RUDY COLLINS, MAYO SMITH, AND MACK REID HUDSON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HARNETT COUNTY BOARD OF COMMISSIONERS; THE BUIES CREEK-COATS WATER AND SEWER DISTRICT; AND THE NORTHEAST METROPOLITAN WATER DISTRICT, DEFENDANTS

No. 8811SC1198

(Filed 16 January 1990)

1. **Municipal Corporations § 24.1 (NCI3d)— new sewer system—assessments against benefited properties—statutory notice required**

Where defendant county financed the building of a new sewer system by making special assessments against benefited properties, defendant was required to follow the notice procedures of N.C.G.S. § 153A, article 9; because defendant failed to comply with these procedures, its ordinance requiring connection to the sewer line is declared null and void as to these plaintiffs.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 573.

2. **Attorneys at Law § 7.5 (NCI3d)— violation of due process rights alleged—plaintiffs entitled to attorney fees**

Plaintiffs were entitled to attorney fees in this action where they asserted a violation of their right to due process under 42 U.S.C. § 1983 through defendant county's having compelled them to make payments without an opportunity to be heard.

Am Jur 2d, Civil Rights § 16.

APPEAL by plaintiffs, cross-appeal by defendants, from judgment and order entered 28 July 1988 in HARNETT County Superior Court by *Judge Wiley F. Bowen.* Heard in the Court of Appeals 18 April 1989.

East Central Community Legal Services, by Leonard G. Green, and Jeffrey M. Seigle, for plaintiff-appellants, cross-appellees.

Woodall, Felmet & Phelps, P.A., by John M. Phelps, II, for defendant-appellees, cross-appellants.

BECTON, Judge.

[1] Plaintiffs seek declaratory and injunctive relief, alleging that defendants failed to comply with statutory and constitutional provisions in seeking to require plaintiffs to connect their properties to a new sewer line. Essentially, we must decide whether a county has to comply with certain provisions of N.C. Gen. Stat. ch. 153A before it may levy certain charges to finance the construction of a sewage system. We hold that such compliance is required. Because we agree that the defendants failed to comply with statutorily-mandated procedures, we do not reach the constitutional questions presented by plaintiffs.

I

Plaintiffs are owners of residential real property located in rural Harnett County. At the time they purchased their land, no sewage disposal system serviced their area. Therefore, plaintiffs installed septic tanks on their property.

On 20 October 1980, defendant Harnett County Board of Commissioners resolved to create the Buies Creek-[Town of] Coats Water and Sewer District, a district which would encompass plaintiffs' properties. On 1 March 1982, the Board made application for approval of the issuance of $2,500,000.00 worth of bonds to construct an extension of an existing sewer system into the new District. The Board held a public hearing concerning the bonds on 15 March 1982; notice of the hearing, together with the bond order, was published in the *Dunn Daily Record* of 4 March. The bond order stated that a tax would be levied to pay the principal and interest on the bonds if they issued. At the meeting, the Board adopted the bond order and called for a special referendum. At this same meeting, the Board determined that the cost of the system would be financed in part by local funds. The Board set up a "connection

charge schedule" allowing for a mandatory connection fee of $1,200.00 to be charged district residents. (Because of a subsequent increase in grant funding, the Board, at a 5 April 1982 meeting, reduced the amount of the fee to $250.00 per property owner.)

On 30 April 1982, the County held a referendum to decide whether the sewer bonds should issue. The ballot in part asked, "Shall the order adopted March 15, 1982 authorizing not exceeding $2,500,000.00 Sanitary Sewer Bonds of the Buies Creek-Coats Water and Sewer District for the purpose of providing funds, with any other available funds, for constructing a sanitary sewer system for said District . . . and authorizing the levy of taxes in an amount sufficient to pay the principal of and the interest on said bonds, be approved?" The voters approved the bond issuance.

On 21 June 1982, the Board, anticipating the local share of the construction costs to be $250,000.00, met and adopted a resolution calling for the monies to be raised "by user fees to be paid in advance of the construction." The Board resolved that the District would have authority to levy special assessments against benefited property within the District sufficient to finance all or part of the system. The resolution stated that a "tap fee" should be established "in such a manner as to give the district users an incentive to pay [the] anticipated assessments in advance . . . ." This incentive took the form of a waiver of the fee if a potential user would pay an "anticipated assessment sum" of $250.00 by 1 December 1982. If a user did not pay the assessment sum, the tap fee charged would increase each month to a maximum additional amount of $250.00, or $500.00 total. By 7 February 1983, the District had received more than $225,000.00 in advance payments.

On 6 August 1984, the Board adopted an ordinance requiring owners of all improved property in the County to connect their premises to the sewer system. The ordinance further stated that residents who refused to connect to the system would nonetheless be liable for a flat rate of $18.00 per month in sewer charges. The Board further authorized a "tap on" or "connection fee" of $500.00. On 7 January 1985, the Board authorized the County utility department to terminate the water service of any customer who had not paid a sewer bill.

Plaintiffs have not connected their residences to the sewer lines. Plaintiffs Ethearl Morris, Joseph Morris, and Lois Morris have paid a portion of the connection fee; the remaining plaintiffs

have not paid the fee. In May 1985, water service to plaintiffs Celia McNeill and Charles L. McNeill was terminated for their refusal to pay charges due. Their service was subsequently restored upon their payment of these charges.

Plaintiffs instituted this action against defendants and prayed that the court declare the County's charges to be null and void. Defendant Harnett County counterclaimed, seeking orders to compel plaintiffs to connect their properties to the sewer lines, to compel payment of the connection fee, and to recover unpaid sewer charges. The parties filed cross-motions for summary judgment. The trial judge allowed partial summary judgment to plaintiffs, prohibiting the County from compelling payment of the connection fee. Summary judgment was entered for defendants on all other counts. Both parties appealed.

II

Plaintiffs contend that the mandatory connection order is unenforceable in that the County failed to provide them with the required statutory notice and public hearing and that the order violates their rights to due process under the State and federal constitutions. Plaintiffs have not contested, and we accept, the County's assertion that it entered into a valid interlocal cooperative agreement to operate the sewer system. N.C. Gen. Stat. Sec. 153A-284 (1987) empowers a county to require the owner of improved property to connect to a sewer line and to fix charges for the connection. N.C. Gen. Stat. Sec. 162A-88 (1987) provides that a county water and sewer district "may establish, revise and collect rates, fees or charges and penalties for the use of or the services furnished or to be furnished by any sanitary sewer system . . . ."

A water and sewer district has the authority to make special assessments "against a benefited property within the district for all or part of the costs of . . . [c]onstructing . . . sewage disposal systems." N.C. Gen. Stat. Sec. 162A-92(2) (1987). The statute directs, however, that the district exercise its authority to levy such assessments according to the provisions of chapter 153A, article 9. Pursuant to that article, when the cost of all or part of a project is to be financed through special assessments, a board of commissioners must adopt a preliminary assessment resolution. N.C. Gen. Stat. Sec. 153A-190 (1987). A copy of that resolution must be sent by first-class mail to each owner of property subject to the assessment. N.C. Gen. Stat. Sec. 153A-191 (1987). The board must publish

notice of a public hearing to be held on the question of the resolution, *id.*, and afford all interested persons an opportunity to be heard on the matter. N.C. Gen. Stat. Sec. 153A-192 (1987).

At the heart of the dispute between these parties is the question whether the County made "an assessment" against the residents of the District. The County contends it never adopted a preliminary assessment resolution because the $225,000.00 it received in "anticipated assessments" obviated the need to make actual assessments. Further, it contends that its mandatory connection charge and monthly service charge were not assessments but were fees for "services to be furnished" under Section 162A-88; it contends that charges made pursuant to that statute do not require compliance with the provisions of chapter 153A. Plaintiffs, on the other hand, argue that the County's monthly sewer charges generated from the mandatory connection order are being used to repay the principal on the sewer bonds—to finance the cost of the construction of the sewer line, in other words—making applicable chapter 153A's requirements. Plaintiffs contend the County's connection fees, in addition, "are merely assessments masquerading under a new name."

A special assessment is a compulsory charge placed upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement within the district. 14 McQuillin, Municipal Corporations, Sec. 38.01 (3d ed., Cum. Supp. 1988). The improvement must confer a benefit on property distinguishable from the benefit enjoyed by the surrounding area. *Id.* "The underlying theory upon which a valid assessment is based is that a local improvement has been made by a municipality, and that the property of all abutting owners derives a benefit therefrom, for which they should be compelled to pay." *Atlantic Coast Line R.R. Co. v. Town of Ahoskie*, 192 N.C. 258, 260, 134 S.E. 653, 654 (1926).

The County contends that no assessment was made in this case because the mere presence of the sewer line is a benefit to both the improved and unimproved property in the District. *See Amherst Builders Ass'n v. City of Amherst*, 61 Ohio St. 2d 345, 347, 402 N.E.2d 1181, 1183 (1980); *but see Robinson v. Richland County Council*, 293 S.C. 27, 32, 358 S.E.2d 392, 395-96 (1987) (increase in property values in adjoining area because of new sewer lines not sufficient to bring adjacent landowner within class who "benefit" from project). Because it charged fees to only those prop-

erty owners who used the system, and not to all owners of property within the District, the County argues that it made no assessments. The County also seeks to differentiate its charges from assessments by noting those statutes in which the making of an assessment creates a lien on the assessed property. *See* N.C. Gen. Stat. Secs. 153A-195 and 153A-200 (1987). The County contends that no liens against plaintiffs' properties were created by the fees it charged.

Even if the charges levied in this case are not assessments in the technical sense, we do not view them as the types of charges contemplated by Section 162A. The County cannot, for example, on the one hand argue that the connection fee is not an assessment because it is only charged to users of the system when, on the other hand, it seeks to compel all owners of improved property to become users. And although the connection fees do not themselves become liens on plaintiffs' properties, the County would have obtained judgment liens had the trial judge upheld the validity of the connection charges. We find probative, moreover, the County's use of the term "anticipated assessments" to describe the $250.00 it solicited from each owner of improved property in the District. This anticipated assessment, if not paid, then became a mandatory connection charge consisting of that $250.00 plus an additional amount up to $250.00. The record demonstrates that the anticipated assessments, the connection fees, and the monthly service charge were directed, to varying extents, to the financing of the sewer project. We hold these charges to be the functional equivalent of a special assessment and not as charges for services under Section 162A-88. Therefore, notice and an opportunity to be heard on the County's plan to finance construction of the system should have been afforded plaintiffs. Notice of the actual financing plan was especially necessary in this case as the published bond order had stated that a tax would be levied to pay the principal on the sewer bonds.

The County argues that the setting of rates and charges may reflect costs associated with financing the construction of a system. In *Town of Spring Hope v. Bissette*, this Court said that

> [t]he great weight of authority is to the effect that in the setting of such rates and charges, a municipal body may include not only operating expenses and depreciation, but also capital cost associated with actual or anticipated growth or improvement of the facilities required for the furnishing of such services.

53 N.C. App. 210, 213, 280 S.E.2d 490, 492 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982) (citations omitted). *Bissette*, however, involved a dispute over the payment for services already received. Our Supreme Court said that

> [c]onstruction of the new water treatment plant was not intended to, nor did it result in, providing a new or a higher level of service to the sewer system's customers. When the new plant went into operation, the customers received nothing they had not theretofore received; thus, the increase in the rate did not reflect any services yet to be furnished, but merely the same service which had previously been furnished, *i.e.*, the efficient removal of waste water. The increase in the rate, far from being a charge for a new service not yet provided by the Town, represented the cost of a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service.

305 N.C. at 251-52, 287 S.E.2d at 853. *Bissette* is distinguishable from this case in that the County here is using its charges to pay for the construction of a new project. The statutes prescribe more exacting procedures when assessments or their equivalent are used for this purpose than is required when charges associated with the operation of an existing system are levied.

Plaintiffs have urged us to hold that N.C. Gen. Stat. Sec. 153A-276 (1987) requires that notice by first-class mail be given whenever a mandatory connection order is issued under Section 153A-284. Section 153A-276 provides that "[s]ubject to the restrictions, limitations, procedures, and regulations *otherwise provided by law*, a county may finance the cost of a public enterprise by levying taxes, [etc.]" (Emphasis added.) Plaintiffs read the "otherwise provided by law" provision to mean that individual notice and a public hearing are required whenever landowners are required to connect to a sewage system. We do not believe our decision in this case requires a holding of that breadth. It may not be the case that every mandatory connection order is void for lack of notice. Our decision in this case hinges on the method of financing adopted by the County, a plan which effectively involved the making of special assessments for the financing of the new sewer line.

We are unwilling to sanction a plan that would allow a county to circumvent the statutory scheme for the financing of public

projects. We therefore hold the County's ordinance requiring connection to the sewer lines to be null and void as regards these plaintiffs, and that portion of the judgment mandating connection and payment of service charges is hereby vacated.

III

[2] Plaintiffs argue that they are entitled to attorney fees in this case. In their Complaint, plaintiffs sought, among other things, a declaratory judgment and asserted a claim under 42 U.S.C. Sec. 1983. As we have decided this case under the statutory law of our State, the test for determining whether plaintiffs, as the prevailing party, are entitled to fees is whether 1) there is a substantial claim under Section 1983 and 2) there is a common nucleus of operative facts between the Section 1983 claim and the State law claim. *Ward Lumber Co. v. Brooks*, 50 N.C. App. 294, 296-97, 273 S.E.2d 331, 333, *appeal dismissed*, 302 N.C. 398, 279 S.E.2d 356, *cert. denied*, 454 U.S. 1097, 70 L.Ed. 2d 638 (1981); *see also* H.R.Rep. No. 1558, 94th Cong. 2d Sess. 4, n.7 (1976). Both prongs of the test are met here.

Plaintiffs' claim under Section 1983 is substantial. They assert a violation of their right to due process through the County's having compelled them to make payments without an opportunity to be heard. The facts upon which we have decided their statutory claim, in addition, are the same facts upon which their Section 1983 claim is based. We hold that plaintiffs are entitled to fees in this action and remand for a determination as to amount.

IV

That portion of the judgment requiring plaintiffs to connect their properties to defendants' sewer system is reversed; that portion requiring plaintiffs to pay sewer charges is reversed and remanded with instructions that any sums heretofore paid by plaintiffs be reimbursed them with interest; that portion of the judgment relieving plaintiffs of liability for the mandatory connection fee is affirmed. Plaintiffs' motion for attorney fees for the time expended on this appeal is granted; the case is remanded for a determination as to the amount of attorney fees to which plaintiffs are entitled.

Affirmed in part, reversed and remanded in part.

Judges JOHNSON and ORR concur.

KELLY ROBERT CASEY, BY AND THROUGH HIS GUARDIAN AD LITEM, BRENDA KIRTON AND MARY LOIS CASEY, PLAINTIFFS v. FREDRICKSON MOTOR EXPRESS CORPORATION, DEFENDANT

No. 8828SC1274

(Filed 16 January 1990)

1. **Damages § 17.1 (NCI3d)— thin-skulled plaintiff rule—failure to instruct—error**

In an action to recover for injuries sustained in an automobile accident, the trial court erred in refusing to instruct the jury on the thin-skulled plaintiff rule where there was evidence which would support a jury finding either that defendant's employee driver was not negligent or that his negligence did not cause plaintiff's brain damage, but the evidence would also support a finding of liability despite the fact that plaintiff's injuries also resulted from a pre-existing congenital defect unknown to anyone; furthermore, the trial court's error in failing to instruct the jury on the rule was not rendered moot because of the jury's verdict on the issue of negligence.

Am Jur 2d, Damages §§ 310-312, 997.

2. **Automobiles and Other Vehicles § 89.2 (NCI3d)— last clear chance—insufficiency of evidence to require submission of issue**

In an action to recover for injuries sustained in an automobile accident, the trial court did not err in refusing to instruct the jury on the doctrine of last clear chance where there was no evidence of the speed of defendant's tractor-trailer and no evidence that defendant's employee did not slow down when he saw plaintiff run off the road; there was evidence that defendant's employee swerved into the lane of oncoming traffic in order to avoid plaintiff who had run off the highway to the right of defendant's employee's lane of travel; there was evidence that the employee locked his brakes and that the tractor-trailer skidded for 107 feet, but there was no evidence that he had sufficient time to respond otherwise to a vehicle traveling toward him out of control; and the opportunity to avoid the accident was equally available to plaintiff who, having run off the highway, then pulled back onto the highway in front of defendant's employee.

Am Jur 2d, Automobiles and Highway Traffic §§ 843, 1118.

3. Automobiles and Other Vehicles § 90.7 (NCI3d)— sudden emergency—instruction proper

Evidence was sufficient to support the trial court's instruction on the doctrine of sudden emergency where, according to defendant's employee's statement to the investigating officer, the employee was faced with a situation in which an oncoming vehicle had run off the road in front of him and then had pulled back onto the highway into the employee's lane of travel.

Am Jur 2d, Automobiles and Highway Traffic §§ 843, 1117.

APPEAL by plaintiff from judgment of *Judge Marlene Hyatt* entered 6 April 1988 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 17 May 1989.

Tharrington, Smith & Hargrove, by John R. Edwards and Douglas E. Kingsbery, for plaintiff appellant.

Collie and Wood, by George C. Collie and James F. Wood, III; and Charles M. Welling for defendant appellee.

COZORT, Judge.

Plaintiff appeals from a jury verdict finding that plaintiff was not injured by the negligence of defendant. He contends that he was prejudiced by the trial court's refusal to instruct the jury on the "thin-skulled plaintiff" doctrine. We agree and remand for a new trial.

On 3 November 1981, plaintiff, a twenty-four-year-old student at UNC-Asheville, was driving his automobile on U.S. 25A (also called Sweeten Creek Road) in Asheville. Plaintiff was traveling south out of Asheville on his way to his part-time job at United Parcel Service, where his shift was to begin at 3:30 a.m. At approximately 123 Sweeten Creek Road, a short distance beyond a curve in the road, plaintiff's vehicle collided with a tractor-trailer owned by defendant and operated by defendant's employee, David York.

Plaintiff, who was unconscious following the accident, was transported to Memorial Mission Hospital, where he was seen by a neurosurgeon, Dr. Larry Schulhof. Plaintiff was in a coma and his neurological functioning was rapidly deteriorating. A CAT scan revealed a blood clot or a hemorrhage in the brain, and surgery

was performed, during which the hemorrhage was removed. Dr. Schulhof also discovered and removed a blood vessel abnormality, an arteriovenous malformation, which was congenital. As a result of the hemorrhage, plaintiff suffered severe brain damage and significant mental, vocational, and visual impairment. He has no memory of the accident.

Plaintiff's parents were appointed as guardians for plaintiff in 1981. Following the death of plaintiff's father and a move by plaintiff and his mother to Costa Mesa, California, a resident of Buncombe County was appointed guardian ad litem in 1984. Plaintiff, by and through his guardian ad litem and his mother, filed a negligence action in 1984 against defendant Fredrickson Motor Express Corporation and David York. Defendants filed Answer alleging contributory negligence. Plaintiff responded denying contributory negligence and pleading the doctrine of last clear chance. Plaintiff's complaint was subsequently amended to include allegations of negligent entrustment. In March 1988, York was voluntarily dismissed from the action without prejudice.

At trial, plaintiff presented the testimony of Robert Demetrius, a co-worker who was traveling two cars behind plaintiff the morning of the accident. Demetrius testified that, prior to entering the curve at 123 Sweeten Creek Road, plaintiff was traveling in his own lane of traffic and below the posted speed limit. Demetrius did not see the collision take place. He stated that when he rounded the curve he had to slam on brakes and run off the road to a graveled area on his left to avoid the accident. He saw the tractor-trailer across both lanes of traffic with the tractor through the southbound lane, saw plaintiff's vehicle, badly damaged, in the southbound lane but facing north, and most of the debris in the southbound lane. Demetrius identified on a photograph a set of skid marks where he ran off the northbound shoulder to his left. He testified that there was a ten-foot graveled shoulder which continued all along the northbound lane and that he drove around the accident on that graveled area.

Defendant's driver, York, the only witness to the accident, did not take the stand at trial. The Asheville police officer who was called to the scene of the accident testified as to York's statement as follows:

> This is in my own words. I don't recall exactly what [York] said. He advised me that he was proceeding north on 25-A.

> He had just come out of a curve northbound when he observed a white vehicle that was traveling southbound run off the road through his lane at approximately the area of 123 Sweeten Creek Road. He observed this vehicle cross over and turn facing—almost facing him, still facing him somewhat southbound.

According to the officer, York further stated that he tried to swerve to his left to go around the vehicle and, upon seeing that the vehicle was moving back into its own, southbound lane of travel, he tried to go back into his northbound lane but instead collided with plaintiff's vehicle approximately in the center of the road. York showed the officer a set of skid marks where plaintiff allegedly ran off the road. It was the same set of marks identified by Demetrius as having been made by him when he skidded off the road to avoid the accident. Finally, the officer testified that there were approximately one hundred and seven feet of skid marks leading up to the tractor-trailer; almost all of those marks were in the truck's own, northbound lane of travel.

On the issues of the nature of plaintiff's injury and causation, Dr. Schulhof testified that there was no sign of trauma to plaintiff's head, that there were some cuts on his face but no skull fracture. Dr. Schulhof's pre-surgery diagnosis was that the hemorrhage in plaintiff's brain was the result of an abnormality, because its position was not typical for a hemorrhage due to a blow to the head. His post-operative opinion was the same: that the hemorrhage had occurred "spontaneously" and not as a result of a traumatic blow to the head. He testified, "I don't believe I can say with any certainty as to whether the hemorrhage or the blood clot was caused by the effects of the trauma itself. I think the evidence is very strong that it was a result of a hemorrhage from the blood vessel abnormality, if you understand my distinction there." Plaintiff also introduced testimony from a pathologist who testified that he did not think that the hemorrhage resulted from an arteriovenous malformation that ruptured on its own. Defendant introduced expert testimony agreeing with Dr. Schulhof's diagnosis of a spontaneous rupture.

At the charge conference and again at the conclusion of the court's charge to the jury but before the jury began deliberating, plaintiff requested an instruction on proximate cause in accordance with Pattern Jury Instruction 102.20A, "Proximate Cause—Peculiar Susceptibility ('Thin-Skulled' Plaintiff)." The trial court denied the

requests. The court also denied plaintiff's requests for an instruction on the doctrine of last clear chance. Over plaintiff's objections, the trial court instructed the jury on the doctrine of sudden emergency.

[1] The jury returned a verdict finding that plaintiff was not injured by the negligence of defendant. Plaintiff appeals, assigning as error the trial court's refusal to instruct the jury on the thin-skulled plaintiff rule and on the doctrine of last clear chance. Plaintiff also assigns error to the trial court's instructing the jury on the doctrine of sudden emergency. We agree that the court's refusal to instruct the jury on the thin skull rule was reversible error.

The thin skull rule is the rule of law that a negligent defendant takes the plaintiff as he finds him and, therefore, is liable for the harmful consequences of his negligent act notwithstanding the fact that the damages were unusually extensive because of the plaintiff's peculiar susceptibility or pre-existing condition. *See Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964). The instruction requested by plaintiff is set forth in North Carolina Pattern Instruction—Civil 102.20(A) as follows:

> *In this case, the defendant contends, and the plaintiff denies, that plaintiff's injury was not reasonably foreseeable and, that, therefore, the defendant's conduct could not be a proximate cause of plaintiff's injury.*
>
> When a defendant's negligent conduct would not have resulted in any injury to a plaintiff of ordinary susceptibility, the defendant would not be liable for the harmful consequences which result from the plaintiff's peculiar susceptibilities, such as a pre-existing disease or an extraordinary condition, unless, under the circumstances, the defendant knew or should have known of such peculiar condition. However, if the negligent conduct of the defendant would have resulted in any injury to a person of ordinary susceptibility, the defendant would be liable for all the harmful consequences which occur—even though these harmful consequences may be unusually extensive because of a pre-existing or an extraordinary condition. (Emphasis added.) (Footnotes omitted.)

Defendant argues that the instruction requested by plaintiff was not applicable in this case because defendant did not contend that plaintiff's injuries were not reasonably foreseeable. Rather,

it was defendant's contention at trial that York's negligence did not cause the collision and, even if it did, the collision did not cause the hemorrhage in plaintiff's brain, as the vessel abnormality ruptured spontaneously and not as a result of any trauma sustained in the accident. While we agree that the defendant's contentions differ from the pattern instruction's prefatory language regarding foreseeability, we nonetheless believe the facts below support a thin-skulled plaintiff instruction. The introductory comments to the North Carolina Pattern Jury Instructions state that "(t)hese instructions do not eliminate the need to individually tailor each charge to the given factual situation and to comply with Rule 51(a) of the North Carolina Rules of Civil Procedure." Thus, although there was evidence which would support a jury finding either that York was not negligent or that York's negligence did not cause plaintiff's brain damage, the evidence would also support a finding of liability despite the fact that plaintiff's injuries also resulted from a pre-existing congenital defect unknown to anyone. Defendant concedes in its Brief that the thin skull rule would be relevant to the issue of damages. The question that is raised is whether the trial court's error in failing to instruct the jury on the rule is rendered moot because of the jury's verdict on the issue of negligence.

The jury responded "No" to the first issue, which read: "Was the plaintiff, Kelly Robert Casey, injured by the negligence of the defendant, Fredrickson Motor Express Corporation?" Thus, the jury could have found either York was not negligent or that York's negligence was not the proximate cause of plaintiff's injuries. We hold that the rule is relevant to the issue of proximate cause and that plaintiff could have been prejudiced by the court's refusal to give the instruction. *See* Prosser and Keeton, The Law of Torts § 43 (5th ed. 1984).

Defendant argues that there was evidence that plaintiff also suffered a broken leg and kneecap in the collision. Therefore, defendant contends, the fact that the jury was not instructed that defendant could be liable despite plaintiff's unknown pre-existing condition could not have affected defendant's liability for plaintiff's other injuries, and therefore the jury must have found defendant not negligent. We do not believe that argument is valid in the case before us. Plaintiff contends that he presented evidence of his brain injury only. Defendant responds that defendant's Exhibit 28 shows that there was evidence that plaintiff suffered the other

injuries. The record shows defendant's Exhibit 28 to be an enlarged photocopy of Dr. Schulhof's report at Memorial Mission Hospital. That report consists of a full page of information, including the following: "Left mid shaft transverse femur fracture, closed" and "Left transverse patellar fracture, open." However, defendant has failed to show that its Exhibit 28 was read or shown to the jury or that the information was otherwise placed before the jury. Under the circumstances, we do not believe that the record before us mandates the conclusion that the jury found that defendant was not negligent. The evidence below supports an instruction on the thin-skulled plaintiff doctrine, and the trial court erred in failing to give it.

[2] We now address two issues likely to arise on retrial. Plaintiff contends the trial court erred in refusing to instruct the jury on the doctrine of last clear chance. The doctrine of last clear chance is "but an application of the doctrine of proximate cause." *Exum v. Boyles*, 272 N.C. 567, 578, 158 S.E.2d 845, 854 (1968). For the last clear chance doctrine to apply, there must be evidence "that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so." *Id.* at 576, 158 S.E.2d at 853.

Plaintiff contends that sufficient evidence of defendant's last clear chance to avoid injuring plaintiff was presented through York's statement to the police officer and the expert testimony of Ronald Nichols. York stated that he had just come out of a curve when he observed plaintiff's vehicle run off the road through York's lane of travel, that York swerved to his left to avoid plaintiff, but that plaintiff then crossed over and began moving back into his own, southbound lane of travel, and that York then attempted to go back into his northbound lane but instead collided with plaintiff. Nichols, who was qualified by the trial court as an expert in the handling and maneuvering of eighteen-wheeled tractor-trailers, testified that drivers are never instructed to cross the center line and move to the left to avoid an accident and that defendant had enough room on the right to move to the right. Furthermore, Nichols testified that York improperly applied his brakes so as to lock the wheels, thereby taking a greater distance to stop his vehicle than otherwise required. Plaintiff contends that this evidence is

sufficient to show that defendant had the "time and the means" to avoid injuring plaintiff. We do not agree.

Plaintiff bore the burden of proof on this issue. *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977). There was no evidence of the speed of the tractor-trailer nor was there evidence that York did not slow down when he saw plaintiff run off the road. There was evidence that York swerved into the left lane in order to avoid plaintiff, who had run off the highway to the graveled area to the right of York's lane of travel. There was evidence that York locked his brakes and that the tractor-trailer skidded for 107 feet, but there was no evidence that York had sufficient time to respond otherwise to a vehicle traveling toward him out of control. Although plaintiff argues that York first saw plaintiff run off the road when York "had just come out of" a curve some 800 feet away, there is no evidence in the record of that precise distance, nor is there evidence of how far York was from plaintiff when plaintiff turned his vehicle back onto the highway. Furthermore, the opportunity to avoid the accident was equally available to plaintiff, who, having run off the highway, then pulled back onto the highway in front of York. We therefore hold that the trial court correctly concluded that plaintiff's evidence below did not create a question for the jury on the issue of last clear chance.

[3] We further hold that the trial court correctly instructed the jury on the doctrine of sudden emergency. That rule of law provides that one who is faced with a sudden emergency is not required to exercise the same standard of care as he might be required to exercise if he had more time to respond to the danger before him. *White v. Greer*, 55 N.C. App. 450, 285 S.E.2d 848 (1982). According to York's statement to the police officer, York was faced with a situation in which an oncoming vehicle had run off the road in front of him and then had pulled back onto the highway into York's lane of travel. This evidence was sufficient to support an instruction to the jury on the sudden emergency doctrine.

Because the trial court failed to instruct the jury on the thin skull doctrine, we hold that plaintiff is entitled to a

New trial.

Judges JOHNSON and GREENE concur.

IN RE: MELISSA TAYLOR, A MINOR CHILD BORN ON MARCH 1, 1977; JAMES (JIMMY) TAYLOR, A MINOR CHILD BORN ON JULY 24, 1978; CYNTHIA (CINDY) TAYLOR, A MINOR CHILD BORN ON OCTOBER 13, 1979; AND JOYCE TAYLOR, A MINOR CHILD BORN ON SEPTEMBER 5, 1981; H. GENE HERELL, DIRECTOR OF THE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. JAMES TAYLOR AND CAROLYN TAYLOR, PARENTS OF MELISSA TAYLOR, JAMES (JIMMY) TAYLOR, CYNTHIA (CINDY) TAYLOR, AND JOYCE TAYLOR, RESPONDENTS

No. 8920DC447

(Filed 16 January 1990)

1. Parent and Child § 1.5 (NCI3d)— termination of parental rights—sufficiency of notice of hearing

Respondents had notice that a hearing on a petition to terminate their parental rights was to be held within 30 days where the initial hearing was scheduled for 1 August 1988; respondent parents and various representatives of the Department of Social Services were present in court on that date; the judge appointed counsel for respondents, a guardian *ad litem* for the children and an advocate for the guardian; he then continued the hearing until 29 August; and given that all parties had notice on 1 August that a hearing would be held, there was no possibility that respondents were unfairly surprised or that their ability to contest the Department of Social Services' petition at the 7 October hearing was in any way prejudiced by their receipt of notice on 3 October. N.C.G.S. § 7A-289.29(b).

Am Jur 2d, Parent and Child §§ 34, 35.

2. Parent and Child § 1.6 (NCI3d)— termination of parental rights—hearing to determine issues for adjudication—procedure adequate

Even if respondents had properly preserved for appeal an issue as to whether the trial judge erred by failing to hold a separate hearing to determine the issues to be adjudicated at the hearing to terminate parental rights, it was sufficient in this case that the issues for adjudication were delineated immediately prior to the commencement of the hearing. N.C.G.S. § 7A-289.29(b).

Am Jur 2d, Parent and Child §§ 34, 35.

3. Parent and Child § 1.6 (NCI3d)— termination of parental rights—child in foster care for 18 months—time not necessarily continuous

There was no merit to respondents' contention that N.C.G.S. § 7A-289.32(3) (1986), the statute providing for termination of parental rights if the parent has willfully left the child in foster care for more than 18 months under certain circumstances, required that the 18 months be *continuous*.

Am Jur 2d, Parent and Child §§ 34, 35.

4. Parent and Child § 1.6 (NCI3d)— termination of parental rights—sufficiency of evidence

In a proceeding to terminate parental rights evidence was sufficient to support the trial court's finding that respondents failed to make reasonable progress toward improving home conditions during the period in which their children were in foster care where the evidence tended to show that the children went into foster care because of respondent father's heavy drinking and the dirty and unsanitary conditions in their home; the Department of Social Services offered assistance on a continuing basis to educate and assist respondent mother in housekeeping duties, including providing homemaker services on a set schedule, but the homemaker was only able to find respondent mother home on two occasions; on announced and unannounced visits social service workers often found clothes piled around the house, dirty floors, old food lying around, dirty bathrooms, trash in the yard, and generally unsanitary conditions; respondents entered into three separate Parent/Agency Agreements with the Department of Social Services, all of which outlined basic objectives for the return of the children to the home and proper maintenance of the household; at times respondents showed a willingness to provide properly for the children which led to a trial placement in their home; but the children had to go back into foster care due to problems again including poor sanitation in the house, lack of food, and poor living conditions.

Am Jur 2d, Parent and Child §§ 34, 35.

APPEAL by respondents from order entered 7 October 1989 in UNION County District Court by *Judge Ronald W. Burris*. Heard in the Court of Appeals 8 November 1989.

Griffin, Caldwell & Helder, P.A., by Jake C. Helder, for petitioner-appellee.

Joe P. McCollum, Jr., for guardian ad litem-appellee.

Painter & Long, by Richard G. Long, Jr., for respondent-appellants.

BECTON, Judge.

Respondents, James Taylor and Carolyn Taylor, appeal an order terminating their rights as parents of their four minor children. For the reasons that follow, we affirm.

I

Petitioner, Union County Department of Social Services ("DSS"), filed a petition to terminate the Taylors' parental rights on 25 May 1988. The Taylors' children have, since February 1985, been in the legal custody of DSS, with their physical custody alternating between the Taylors and foster care. DSS alleged in its petition that the Taylor children were adjudicated neglected in February 1985 and continued to be neglected by their parents within the meaning of N.C. Gen. Stat. Sec. 7A-517(21) (Cum. Supp. 1988) and Sec. 7A-289.32(2) (1986). The Department also claimed that the Taylors had willfully left their children in foster care for more than 18 months without showing a positive response to the efforts of DSS to strengthen the parental relationship and without showing reasonable progress toward correcting the conditions in the home. It further alleged that the Taylors had failed to pay a reasonable portion of the cost of the children's care, despite their having the physical and financial ability to do so.

A hearing on the petition, scheduled originally for 1 August 1988, was continued until 29 August so that counsel for the Taylors and a guardian *ad litem* for the children could be appointed. The hearing took place on 7 October. After hearing the evidence, the judge entered an order terminating the Taylors' parental rights, and they appealed.

II

The Taylors first claim that they were not furnished with notice of the hearing within the time period mandated by statute. In a related assignment of error, they complain that the hearing to determine the issues raised by the petition was not held sep-

arately from the termination hearing. We hold that notice in this case was properly given and that no error occurred concerning the preliminary hearing.

A

[1] N.C. Gen. Stat. Sec. 7A-289.29(b) (1986) requires that a special hearing on a petition to terminate parental rights be held "after notice of not less than 10 days nor more than 30 days" to the parties. The purpose of the hearing is "to determine the issues raised by the petition and answer(s)." *Id.* In this case, the initial hearing was scheduled for 1 August 1988. The Taylors and various representatives of DSS were present in court on that date. The judge appointed counsel for the Taylors, a guardian *ad litem* for the children, and an advocate for the guardian. He then continued the hearing until 29 August. The parties thus had notice that a hearing was to be held within 30 days.

The special hearing and the termination hearing took place on 7 October. The Taylors received notice of the hearing date via a Juvenile Summons which was served on them on 3 October. The Taylors contend on appeal, as they argued at the hearing, that they were entitled to notice at least ten days prior to 7 October. We disagree. The notice requirement of Section 7A-289.29(b) was met when the judge, on 1 August, scheduled the hearing for 29 August. It was sufficient, under the statute, that the parties had proper notice of that hearing date. We do not read Section 7A-289.29(b) as prescribing the rules for notice when a hearing is continued. Given that all parties had notice on 1 August that a hearing would be held, we see no possibility in this case that the Taylors were unfairly surprised or that their ability to contest DSS' petition at the 7 October hearing was in any way prejudiced by their receipt of notice on 3 October. *Cf. M.G. Newell Co., Inc. v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431, 434 (1988) (purpose of notice to enable one to prepare defense). We overrule this assignment of error.

B

[2] The Taylors next argue that the judge erred by failing to hold a separate hearing to determine the issues to be adjudicated at the termination hearing. *See* Sec. 7A-289.29(b). Initially, we note that the Taylors' lawyer did not object when counsel for DSS recited the issues immediately prior to the beginning of the hear-

ing. The lawyer, in fact, said that the recitation was "sufficient . . . just as long as the issues were read into the record." Ordinarily, a failure to object waives a party's right to later assign error. N.C. R. App. P. 10(b)(1) (1989). When, however, a judge acts in contravention of a statute to the prejudice of a party, the right to appeal is preserved notwithstanding the failure to enter an objection. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

This court has held that a "brief" special hearing held "just prior to the trial" does not conflict with the requirements of Section 7A-289.29(b). *In re Peirce*, 53 N.C. App. 373, 383, 281 S.E.2d 198, 204 (1981). We noted in that case that the statute "does not prescribe the exact form the special hearing is to take except that it is to be used to determine the issues raised by the pleadings." *Id.* at 382, 281 S.E.2d at 204. It was sufficient in this case that the issues for adjudication were delineated prior to the commencement of the termination hearing itself. Even had the Taylors properly preserved this issue for appeal, therefore, we would find no error under Section 7A-289.29(b).

III

The Taylors assign error to the judge's failure to allow their motion to dismiss two causes of action contained in DSS' petition. The first of these causes of action alleged that the Taylors had left the children in foster care for a period of 18 months prior to the filing of the petition, without showing a positive response to the efforts of DSS to strengthen the family unit and without showing reasonable progress, under the circumstances, toward correcting the conditions that led to the children's removal from the home. In related assignments of error, the Taylors argue that the judge's findings of fact and conclusions of law with regard to this issue are not supported by the evidence.

A

[3] N.C. Gen. Stat. Sec. 7A-289.32(3) (1986) provides that parental rights may be terminated if "[t]he parent has willfully left the child in foster care for more than 18 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made . . . ." The Taylors argue that the statute requires that the parent willfully leave the child in foster care for 18 *continuous* months. The record shows that the Taylor children, since 1985, have spent more than 18 months under foster

care. From June 1986 until May 1987, however, the children lived with their parents on a trial basis. There is thus no period of foster care for 18 consecutive months.

The legislature amended subsection (3) in 1985; prior to the amendment, the statute required the parent to have left the child in foster care "for more than two consecutive years." *See* comment to Sec. 7A-289.32 (1986). The amended subsection shortened the period to an excess of 18 months and eliminated the word "consecutive." We agree with DSS that "consecutive" would have been retained in the new statute had the legislature intended the period of foster care to be 18 continuous months. We further agree with the Department that a contrary reading of the statute might potentially undermine efforts to reestablish the family unit by causing agencies to be apprehensive about placing children with their parents for trial periods. The Taylors' motion to dismiss this cause of action was properly denied.

B

[4] The Taylors advance the same argument in contending that the judge's findings of fact and conclusion of law with regard to the period of foster care are inadequate to support the order of termination. Having held that the period of foster care need not be 18 continuous months under Section 7A-289.32(3), we address whether there is clear, cogent and convincing evidence in the record to support the judge's findings of fact and conclusion of law with regard to this issue. N.C. Gen. Stat. Sec. 7A-289.30(e) (1986).

The following findings by the judge are pertinent:

> 7. The children came into the custody of the Union County Department of Social Services in October of 1983 due to the respondent father's heavy drinking and the dirty and unsanitary conditions in the Taylor residence. Those conditions have continued to exist at various times during the placement of the children in foster care. The respondent mother has shown an ability to provide basic housekeeping services for the family but has not done so on a continuing basis. The Union County Department of Social Services staff offered assistance on a continuing basis to educate and assist the respondent mother in these duties, including providing homemaker services on a set schedule, but the homemaker was only able to find the respondent mother home on two occasions. On announced and

unannounced visits social service workers often found clothes piled around the house, dirty floors, old food lying around, dirty bathrooms, trash in the yard and generally unsanitary conditions.

* * * *

14. [The Taylors] have entered into three separate Parent/Agency Agreements with the Union County Department of Social Services, all of which outlined basic objectives for the return of the children to the home and proper maintenance of the household. At times, the parents have shown a willingness to properly provide for the children and this led to a trial placement in their home in June of 1986 . . . . The children came back into foster care on May 1, 1987, due to problems again . . . [including] poor sanitation in the house, not enough food in the home and poor living conditions despite continued employment by Mr. Taylor. The children have remained in foster care since that date. The parents have shown no improvement or willingness to follow through with correcting the conditions which led to the children being placed in foster care.

The evidence in the record provides clear, cogent and convincing support of these findings by the judge. Although the Taylors concede that "the majority of the Court's findings of fact in Paragraph 14 are supported by the evidence," they contend that the finding contradicts itself by stating that the Taylors have "shown a willingness to properly provide for the children . . . ." However, the fact that the Taylors showed a willingness to provide for their children in 1986 does not preclude a finding that they have failed to make "reasonable progress under the circumstances." *See In re Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984). We hold that the record demonstrates a failure on the part of the Taylors to make reasonable progress toward improving the home conditions during the period in which their children were in foster care, and we uphold the judge's finding.

In addition to showing a failure to make reasonable progress, Section 7A-289.32(3) requires that DSS prove, by clear, cogent and convincing evidence, respondents' lack of a "positive response" to the Department's "diligent efforts . . . to encourage the parent to strengthen the parental relationship to the child[ren] or to make and follow through with constructive planning for the future of

the child[ren]." *See In re Harris*, 87 N.C. App. 179, 185, 360 S.E.2d 485, 488 (1987). The judge made this required finding, and we hold that it is supported by the record. In *Harris*, this court said that the judge's finding of failure to show positive response could not stand in the absence of findings "showing [DSS'] attempt to provide services or counsel to [the father] or even showing [DSS'] attempt to locate him." *Id.* In contrast to *Harris*, the findings we have recited above show the continuing efforts of DSS to assist the Taylors so as to reestablish the family unit. The record discloses the Taylors' failure to respond positively to these efforts.

We hold, therefore, that the evidence in this case supports the judge's findings of fact and conclusion of law as to Section 7A-289.32(3).

C

A finding of any one of the grounds enumerated at Section 7A-289.32 will support a judge's order of termination. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). The properly supported findings and conclusion addressing the period of foster care, therefore, provide a sufficient basis for us to affirm the order of the trial judge. We note, in addition, that the judge ordered termination on other grounds, including neglect, Section 7A-289.32(2). The evidence in the record, in our view, equally supports termination on this ground.

IV

The order of the trial judge terminating the parental rights of the Taylors is, for the reasons stated above,

Affirmed.

Judges PHILLIPS and GREENE concur.

MARGUERITE B. JOYNER v. J. R. ADAMS

No. 8910SC370

(Filed 16 January 1990)

Landlord and Tenant § 19 (NCI3d)— recomputation of rent—provisions ambiguous—no knowledge by lessee of lessor's intent

In an action to enforce a recomputation in rental payment amounts for defendant's alleged failure to comply with the lease requirements, the trial court properly granted summary judgment for defendant where the recomputation language was ambiguous; plaintiff contended that defendant must have all buildings completed on her land in order to avoid a retroactive recomputation of rent; but the evidence supported the trial court's determination that defendant did not know or have reason to know plaintiff's "completed building" meaning.

Am Jur 2d, Landlord and Tenant § 143.

APPEAL by plaintiff from judgment entered 16 December 1988 by *Judge Coy E. Brewer* in WAKE County Superior Court. Heard in the Court of Appeals 6 November 1989.

Hunton & Williams, by Julius A. Rousseau, III, for plaintiff-appellant.

Tharrington, Smith & Hargrove, by John R. Edwards and Burton Craige, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals the trial court's entry of judgment for defendant after a non-jury civil trial. Plaintiff is the lessor in a commercial property lease; defendant is the lessee (or tenant). This is the third time this court has reviewed an issue stemming from plaintiff's attempt to enforce a recomputation in rental payment amounts for defendant's alleged failure to comply with the lease requirements.

The record shows that the original (or 'base') lease was executed in 1972 between plaintiff and lessee Brown Investment Company ("Company"), with an initial term of 50 years. At the time the parties executed the lease, the property was divided into several lots, essentially unimproved and undeveloped. The parties' intent was to develop the land as an office park. Pursuant to the lease,

the rental amount that lessee paid to plaintiff was calculated by a percentage of the land tract's worth. Lessee was to develop the land for office buildings. Lessee would then rent the buildings to subtenants. If the property was 'developed' by being ready for construction, lessee would obtain a lot lease from plaintiff, grant a deed of trust in exchange for construction financing, build and lease the building to subtenants. Lessee would then pay plaintiff a percentage of the rents collected from subtenants. The lease provided that the rent on undeveloped property would be recomputed annually by reference to the United States Department of Labor Wholesale Price Index for All Commodities, to compensate for the lack of subtenant rentals. When plaintiff granted lessee a lot lease, the lot was no longer subject to the recomputation provision.

Company developed financial problems, and plaintiff initiated negotiations with defendant about the lease, with defendant succeeding Company as lessee. At the time defendant succeeded Company as lessee, Company had built only on one of plaintiff's lots. Negotiations amended the agreement recomputation provision. After negotiations, defendant and plaintiff executed this provision as part of the amended lease agreement:

> Notwithstanding any provision of Paragraphs 7 and 9 of The Lease, as to all lots which are subdivisions of the undeveloped land and as to which subdivision occurs on or before September 30, 1980, the adjusted cost of each such lot shall be its prorated value of the undeveloped land without any adjustment on account of any increase or decrease in the Wholesale Price Index on or after September 30, 1975. For the purpose of this agreement, the agreed value of the undeveloped land on September 30, 1975, is $235,316.00
>
> If, however, the Tenant *fails to subdivide all of the undeveloped land* on or before September 30, 1980, *whereby all portions are deemed lots and eligible for the execution of a lease* or leases as set forth in Exhibit B, the rent of the undeveloped land and the rent for all leases of lots subdivided from the undeveloped land between October 1, 1975 and September 30, 1980, shall be recomputed in the manner set forth in The Lease before the amendments contained in this instrument, and such amounts as are due upon the making

of such recomputation shall be paid within 90 days following such recomputation. [Emphasis added.]

Essentially, defendant and plaintiff changed the time for recomputation, deleting the yearly requirement so that defendant had 5 years to 'develop' the property before the recomputation provision operated to change the rental payments. If defendant did not meet the 5-year deadline, his rental payments were recomputed retroactively to the time of execution of the lease.

Plaintiff brought suit in 1983, alleging that "a portion of the undeveloped land as defined in the agreements had not been subdivided into lots" as of 30 September 1980. At the time of suit, defendant had built commercial buildings on all but one of plaintiff's lots. Defendant had filed subdivision plats on the lot at issue, graded it, installed water and sewer lines, and built the planned roads and driveways. As of 30 September 1980, defendant had not requested a lot lease from plaintiff. In 1982, defendant requested a lot lease on the remaining lot and constructed a building on the lot.

The trial court granted summary judgment for defendant. Plaintiff appealed. In an unpublished opinion ("*Joyner I*"), this court determined that the lease agreement language was ambiguous about the conditions meriting recomputation of rental amounts and remanded the action for trial to determine the proper interpretation of the agreement language. At the second non-jury trial, the trial court entered judgment for plaintiff. Defendant appealed. This court reversed and again remanded the case for non-jury trial. *Joyner v. Adams*, 87 N.C. App. 570, 361 S.E.2d 902 (1987) ("*Joyner II*"). This court determined in *Joyner II* that the parties had no 'meeting of the minds' as to what conditions would trigger the recomputation provision. *Id.*, at 575, 361 S.E.2d at 904-05. However, since an enforceable agreement could result from an 'innocent party's' meaning attached to the provision, the court again remanded the case to the trial court for determination of each party's meaning of the disputed language of the recomputation provision. *Id.*, at 575-76, 361 S.E.2d at 905. This court ordered the trial court to find facts on each party's knowledge of what the other party intended the lease agreement recomputation provision to require. *Id.* In summarizing the opinion, this court noted that plaintiff prevails only if the trial court finds that "defendant knew or had reason to know what meaning plaintiff attached to the disputed terminology and that plaintiff did not know or have reason to know of the

meaning attached to the disputed language by defendant." *Id.*, at 578, 361 S.E.2d at 906. Only if plaintiff were the innocent party and defendant had reason to know her meaning could an enforceable agreement result on which plaintiff could recover.

Upon remand the trial court found the following facts and entered these pertinent conclusions of law:

FINDINGS OF FACT

5. This court finds that defendant did not know or have reason to know what meaning plaintiff attached to the disputed terminology.

6. This court further finds that plaintiff did not know or have reason to know of the meaning attached to the disputed language by defendant.

7. Every physical act necessary for the property to be "ready for construction" had been completed prior to September 30, 1980.

8. Every condition precedent to requesting a lot lease pursuant to the provisions of the agreement had been accomplished by September 30, 1980.

9. Under the terms of the agreement, a lot lease was required before construction could actually begin.

CONCLUSIONS OF LAW

3. Having found that defendant did not know or have reason to know what meaning plaintiff attached to the disputed terminology, pursuant to the direction of the Court of Appeals, plaintiff's claim does not prevail.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff have and recover nothing from defendant.

The issues presented are: (I) whether the trial court's findings of fact were supported by the evidence adduced at trial that defendant did not know or have reason to know of plaintiff's meaning of the rental recomputation provision and (II) whether the trial court exceeded its authority in finding as a fact that defendant had complied with the lease provisions.

I

The mandate of *Joyner II* required the trial court to determine whether the defendant knew or had reason to know what meaning plaintiff attributed to the conditions in the recomputation provision. *Id.*, at 578, 361 S.E.2d at 906. In reviewing the trial court's finding on this determination, we first must ascertain plaintiff's meaning at the time of negotiations. 3 A. Corbin, *Contracts* § 537 (1971). Plaintiff contends that the agreement required defendant to have actually completed all buildings by 30 September 1980 to avoid the recomputation provision.

Second, we must determine whether defendant knew or had reason to know plaintiff's meaning of the conditions. *Id.* In determining whether defendant had knowledge or reason to know of plaintiff's meaning, the following language guides us:

> it [is] material what a reasonable man in [defendant's] position would have known [under these circumstances]. But observe that it is such a man 'in [defendant's] position' whose hypothetical meaning is given weight, not a reasonable man in vacuo, or a reasonable college professor, or a normal user of English in a different environment.

Id.

"If A and B gave different meanings to [ambiguous terminology], we must proceed to determine whether [defendant] knew, or had reason to know, that [plaintiff] gave a particular meaning to the [ambiguous provision] *and* [defendant] *assented in reliance thereon.*" (Emphasis added.) Rephrased, was defendant "reasonably induced by [plaintiff's or by her representatives'] expressings of *agreement*" to believe that he must have all buildings completed "without running counter to other expectations and understandings that were also reasonably induced [by plaintiff?]" *Id.* (Emphasis added.) One of the "chief purposes" of contract law is "to secure the realization of expectations reasonably induced by the expressions of agreement." *Id.*

In this case the trial court found that defendant did not have reason to know plaintiff's 'completed building' meaning. The trial court's finding is binding on this court if the record contains some competent evidence to support the finding. *Lyerly v. Malpass*, 82 N.C. App. 224, 225, 346 S.E.2d 254, 256, *review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987).

We determine that at least four instances of competent evidence exist to support the trial court's finding. First, plaintiff's testimony reveals two versions of her meaning of the conditions triggering the recomputation agreement. Her initial testimony was that 'completed building' was the condition for avoiding recomputation. However, her subsequent testimony was that the condition meant 'completed buildings' *and* tenant occupation of the buildings. Plaintiff also testified about her inexperience and unfamiliarity with commercial real estate transactions.

Second, even if plaintiff did not have more than one meaning, plaintiff's lack of direct communication with defendant during negotiations was insufficient to give defendant reason to know that either version of plaintiff's meaning of the conditions triggering the recomputation provision differed from defendant's meaning. In negotiations, plaintiff did not meet with defendant; she was represented by her husband-attorney and several accountants. Nowhere does the record show that plaintiff's negotiators conveyed either version of plaintiff's meaning to defendant.

The third instance is the lack of evidence that defendant assented to the contract in reliance on a 'completed building' meaning of the recomputation conditions. The record shows that plaintiff's negotiators recommended a 'completed building' clause for the recomputation provision without stating whether it was plaintiff who requested the recommendation. The record also shows that defendant flatly rejected plaintiff's negotiators' recommendation that the agreement recomputation provision include 'completed building' language. Subsequent to defendant's rejection, the record shows that none of plaintiff's negotiators informed defendant that plaintiff knew of defendant's rejection, that plaintiff disagreed with defendant's rejection, or that defendant's rejection was to have no effect.

The fourth instance is defendant's evidence showing that his previous extensive business knowledge and experience with commercial real estate transactions led him to attribute meanings to the recomputation terms 'subdivision,' 'development,' and 'construction' different from plaintiff's meanings. Defendant offered this evidence to show that he did not have reason to know that the recomputation provision should have been understood to include 'completed buildings.'

Based on the record before us, we determine that a reasonable lessee in defendant's position would not have been reasonably in-

duced to believe that he must complete all buildings by the recomputation provision deadline. Thus, the trial court properly found that defendant had no knowledge or reason to know plaintiff's meaning that would allow plaintiff to prevail.

II

Plaintiff failed to cite case authority to support her contention that the trial court exceeded its authority in making certain findings of facts and we deem plaintiff's second contention abandoned. *Tindall v. Willis*, 95 N.C. App. 374, 378, 382 S.E.2d 778, 780 (1989).

Affirmed.

Judges BECTON and PHILLIPS concur.

J. M. WESTALL & COMPANY, INC., A NORTH CAROLINA CORPORATION v. WINDSWEPT VIEW OF ASHEVILLE, INC. AND DOUGLAS BEBBER

No. 8928SC340

(Filed 16 January 1990)

1. Unfair Competition § 1 (NCI3d) — delivery of building materials to third person — commerce affected — unfair trade practices claim appropriate

In determining whether an unfair trade practices claim exists the proper inquiry is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts affected commerce. In this case defendants' alleged misrepresentations to plaintiff related to the delivery of building materials to a third party contractor, and as such the misrepresentations affected commerce; therefore, summary judgment for defendants was inappropriate, and the unfair trade practices claim must be remanded for a factual determination of whether the misrepresentations were in fact made and, if made, whether they caused plaintiff to continue to supply building materials to the contractor. N.C.G.S. § 75-1.1(a).

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 696.

2. Fraud § 9 (NCI3d)— negligent misrepresentation—failure to plead or offer evidence

The trial court properly refused to instruct the jury on a negligent misrepresentation issue where the complaint contained no allegation of negligent misrepresentation, express or implied, and the parties did not litigate a negligent misrepresentation issue by consent based on the evidence admitted to prove fraudulent misrepresentation which could also tend to prove some elements of negligent misrepresentation.

Am Jur 2d, Fraud and Deceit §§ 434, 475.

APPEAL by plaintiff from judgment entered 2 November 1988 by *Judge W. Terry Sherrill* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 22 September 1989.

Westall, Gray, Kimel & Connolly, P.A., by David G. Gray, for plaintiff-appellant.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for defendant-appellees.

GREENE, Judge.

The plaintiff, J. M. Westall & Company, Inc., brought an action against Windswept View of Asheville, Inc. and Douglas Bebber alleging fraudulent misrepresentation and unfair trade practices. Other defendants in this action were dismissed on their bankruptcy. The trial court granted defendants' motion for summary judgment on the unfair trade practices claim, and the jury found for defendants on the fraudulent misrepresentation issue. Plaintiff appeals.

The evidence tends to show that in Autumn 1983 the defendant Windswept View of Asheville, Inc. (hereafter Developer) and its officer Douglas Bebber contracted with the bankrupt defendant J. E. Lawson & Sons, Inc. (hereafter Contractor) to construct condominiums. From Autumn 1983 to January 1986 the plaintiff provided building supplies and materials to the Contractor. The plaintiff did not have a contractual relationship with the defendant Developer for this provision.

According to plaintiff's evidence, the Contractor's continuing delinquency in paying on its account with plaintiff motivated plaintiff's president, Jack Westall, to visit Douglas Bebber at the Developer's office. Westall testified that Bebber told him that since

the job was bonded, plaintiff would be paid by bond if the Contractor failed to pay. Furthermore, Bebber asked plaintiff to continue providing the Contractor with building supplies.

The defendants' evidence tends to show that Bebber told Westall that he did not know whether the Contractor had a bond. Furthermore, Bebber testified that he telephoned plaintiff a week later after learning that the Contractor indeed had no bond. It is undisputed that Bebber was the Developer's officer and was acting in the scope of his authority.

The trial court instructed the jury on the fraudulent misrepresentation claim, but it refused plaintiff's request for jury instructions for negligent misrepresentation even though the plaintiff claimed to have either pled or actively litigated the issue.

The issues presented are: I) whether the statements allegedly made by the defendants were deceptive and affected commerce; and II) whether the plaintiff pled or actively litigated negligent misrepresentation such that the trial court should have placed the issue before the jury.

I

[1] The plaintiff first argues that the trial court erred in granting the defendants' motion for a summary judgment on the unfair trade practices claim. The defendants respond that the plaintiff had no unfair trade practice cause of action under N.C.G.S. Chapter 75 since the plaintiff and defendants "were not engaged in any way in commerce between themselves."

N.C.G.S. § 75-1.1 provides the statutory cause of action for unfair trade practices. It states in pertinent part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or *affecting commerce*, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C.G.S. § 75-1.1(a), (b) (1988) (emphasis added).

The defendants apparently do not dispute that the alleged misrepresentations, if they occurred within commerce as defined by N.C.G.S. § 75-1.1, would have been an unfair or deceptive act or practice. Indeed, if a jury were to determine defendants deceived plaintiff into believing the Contractor was bonded, this would be a deceptive act or practice as defined by N.C.G.S. § 75-1.1. *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980) (an act or practice having the tendency or capacity to deceive is deceptive). Deceptiveness is determined as a matter of law. *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986), *cert. denied, appeal dismissed*, 319 N.C. 459, 354 S.E.2d 888 (1987).

The defendants argue however that the plaintiff's cause of action fails since the plaintiff and defendants were not engaged in a commercial relationship. In the most common unfair trade practices case appearing before the courts of North Carolina, the parties have been engaged in commerce between themselves, often in a buyer-seller relationship. *See, e.g., Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *cert. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). Our courts have also recognized causes of action arising outside the context of a contractual relationship between the plaintiff and defendant. In *Winston Realty Co., Inc. v. G.H.G., Inc.*, 70 N.C. App. 374, 320 S.E.2d 286 (1984), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985), the defendant employment service suggested at plaintiff's request, a potential employee to suit plaintiff's needs. When this employee proved considerably less than ideal, the plaintiff sued the employment agency alleging, among other things, that defendant engaged in an unfair act or practice in recommending the unfortunate candidate. The defendant there argued that Chapter 75 applies "only to buyer-seller relationships and competition between business competitors." 70 N.C. App. at 381, 320 S.E.2d at 290. This court noted that the parties were not in competition, and that the defendant, having been paid by the employee, had sold nothing to the plaintiff. The court, in rejecting defendant's arguments, found that "[i]n recommending employees to plaintiff and other employers defendant certainly was engaged in business and his activities obviously affected commerce." 70 N.C. App. at 381, 320 S.E.2d at 291.

Furthermore, the North Carolina Supreme Court has recently emphasized that N.C.G.S. § 75-1.1 actions are not limited to "fraudulent advertising and buyer-seller relationships." *United*

Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988). North Carolina courts have also recognized causes of action under N.C.G.S. § 75-1.1 for unfair methods of competition where the plaintiff had no direct transactional relationship with the defendant. *See Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Accordingly, the proper inquiry is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts *affected* commerce. A contractual relationship is not required in order to affect commerce. *See Chestnut Hill Development Corp. v. Otis Elevator Co.*, 653 F. Supp. 927 (D. Mass. 1987) (privity of contract not required for owner-developer to maintain action against subcontractor under Massachusett's Unfair and Deceptive Trade Practice Law); *cf. Nei v. Boston Survey Consultants, Inc.*, 446 N.E.2d 681 (Mass. 1983) (although privity not required, defendant's acts had too little effect on transaction to allow unfair trade practice action).

" 'Commerce' in its broadest sense comprehends intercourse for the purpose of trade in any form." *Johnson*, 300 N.C. at 261, 266 S.E.2d at 620 (the Court here interpreted an earlier, more restrictive phrasing of the statute which limited commerce to a trade or exchange between the parties). The determination of whether an act or practice is in or affects commerce is one of law. *See La Notte, Inc.*, 83 N.C. App. at 485, 350 S.E.2d at 892. In this case, the defendants' alleged misrepresentations to the plaintiff related to the delivery of building materials to a third party, and as such the misrepresentations at least affect commerce while arguably they are also "in commerce." Therefore, since the defendants were not entitled to judgment as a matter of law, summary judgment was inappropriate. The unfair trade practices claim must be remanded for a factual determination of (1) whether the misrepresentations were in fact made and (2) if made, whether they caused the plaintiff to continue to supply building materials to the contractor. *See Ellis*, 48 N.C. App. at 184, 268 S.E.2d at 274 (jury decides whether allegedly deceptive act proximately caused injury to the plaintiff).

II

[2] The plaintiff next argues that the trial court erred in failing to instruct the jury as to negligent misrepresentation. Upon examination of the complaint we find no allegation of negligent misrepresentation, express or implied. Where, as here, a claim is not pled, the trial court may not place it before the jury, *see, e.g., Rural Plumbing & Heating, Inc. v. H. C. Jones Const. Co., Inc.*, 268 N.C. 23, 149 S.E.2d 625 (1966), unless "no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, [then] the issue raised by the evidence" may be placed before the jury. *Mangum v. Surles*, 281 N.C. 91, 98, 187 S.E.2d 697, 701-02 (1972). Here the evidence placed before the jury was "inside" the issue (fraudulent misrepresentation) raised by the pleadings. We cannot say the parties litigated a negligent misrepresentation issue by consent based on the evidence admitted to prove fraudulent misrepresentation which may also tend to prove some elements of negligent misrepresentation. To give rise to the *Mangum* exception to the pleading requirement, the evidence admitted without objection must be clearly irrelevant to any causes of action properly pled. Otherwise a defendant would not be on notice that he was litigating an issue other than those pled. *See Munchak Corp. v. Caldwell*, 37 N.C. App. 240, 244, 246 S.E.2d 13, 15, *cert. denied*, 295 N.C. 647, 248 S.E.2d 252 (1978) (case involving amendments to conform to the evidence under N.C.G.S. § 1A-1, Rule 15(b)); *see also W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E.2d 567 (1980). Thus, the trial court properly refused to instruct the jury on a negligent misrepresentation issue.

We vacate the trial court's grant of summary judgment to the defendants on the unfair trade practices issue, and we remand for trial on that issue.

Affirmed in part, vacated in part, and remanded.

Judges EAGLES and PARKER concur.

JOHNNY ELLIS MILLER v. LOIS JUNE MILLER

No. 8925DC207

(Filed 16 January 1990)

1. **Divorce and Alimony § 30 (NCI3d)— equitable distribution— debt not classified as marital or separate property—insufficient evidence presented**

The trial court in an equitable distribution proceeding did not err in failing to classify, value, and distribute as marital debt a judgment in favor of a lumber company which was entered against both husband and wife during the marriage, since plaintiff who claimed the debt was marital did not offer any evidence as to the circumstances giving rise to the debt or as to the value of the debt on the date of separation; furthermore, the case is not remanded for the taking of new evidence where the parties had ample opportunity to present evidence at trial and failed to do so.

Am Jur 2d, Divorce and Separation § 935.

2. **Divorce and Alimony § 30 (NCI3d)— stipulation that equal division was equitable—no credit for mortgage payments made after separation**

Where the parties stipulated that an equal division of the marital property was equitable, it would have been improper for the trial court to credit plaintiff with any mortgage payments he made after the separation of the parties.

Am Jur 2d, Divorce and Separation § 632.

APPEAL by plaintiff from judgment entered 20 October 1988 by *Judge Timothy Kincaid* in BURKE County District Court. Heard in the Court of Appeals 20 September 1989.

Wayne O. Clontz for plaintiff-appellant.

Todd, Vanderbloemen, Respess and Brady, P.A., by W. Darrell Pope and William W. Respess, Jr., for defendant-appellee.

GREENE, Judge.

The plaintiff (husband) appeals from an order of equitable distribution entered after a trial conducted on 20 October 1988.

The undisputed evidence reveals that the husband and defendant (wife) were married 6 August 1967 and separated 22 May 1984. During the marriage the parties acquired certain real and personal properties, primarily a house, furnishings for the house and various automobiles. The parties agreed that the house was marital property but had some disagreement as to whether various personal properties were marital or separate. It was undisputed that there existed a debt secured by a deed of trust on the house with an outstanding balance on the date of separation of $15,011.30. The parties also agreed a judgment existed in favor of Wall Lumber Company which had been filed in December 1981 against the husband, the wife and additional defendants Edgar B. Patton and wife, Sarah E. Patton and Table Rock Construction Company in the amount of $31,833.84 plus interest at the rate of 12% per annum. The Deputy Clerk of Court testified that the "judgment [was] satisfied as to Edgar Patton and Vera [sic] Patton" sometime "between May 1982 and May 1983." The Deputy Clerk further testified that "as far as I can tell the remainder of the judgment, except for the Edgar Patton and Tara [sic] Patton, release remains in full force and effect."

Between the date of the separation and the date of the equitable distribution trial, the wife resided in the marital home forty-five days and the husband the remainder of the time. After the separation, the husband made fifty-three house payments, and the wife made "one or two." The husband in 1985 paid to the Internal Revenue Service $3,806.10, said sum representing delinquent taxes assessed against the husband and wife for the year 1978 in the amount of $2,227.60 and penalties of $1,478.50.

The parties stipulated that an "equal division of the marital property is equitable" and that the wife "would be credited with penalties and interest that accrued on the IRS tax lien subsequent to the parties' separation."

The trial court valued the marital home at $35,000 on the date of separation and determined its net value to be $19,988.70. The trial court determined the net value of the marital personal property was $6,953.33. In the final order of distribution, the trial judge ordered that title in all marital property be placed with the husband and that the husband pay to the wife one-half of the net value of all the marital property or $13,470.00.

The issues presented are I) whether the Wall Lumber Company judgment was a marital debt which the trial court was required to distribute; II) whether the husband should have been given a credit for post-separation payments he made on the marital home mortgage; and III) whether the trial court prejudicially erred in its calculations of the total equity of the marital property.

I

[1] The husband first argues the trial court erred in failing to classify, value and distribute, as marital debt, the judgment in favor of Wall Lumber Company which was entered against both the husband and wife during the marriage.

Pursuant to our equitable distribution statute, N.C.G.S. § 50-20 *et seq.* (1987), the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage. *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987). The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was "incurred during the marriage for the joint benefit of the husband and wife." *Id.; see Johnson v. Johnson*, 317 N.C. 437, 455, n.4, 346 S.E.2d 430, 440 (1986) (when classifications of assets are disputed, the assets must be labeled "marital" or "separate" "depending upon the proof presented to the trial court of the nature of those assets"); *cf. White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (party desiring unequal division of marital property bears "the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable.").

The equitable distribution order entered in this case fails to classify the Wall Lumber Company debt as either marital or separate, value the debt, or finally, distribute it. However, as the husband, who claims the debt was marital, has failed in his burden of proof, the trial court therefore did not err in failing to classify, value and distribute the debt. *See Green v. Green*, 494 A.2d 721, 729-30 (Md. Ct. Spec. App. 1985) (upon applicant's failure to present evidence of the identity and value of various items, the trial court correctly omitted the items in its determination of marital property).

The husband offered no evidence as to the circumstances giving rise to the debt, and therefore a determination could not be made by the trial court as to whether the debt was incurred for

the joint benefit of the spouses or otherwise. The mere fact that the judgment was entered against both spouses is not alone evidence sufficient to require classification of the debt as marital. *See Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). Furthermore, there is insufficient evidence of the value of the debt on the date of the separation. The evidence reveals only the amount of the judgment on the date of its entry, some two and one-half years before the date of the separation. While there was evidence that the judgment in its full amount remained of record in the clerk's office on the date of the equitable distribution trial, there was some evidence that two of the defendants of the judgment, not the husband and the wife, had paid some amount of monies to Wall Lumber Company reducing the amount of the debt. We determine that the evidence of value is inconclusive and does not satisfy the husband's burden of proof.

Since the party claiming the property, here a debt, to be marital has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. *See Beaty v. Beaty*, 423 N.W.2d 262, 264 (Mich. Ct. App. 1988) ("if the burden is not met, the interest should not be considered an asset."). Furthermore, we will not remand the case for the taking of new evidence. The parties have had ample opportunity to present evidence and have failed to do so. The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution. Furthermore, remanding the matter for the taking of new evidence, in essence granting the party a second opportunity to present evidence, "would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing." *In re Marriage of Smith*, 448 N.E.2d 545, 550 (Ill. App. Ct. 1983).

II

[2] The husband next argues the trial court erred in not crediting him with the amount by which he decreased the principal of the parties' mortgage after the parties separated. We disagree. Pay-

ment by one of the spouses, after the date of separation, on a marital home mortgage is a factor appropriately considered by the trial court pursuant to N.C.G.S. § 50-20(c)(11a) and (12) (1987) in determining what division of marital property is equitable. However, where the parties, as here, stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in § 50-20(c). The trial court therefore correctly refused to credit the husband with any mortgage payments he made after the separation of the parties. In the absence of such a stipulation, the trial court should consider in determining what distribution is equitable, the payments any spouse makes on the marital home mortgage after separation, *Hunt v. Hunt*, 85 N.C. App. 484, 491, 355 S.E.2d 519, 523 (1987), and also consider the "post-separation use of the marital residence" by either of the parties. *Becker v. Becker*, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988).

III

The husband next argues that the trial court erred in Finding No. 51 by calculating the equity in the marital home, automobiles and personal property as totalling $31,842.02. In an earlier finding, the trial court established the equity in the marital home at $19,998.70, the equity value of the marital automobiles at $2,053.33, and the net value of the other marital personal property at $4,900.00. In calculating the sum of these, the trial court apparently added in the value of personal property twice. However, we find this error non-prejudicial since the trial court, in fact, ordered husband to pay to wife the correct amount, half of $26,942.30, in equal division of the marital property.

IV

The husband finally argues the trial court erred in classifying some portions of his separate property as marital and that he was not given proper credit for his IRS payment. We disagree. First, we determine there was competent evidence in the record to support the trial court's classification of the properties. *See Patton v. Patton*, 78 N.C. App. 247, 255, 337 S.E.2d 607, 612 (1985), *reversed on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986) (in equitable distribution proceeding, findings are binding on appellate courts when supported by competent evidence). Secondly, we determine the trial court committed no error in his credit-

ing of the tax payments made by the husband. The trial court's order appears entirely consistent with the parties' stipulation relating to the IRS tax payments.

Affirmed.

Judges EAGLES and PARKER concur.

TOWN OF SPARTA, PLAINTIFF v. WILLIE RAY HAMM, AND WIFE, MYRTLE C. HAMM, DEFENDANTS

No. 8923DC626

(Filed 16 January 1990)

Easements § 6.1 (NCI3d)— prescriptive easements—sufficiency of evidence

Plaintiff established a prescriptive easement in a street crossing defendants' property where plaintiff alleged that the street was graveled and opened in the summer of 1956, maintained by plaintiff, and used by the public and as a mail and school bus route until the fall of 1985; defendants contended that there was no road in existence until 1962, but that still amounted to 23 years' use, enough to satisfy the time requirement for an easement by prescription; plaintiff maintained, however poorly, and the public used the road and so gave notice to defendants that there was a "claim of right" to the street; and defendants' appearance at a Town Council meeting to request help in paving the street gave rise to a strong inference that defendants thought the street was a public way, as the town could not pave a private driveway.

Am Jur 2d, Easements and Licenses §§ 118, 119.

APPEAL by defendants from judgment entered 3 March 1989 by *Judge Edgar B. Gregory* in ALLEGHANY County District Court. Heard in the Court of Appeals 5 December 1989.

The deed to defendants' predecessor in title referred to the existence of a separate deed which described as an easement upon defendant's land, "a street across said property" which had been

conveyed to the Town of Sparta. The deed describing the easement was never found. The plat which was used for a public auction of the lots which were bought by defendant's predecessor in title and which was recorded with the Alleghany County Register of Deeds included a designation for "Hawthorne Street" across the property which is currently owned by defendant. The deed which conveyed the property in question to the male defendant does not include any mention of a street or easement, either in the deed itself or on the plat to which the deed refers.

Defendant built a house on the property and alleges that there is not now and has not been a public street across his property. Plaintiff contends that Hawthorne Street has been used by the public since 1956 and has been maintained by the Town of Sparta. When defendant went to a local Town Council meeting to request help in "fixing a section of Hawthorne Street," he was told, according to a local newspaper article which was attached to an affidavit in evidence, that the section of Hawthorne Street in dispute "was never deeded to the town, but was on a lot owned by [defendant] Hamm." The town attorney recommended that Hamm settle his dispute about the usage of that road directly with the persons who were using it. Hamm stated that he would "close the street off" which he subsequently did with the assistance of town maintenance personnel.

In September of 1988, almost three years after "Hawthorne Street" was barricaded by defendant, plaintiff filed its complaint seeking to establish a property right in the form of an easement over said "street" and to enjoin defendants from interfering with the public use of it. Plaintiff filed a motion for summary judgment and, after a hearing on affidavits, the court granted it stating that the plaintiff was the owner of a public easement known as Hawthorne Street. No metes and bounds were set out describing the easement. Defendants were permanently enjoined from denying plaintiff access over Hawthorne Street. Defendants appeal.

Richard L. Doughton and Wm. Bynum Marshall for plaintiff-appellee.

Arnold L. Young for defendants-appellants.

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 a judgment as a matter of law." G.S. Section 1A-1, N.C.R. Civ. P. 56(c). The burden of proof is on the plaintiff to establish the public easement known as Hawthorne Street.

Defendants discussed three possible theories of law:

I: Dedication by Deed

In June of 1956, a conveyance was made to defendants' immediate predecessor in title of lots numbers 11, 12, 13, 14, 15 and 16 "as set out in plat of the A. S. Carson Estate [in the Town of Sparta], recorded in the office of the Register of Deeds of Alleghany County in Plat Book 1, Page 22." That deed specified that it was made "subject to the conveyance of a street across said property to the Town of Sparta, which deed is recorded in the office of the Register of Deeds of Alleghany County, to which reference is made for a description of said street." No such deed of record has been found. At the Town Council meeting held in October of 1985, according to a local newspaper article in evidence, it was admitted that the section of Hawthorne Street in question had never been deeded to the Town of Sparta.

A plat was recorded in June of 1956 in the Office of the Register of Deeds of Alleghany County in Plat Book 1 at page 46 which indicated that there was a street labeled "Hawthorne Street" which was laid out across the "J. R. Hawthorne Lots in Sparta, N.C." During the summer of 1956 at a public auction of the Hawthorne Lots, the owners of the auction company announced to potential bidders that there was a public way known as Hawthorne Street running across the land which had been deeded to the Town of Sparta. The auctioneers based their description of the property on that same plat.

On 1 October 1959, Mr. Hamm purchased lots numbers 11, 12, 13, 14, 15 and 16 "of Carson Plat in the Town of Sparta as is shown in Plat Book 1 at page 22 in the office of the Register of Deeds of Alleghany County. . . ." Neither the deed nor the plat included any mention of a street or easement.

Defendants contend:

> [A] conveyance of an easement must satisfy the requirements of the Statute of Frauds, N.C.G.S. 22-2; *Mountain View, Inc.*

> *v. Bryson*, 77 N.C. App. 837 [336 S.E.2d 432, parallel citation added] (1985). A deed conveying an easement to the plaintiff must contain a description of the easement either certain in itself or capable of being reduced to certainty by something extrinsic to which the deed refers. *Plemmons v. Cutshall*, 234 N.C. 506, 67 S.E.2d 501 (1951).

Even though defendant's deed for this property does not mention the easement, the deed to defendant's predecessor in title specifies that there was "a street across said property." Defendants had constructive notice of the existence of an easement which was to be used as a street.

However, it is not necessary to have a recorded deed in order for the Town of Sparta to gain an easement for a public street. According to *Nicholas v. Salisbury Hardware and Furniture Company*, 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958), "[i]t is familiar learning that . . . the intention to dedicate may, in a proper case, be inferred from the circumstances without a formal act of dedication. 16 Am. Jur., Dedication, p. 363; Anno. 58 A.L.R. 240-41." In *Milliken v. Denny*, 141 N.C. 224, 53 S.E. 897 (1906), the North Carolina Supreme Court discussed this concept.

> It is elementary learning laid down in all of the books and adjudged cases on the subject that an easement may be acquired either by grant, dedication, or prescription. . . . It is well settled that dedication may be either by express language, reservation, or by conduct showing an intention to dedicate; such conduct may operate as an express dedication, as when a plat is made showing streets . . . and the land is sold, either by express reference to such plats or by showing that they were used and referred to in the negotiation. . . .

Id. at 227, 53 S.E.2d at 868. The plat which was used for reference when the lots were sold to defendant's predecessor in title was recorded in Alleghany County and showed Hawthorne Street running across defendant's property as a public street. Thus, even though no specific deed can be found which describes the location of this easement by metes and bounds, the court may find on other grounds that such an easement exists.

II: Easement by prescription

Defendant built his house on the property in 1962 and contends that prior to and subsequent to that time, there was no through

street across his land. Plaintiff alleges that Hawthorne Street was graveled and opened in the summer of 1956, maintained by the Town of Sparta and used by the public and as a mail and school bus route until the fall of 1985. Defendants contend that "there was no road in existence until 1962 when defendant graded out *his driveway*" (emphasis in original) and, even so, the town abandoned whatever interest they may have had.

Potts v. Burnette, 301 N.C. 663, 273 S.E.2d 285 (1982), describes the requirements for establishing that there has been an easement by prescription.

> In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed through the twenty-year period.

Id. at 666, 273 S.E.2d at 287-88. Moreover, North Carolina adheres to the presumption of permissive use which plaintiffs must rebut in order to prevail on the element of adversity, hostility and claim of right. *Id.* at 666-67, 273 S.E.2d at 288.

Defendants challenge only two portions of this definition of easement by prescription. (1) In reference to the requirement that the use must be "continuous and uninterrupted for a period of at least twenty years," defendants state: "[T]here seems to exist, at the very least, a question of exactly when the clock started running for plaintiff." Plaintiff's affidavits allege that the adverse use began in 1956 when Hawthorne Street was opened and that the street was used as a mail route, a school route, and for public use in general until the fall of 1985. Defendants contend that their affidavits tend to show "that there was no road in existence until 1962." If the evidence were construed in the light most favorable to the non-moving party in this summary judgment action, the applicable period of time would be twenty-three years and would still satisfy the "time" requirement for easement by prescription.

(2) Defendants also question "whether the use was hostile or permissive." The definition of the term "hostile" as it is used in

an action for "claiming a right of way by prescription" was stated in *Dulin v. Faires*, 266 N.C. 257, 145 S.E.2d 873 (1966).

> To establish that the use is "hostile" rather than permissive, "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." 17A Am. Jur., Easements section 76, p. 691. A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

Id. at 260-61, 145 S.E.2d at 875. The Town of Sparta maintained, however poorly, and the public used Hawthorne road and so gave notice to defendants that there was a "claim of right" to the street, rising to the required level of "hostility."

The defendants appearing at the Town Council meeting and apparently asking for their consideration in paving the "street" gives rise to a strong inference that he thought it a public way since the town could not pave a private driveway.

The use by the public of Hawthorne Street was continuous, though slight, and may have been affected by the poor maintenance of that street. However, the Town of Sparta has satisfied all of the requirements for a prescriptive easement and we hold there is a public easement over that parcel known as Hawthorne Street.

III: Abandonment

Defendants contend that their affidavits "raise the question of fact as to whether the plaintiff, if it ever had an easement, abandoned it." Since this affirmative defense was not raised in their pleadings, defendants have waived their right to assert this defense on appeal. G.S. Section 1A-1, N.C.R. Civ. P. 8(c).

Since the pleadings and the affidavits indicate that there is no genuine issue as to any material fact, the order granting summary judgment in favor of the plaintiff is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

JAMES GORDON, T/A G & G UNLIMITED, AND G & G UNLIMITED, INC. v. NORTHWEST AUTO AUCTION, INC.

No. 8920DC335

(Filed 16 January 1990)

Principal and Agent § 11 (NCI3d); Automobiles and Other Vehicles § 5.1 (NCI3d)— sale of stolen vehicle—warranty of title—warranty breached

A warranty by defendant auctioneer that title to a vehicle was free and clear of all liens and encumbrances could only be construed to mean a valid title, not a sham, spurious or nonexistent title; therefore, defendant breached its warranty of title when a vehicle which it sold to plaintiff was subsequently discovered to have been stolen and the North Carolina Department of Motor Vehicles returned it to its true owner. Moreover, though defendant auctioneer acted as agent for a disclosed principal, and ordinarily an agent is not liable on the principal's warranties, an agent may nevertheless make a personal contract of warranty whenever it sees fit, as the evidence established without contradiction that this agent did.

Am Jur 2d, Auctions and Auctioneers §§ 57, 66.

Judge GREENE dissenting.

APPEAL by plaintiff from *Huffman, Judge*. Order entered 20 February 1989, *nunc pro tunc* 13 October 1988, in District Court, RICHMOND County. Heard in the Court of Appeals 6 November 1989.

Sharpe & Buckner, by Richard G. Buckner, for plaintiff appellant.

Weinstein & Sturges, by W. H. Sturges and L. Holmes Eleazer, Jr., for defendant appellee.

PHILLIPS, Judge.

In February 1985, plaintiff, a Richmond County automobile dealer, for $3,420 bought what was represented to be a 1977 Cadillac automobile at an automobile auction conducted by defendant. He received an executed document on defendant's printed form entitled "Bill of Sale and Title Warranty," which carried the notation that it was issued at Northwest Auto Auction, and stated "THIS

SALE IS SOLELY A TRANSACTION BETWEEN THE BUYING AND SELLING DEALERS." *Inter alia*, the document identified plaintiff as purchaser and Archie's Auto Sales of Rock Hill, South Carolina as seller, and that:

> The seller covenants with the purchaser that he is the true and lawful owner of the said described automobile; that the same is free from all encumbrances; that he has good right and full power to sell the same as aforesaid; and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever. The purchaser agrees that he has examined the above vehicle and accepts it in its present condition.
>
> We, NORTHWEST AUTO AUCTION of Charlotte, N. C. guarantee title to the above car to be free and clear of all liens and encumbrance at the time of execution of this instrument. Limit of liability not [to] exceed purchase price of car as shown above, this value to be depreciated 2% per month for a period of four years. "WE MAKE NO WARRANTY TO THE MECHANICAL CONDITION OF SAID CAR."

In the transaction plaintiff paid defendant auction company the sale price of $3,420 plus a $20 buyer's fee, and received the car and the purported title to it. Several months later, after plaintiff had cleaned up the car and sold it for $3,900, the North Carolina Department of Motor Vehicles discovered that it was a 1976 Cadillac that had been stolen in Atlanta in 1984 and returned it to its true owner; and plaintiff gave its customer another car of equal value.

In suing to recover his loss plaintiff alleged that defendant auction company breached its warranty of title to the vehicle; the case was tried without a jury by Judge Huffman, who entered judgment for defendant. In doing so he (1) refused to receive into evidence testimony by several used car dealers to the effect that the foregoing warranty by the auctioneer is understood by auction attending and buying automobile dealers to be a warranty of title; (2) found facts somewhat as stated above; and (3) concluded as a matter of law that:

> Defendant never guaranteed the title to the automobiles sold, but rather only guaranteed that 'title to be free and clear of all liens and encumbrance' and the fact that the automobile

> in question was, in fact, a stolen automobile, does not constitute a 'lien or encumbrance.' Defendant is not in breach of the only covenant which it made to the Plaintiff.

Elsewhere in what was designated as a finding of fact the court also concluded as a matter of law that:

> This Warranty by Northwestern (sic) does not guarantee that the Seller is the true and lawful owner of the automobile or that the Seller has the good, right and full power to sell the automobile. This warranty only guarantees that the automobile is free from liens and encumbrances.

The mislabeled finding of fact, as the other conclusion of law, is not binding on us. *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E.2d 871 (1957). It is also factually erroneous since defendant's warranty was not "that the *automobile* is free from liens and encumbrances," or even that the certificate on hand was without encumbrance, but that "*title* to the car" (emphasis supplied), a different matter altogether, was free and clear; and those words can only be construed to mean a valid title, not a sham, spurious or nonexistent title. Since the execution of the document is admitted and its terms are without ambiguity, their meaning is a question of law for us, *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 111 S.E.2d 841 (1960), and they plainly mean that defendant warranted that the seller of the automobile had *title* to it. Defendant's argument that it only warranted that there was no lien on the title *if* the seller happened to have one is absurd; for there can be no lien on a nonexistent or fictitious title or a need for a warranty against them.

Though it is true, as defendant maintains, that as auctioneer it acted as agent for a disclosed principal, Archie's Auto Sales, and ordinarily an agent is not liable on the principal's warranties, an agent may nevertheless make a personal contract of warranty whenever it sees fit, 3 Am. Jur. 2d *Agency* Sec. 308 (1986), and the evidence establishes without contradiction that this agent did so. For the obvious and profitable purpose of inducing dealers to buy cars at its automobile auction sales business, defendant regularly delivered an executed warranty form to each buyer, and the consideration that supported the warranty was the $20 fee it collected from each buyer. That the language of the warranty is not as explicit as it might be is immaterial. For "[a]n express warranty may arise by implication. It need not be expressly stated,

provided that what is stated reasonably conveys the warranty." 67A Am. Jur. 2d *Sales* Sec. 738 (1985). In this instance defendant's express warranty that "*title* to the above car" (emphasis supplied) was free and clear of all liens and encumbrances necessarily carried with it an express warranty by implication that the seller had a title to which a lien or encumbrance could attach. To construe it otherwise would have the absurd and incongruous effect of making the warranty of some value when the seller's title was blemished to some extent, but worthless when the seller had no title at all. Thus, the judgment entered for defendant is vacated and the case remanded to the District Court for the determination of plaintiff's damages and the entry of judgment for him.

In view of our holding we need not determine whether the court also erred in refusing to receive the evidence plaintiff offered as to the usages and practices in the trade of auctioning automobiles to automobile dealers.

Vacated and remanded.

Judge BECTON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the conclusion of the majority that the defendant auction company "warranted that the seller of the automobile had *title* to it." The warranty executed by the defendant guaranteed only that title to the automobile was "free and clear of all liens and encumbrances." It did not guarantee that the seller had that title. The owner of the automobile, the seller, did however in a separate agreement, covenant that he was "the true and lawful owner" of the automobile.

I find the language of the warranty to be clear and unambiguous, and this court cannot, as the majority has done, "insert what the parties elected to omit." *Taylor v. Gibbs*, 268 N.C. 363, 365, 150 S.E.2d 506, 507 (1966). The clear language of the contract placed the burden of defective title on the seller, and no one here contends that the defendant was the seller. Furthermore, I find no error in the trial court's exclusion of plaintiff's evidence from other automobile dealers as to the meaning in the "trade" of the

disputed contract language. While custom and trade usage may be good evidence to explain the terms of an ambiguous contract, such evidence is "never admitted to make a new contract or to add a new element to one previously made." *Lester v. Thompson*, 261 N.C. 210, 218, 134 S.E.2d 372, 378 (1964).

Finding no error in the trial, I would affirm.

THOMPSON-ARTHUR PAVING COMPANY, A DIVISION OF APAC-CAROLINA, INC., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

Nos. 8918SC647
8918SC648

(Filed 16 January 1990)

Highways and Cartways § 9.3 (NCI3d) — construction of highway — underrun in unclassified excavation — no additional compensation — no breach of warranty

There was no merit to plaintiff contractor's claim that defendant was liable on a breach of warranty theory based on the fact that the amount of unclassified excavation underran bid estimates in two contracts, and that underruns in the amount of unclassified excavation materially changed the character of the work as well as the cost to perform the work, since the parties' contract clearly established that the contractor was not entitled to an increase in unit price or additional compensation for underruns in minor contract items; there were no supplemental agreements covering plaintiff's claims; and the contract made numerous references to the effect that quantities contained in bid proposals were estimates and did not constitute warranties.

Am Jur 2d, Public Works and Contracts §§ 23, 176-178.

APPEAL by plaintiff from *DeRamus, Judge*. Summary judgments entered 7 March 1989 in GUILFORD County Superior Court. Heard in the Court of Appeals 6 December 1989.

Plaintiff contractor was awarded two highway construction contracts with defendant Department of Transportation (DOT)

to do grading and paving work in Guilford County. Unclassified excavation was a minor contract item in both contracts. During construction defendant paid plaintiff for unclassified excavation in regular installments. The payments were based on defendant's estimates of the amount of unclassified excavation. When the projects were finished, defendant resurveyed the sites and discovered that both projects had required less than the estimated amount of unclassified excavation. Defendant then required plaintiff to return funds representing the difference between the estimated and actual amount of unclassified excavation. Plaintiff argued that inefficiencies associated with working with a smaller quantity of earth caused plaintiff's cost per cubic yard to increase. Plaintiff brought separate actions for the recovery of additional compensation on each contract under N.C. Gen. Stat. § 136-29. Defendant moved for summary judgment in both cases. From the trial court's grant of defendant's motions, plaintiff appeals. Because the actions involve common questions of fact and law the appeals were consolidated by order of this Court on 21 June 1989.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard G. Sowerby, Jr., for defendant-appellee.

WELLS, Judge.

Plaintiff argues that summary judgment was improvidently granted in both cases because genuine issues of material fact exist. Summary judgment should be granted when there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983). Plaintiff contends that defendant DOT is liable on a breach of warranty theory based on the fact that the amount of unclassified excavation underran bid estimates in both contracts. Plaintiff asserts that underruns in the amount of unclassified excavation materially changed the character of the work as well as the cost to perform the work.

N.C. Gen. Stat. § 136-29 provides for adjustments and resolution of highway construction contract claims. When a contractor's claim has been denied by the State Highway Administrator, one option available to the contractor is the institution of a civil action for the sum he claims to be entitled under the contract. *See*

G.S. § 136-29(b) (Supp. 1989). Our courts have previously interpreted this to mean that recovery is possible only within the terms and framework of the underlying contract. *See, e.g., Nello L. Teer Co. v. N.C. State Highway Commission*, 4 N.C. App. 126, 166 S.E.2d 705 (1969), and *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). When the State consents to be sued and provides statutory provisions for an action against it, not only must those procedures be followed, but the remedies provided are exclusive. *Harrison Assocs., Inc. v. N.C. State Ports Authority*, 280 N.C. 251, 185 S.E.2d 793 (1972). In order to be entitled to any relief, the contractor's claim must arise out of a breach of the contract. *Davidson and Jones, Inc. v. N.C. Dept. of Administration*, 315 N.C. 144, 337 S.E.2d 463 (1985). We therefore look to the contract in order to determine whether any basis of relief is available to plaintiff.

Plaintiff asserts that it is due an equitable adjustment to allow recovery of the extra costs incurred because of the underrun. Plaintiff relies primarily on our decisions in *Lowder, supra*, and *Groves & Sons, Inc. v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *disc. rev. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981). This reliance is misplaced, however, because in both of those cases equitable adjustments were available under "changed conditions" clauses in the underlying contracts. The "changed conditions" clause was deleted from the contracts for the projects at issue here. Therefore, an award of additional compensation based on "changed conditions" is unavailable to plaintiff in these cases.

The contract in question specifically incorporates by reference the North Carolina Department of Transportation's Standard Specifications for Roads and Structures dated 1 July 1978 (hereinafter the SSRS) with all amendments and supplements. When the language is clear and unambiguous the court must construe the contract as written. *See, e.g., Nello L. Teer Co. v. N.C. Hwy. Comm., supra.* In this case the contract establishes that the contractor is not entitled to an increase in unit price or additional compensation for underruns in minor contract items. Article 109-7 provides:

> Except as provided for by this article, payment for work performed will be made at the contract unit price or the contract lump sum price, as the case may be. . . . [N]or shall the Contractor receive additional compensation over and above the contract price for work performed or for extra work per-

> formed, except for work performed pursuant to an executed supplemental agreement or work performed in accordance with the applicable provisions of Section 104.

In this case there were no supplemental agreements covering plaintiff's claims. In the absence of a supplemental agreement, the parties are bound by the terms of the contract and recovery, if any, is controlled by its provisions. *See Nello L. Teer Co. v. Hwy. Comm.*, *supra.*

Article 104-4 of the SSRS addresses when an underrun of the original bid quantity justifies an increase in the contract unit price. The 1978 provision was modified by the Standard Special Provisions of January 1983. In pertinent part Article 104-4 provides: "The contractor will be entitled to an adjustment in contract unit prices . . . only as provided for in this article, ... No revision will be made to the contract unit price for any minor contract item which underruns the original bid quantities."

Plaintiff argues that Article 104-4 does not bar its claim because plaintiff is seeking recovery on the basis of breach of warranty, specifically that defendant's inaccurate estimates regarding unclassified excavation led to an increase in per unit cost which materially changed the character of the work as well as the cost of performing the work. For the following reasons, we disagree.

First, the contract makes numerous references to the effect that quantities contained in bid proposals are estimates and do not constitute warranties. For example, Article 102-5 of the SSRS provides:

> The quantities appearing in the proposal form are approximate only and are to be used for the comparison of bids. Payment to the Contractor will be made only for the actual quantities of the various items that are completed and accepted in accordance with the terms of the contract.

Likewise Article 225-8 provides that "[t]he quantities of excavation, measured as provided in Art. 225-7, will be paid for at the contract unit price per cubic yard . . . [and] [t]he above prices and payments will be full compensation for all work covered by this section. . . ." Finally Art. 102-6 of these contracts required the bidder to examine the plans, specifications, contract, and site of work before submitting a bid. That article provided:

> The submission of a bid shall be conclusive evidence that the Bidder has investigated and is satisfied as to the conditions to be encountered; as to the character, quality, and scope of work to be performed; the quantities of material to be furnished; and as to the requirements of the proposal form, plans, specifications, and contract.

These provisions clearly indicate that under these contracts, bid quantities constituted estimates only and were not submitted as warranties.

Finally, we are unpersuaded by plaintiff's contention that a material fact exists as to whether Article 104-3 provides plaintiff with a basis for recovery. This contract provision deals with the alteration of plans or details of construction. The underrun in unclassified excavation was not an alteration as anticipated by this section, nor can it be said to have affected the character of the work. Even assuming arguendo that this section was applicable, plaintiff has failed to meet the notice and record keeping requirements of that article.

In the present cases there was no provision in the contracts for recovery of additional compensation based on an underrun of a minor contract item. Article 104-4 plainly bars recovery on these facts and no other provision of the contract is applicable. Under G.S. § 136-29 a contractor is entitled to recover "the sum he claims to be entitled to under the contract." We therefore hold that the trial court properly entered summary judgment in these cases. The judgments of the trial court are

Affirmed.

Judges PHILLIPS and GREENE concur.

GLENDA DENTON v. KAREN PEACOCK

No. 8911SC492

(Filed 16 January 1990)

1. **Automobiles and Other Vehicles § 62 (NCI3d) — striking pedestrian — claim of failed brakes — failure to keep proper lookout — failure to keep vehicle under proper control**

In an action to recover for injuries sustained by plaintiff when she was struck by defendant's vehicle the trial court did not err in denying defendant's motions for directed verdict, judgment n.o.v., and a new trial where defendant claimed that her brakes failed, but the evidence at trial was sufficient to permit the jury to find that defendant drove her vehicle from the highway into and through the parking lot of a restaurant without having the automobile under proper control, without keeping a proper lookout, and without taking any evasive action to avoid striking plaintiff restaurant patron who was walking on a sidewalk between the restaurant and the parking lot; and the jury could find that defendant was negligent in the operation of the vehicle and that such negligence was the proximate cause of the injuries to plaintiff.

Am Jur 2d, Automobiles and Highway Traffic § 780.

2. **Bills of Discovery § 6 (NCI3d) — claim of failed brakes — opinion testimony about brakes — failure to inform defendant about expert — testimony admissible**

In an action to recover for injuries sustained by plaintiff pedestrian when she was struck by defendant's vehicle the trial court did not err in allowing plaintiff's expert witness to give his opinion regarding the brakes on a particular automobile, though plaintiff had not listed the expert as a witness in response to defendant's interrogatories requesting disclosure of experts, since the issue of whether defendant's brakes failed was raised in defendant's answer; plaintiff sought to use the expert witness to refute allegations in the answer and statements made by defendant; defendant vigorously cross-examined the witness at trial; and defendant was not prejudiced by the court's allowing the witness's testimony.

Am Jur 2d, Depositions and Discovery §§ 68, 70.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 16 December 1988 in Superior Court, HARNETT County. Heard in the Court of Appeals 4 December 1989.

This is a civil action wherein plaintiff seeks to recover damages for personal injury arising out of an automobile accident allegedly resulting from the negligence of defendant, Karen Peacock. The following issues were submitted to and answered by the jury as indicated:

1. Was Glenda Denton injured by the negligence of defendant Karen Peacock?

ANSWER: Yes

2. What amount, if any, is Glenda Denton entitled to recover from Karen Peacock?

ANSWER: $130,000.00

From a judgment entered on the verdict, defendant appealed.

Bain & Marshall, by Elaine F. Marshall, for plaintiff, appellee.

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

HEDRICK, Chief Judge.

[1] Defendant assigns error to the denial of her motions for directed verdict, judgment notwithstanding the verdict, and a motion for a new trial. In her brief she states, "[t]he issue brought forward from the Court's denials of these motions is whether sufficient evidence existed to raise a jury question as to any actionable negligence on the part of defendant, Karen Peacock."

The evidence at trial, when taken in the light most favorable to plaintiff, tends to show the following: On the morning of 7 December 1984, plaintiff went to Gym's Steak and Pancake House in Dunn, North Carolina. She was accompanied by Mrs. Loretta Warren. Plaintiff and Mrs. Warren left the restaurant at approximately 8:30 a.m. The weather was cold and clear, and the sun was shining brightly. They exited the restaurant through the front door and proceeded down the sidewalk adjacent to the building. The sidewalk was approximately eighteen inches wide and was bordered on the left by the exterior wall of the restaurant and on the right by a parking area. Because the sidewalk was narrow

and plaintiff was a large woman, approximately 290 pounds, Mrs. Warren walked a couple of steps ahead of plaintiff as they neared the corner of the building. As plaintiff and Mrs. Warren proceeded along the sidewalk, a 1974 Buick automobile owned by William Balance Liverman and operated by defendant, Karen Peacock, struck plaintiff's right leg and pinned her between the car's bumper and the building causing personal injury to plaintiff. Neither plaintiff nor Mrs. Warren saw or heard defendant's car before impact. Following the accident, both plaintiff and Mrs. Warren heard defendant say that her brakes had failed. Officer Benjamin Denning of the Dunn Police Department arrived at the scene of the accident at approximately 9:35 a.m. When he arrived, he observed that defendant's car had been backed up from plaintiff, the sidewalk, and the building into the parking lot approximately seven or eight feet. He questioned defendant about the accident, and she advised him that when she pulled into the restaurant parking lot her brakes had failed causing her to strike plaintiff. The distance between the street and the building was approximately 100 feet. There were vacant parking spaces on either side of defendant's car, and there was a large, unobstructed, dirt parking area at the west side of the restaurant to the right of where defendant's car struck plaintiff.

The evidence offered at trial is sufficient to permit the jury to find that defendant drove the motor vehicle from the highway into and through the parking lot without having the automobile under proper control, without keeping a proper lookout, and without taking any evasive action to avoid striking plaintiff. From the evidence, the jury could find that defendant was negligent in the operation of the motor vehicle and that such negligence was the proximate cause of the injuries to plaintiff. The statements of defendant to some of the witnesses that the brakes on the automobile she was driving failed is evidence to be considered by the jury in determining the issue of proximate cause. The jury, from the evidence, found that plaintiff was injured by the negligence of defendant in the operation of the motor vehicle and that such negligence was the proximate cause of the accident and plaintiff's injuries. The trial judge did not err in denying defendant's motions for directed verdict, and judgment notwithstanding the verdict, or her motion for a new trial.

[2] Defendant further assigns error to the court's ruling allowing plaintiff's expert witness, William H. Green, to give his opinion

regarding the brakes on a 1974 Buick automobile. Defendant argues that it was unfair for the court to allow the witness to testify because plaintiff had not listed the expert as a witness in response to defendant's interrogatories requesting disclosure of experts. Defendant in her brief argues "[d]efendant had no opportunity to cross-examine Mr. Green before trial, by deposition or otherwise, or in any way be prepared to meet his testimony by counter experts."

Whether an expert witness is allowed to testify where the plaintiff has failed in response to an interrogatory to provide the names of the witnesses who might testify at trial rests in the discretion of the trial judge, and his ruling thereon allowing the witness to testify will not be found reversible error absent a showing of an abuse of discretion on the part of the judge. *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983); *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972); *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972).

In the present case, the issue of whether defendant's brakes failed was raised in defendant's answer. At trial, the testimony offered in support of plaintiff's claim included statements made by defendant that her brakes had failed. Plaintiff sought to use the expert witness regarding the brakes on a 1974 Buick automobile to refute the allegations in the answer and statements made by defendant. Defendant does not challenge the competency of the testimony of the expert witness, but simply argues that it was unfair for the court to allow the witness to testify at trial since plaintiff had failed to advise defendant that an expert witness would be called regarding the brakes. Defendant vigorously cross-examined the witness at trial, and we perceive no prejudice to defendant by the court's allowing the witness' testimony. Under the circumstances of this case, we find no abuse of discretion by Judge Bowen in allowing the witness to testify.

Defendant's third and final assignment of error is set out in the record as follows: "The Court's refusal to allow defendant's counsel to cross-examine witnesses on several relevant and material issues cumulatively constitutes reversible error. . . ." The first exception upon which this assignment of error is based relates to a question asked of plaintiff as to whether she had also named the owner of Gym's Steak House as a party defendant. To this question on cross-examination, plaintiff answered yes. After the question had been asked and answered, plaintiff's objection was

sustained, but defendant made no action to strike. This exception is clearly without merit. The next three exceptions upon which this assignment of error is based relate to the court's sustaining plaintiff's objections to questions asked of plaintiff on cross-examination: (1) whether she had filed any complaint relating to the burn on her leg she received at the hospital; (2) whether she had been unable to pay certain bills, including medical bills; and (3) whether her husband had filed a loss of consortium claim in this matter. Defendant did not include the answers to these questions in the record; thus, we are unable to determine whether defendant was in any way prejudiced by the court's rulings. Moreover, we believe the information sought was wholly irrelevant, and the court did not err by sustaining plaintiff's objections.

No error.

Judges PHILLIPS and GREENE concur.

HARRIS-TEETER SUPER MARKETS, INC., PLAINTIFF v. JACK RANKIN WATTS, JR., CONNIE P. WALLACE, AND RODNEY E. WALLACE, DEFENDANTS

No. 8927SC724

(Filed 16 January 1990)

Assignments § 1 (NCI3d)— personal injury action—no assignment to insurer allowed

The trial court properly entered summary judgment for defendant tortfeasor in plaintiff insurer's action based on the theory of equitable subrogation, since there could be no assignment of rights arising out of a cause of action for the personal injury of insureds' dependent.

Am Jur 2d, Assignments § 37; Insurance § 1902.

APPEAL by plaintiff from order entered 3 April 1988 by *Judge James U. Downs* in GASTON County Superior Court. Heard in the Court of Appeals 6 December 1989.

Defendant John Rankin Watts, Jr. drove a motor vehicle which struck Bradley James Wallace, the son of defendants Connie P.

Wallace and Rodney E. Wallace. Bradley Wallace suffered bodily injuries and his parents incurred expenses for medical attention and hospitalization. At the request of Rodney E. Wallace, an employee of the plaintiff, the plaintiff provided, through a self-funded employee benefit program, benefits in excess of $10,000 for medical expenses related to Bradley's injuries.

In a separate action, Bradley Wallace, through his guardian ad litem Connie P. Wallace, seeks to recover damages from defendant Watts for personal injuries sustained by the minor child. The guardian ad litem failed and refused to assert a claim specifically for medical expenses related to the injury. The plaintiff was denied leave to intervene in that action when plaintiff attempted to assert its claim for reimbursement of medical expenses which plaintiff paid for the child's injuries.

Plaintiff then filed this action and defendant Jack Rankin Watts, Jr. filed a motion to dismiss the action as to him pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the complaint failed to state a claim upon which relief can be granted. The Superior Court granted the motion to dismiss the action as to defendant Watts. Plaintiff appeals.

James, McElroy & Diehl, P.A., by Judith E. Egan, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, by Lin B. Hollowell, Jr., for defendant-appellee Jack Rankin Watts, Jr.

LEWIS, Judge.

Plaintiff asserts that "[t]he defendant Watts is primarily liable for the medical expenses which were paid by the plaintiff, and those medical expenses are the defendant Watts' obligation." The plaintiff had already "demanded" that defendants "Rodney and/or Connie P. Wallace assert a claim against the defendant Watts for recovery of the medical expenses" which plaintiff paid but the Wallaces had "failed and refused" to do so. This appeal does not address any claims which plaintiff may have against defendants Connie P. Wallace and Rodney E. Wallace.

This appeal challenges the granting of a motion pursuant to Rule 12(b)(6) which allows the dismissal of an action for "failure to state a claim upon which relief can be granted." In ruling on a 12(b)(6) motion, the Court "must take as true the facts alleged"

[*Ladd v. Estate of Kellenberger*, 314 N.C. 477, 479, 344 S.E.2d 751, 753 (1985)] and should not dismiss the complaint "unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim" [*Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)].

Plaintiff contends that "[t]he trial court erred in dismissing the action as against the defendant Watts, because the complaint states a claim for relief against . . . him." Plaintiff's argument is based on (1) "the equitable principle of subrogation" and (2) plaintiff's alleged lack of an alternate "remedy for the losses it suffered as a result of defendant Watts' negligence."

I: Equitable subrogation

Equitable subrogation is "a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it" and "arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Beam v. Wright*, 224 N.C. 677, 683, 32 S.E.2d 213, 218 (1944). Defendant contends: "To allow plaintiff equitable subrogation rights against the defendant would in effect allow an assignment of rights arising out of an alleged cause of action for personal injury, which is contrary to the law of North Carolina." Since, in a subrogation action, the rights of the insurer succeed only to the rights of the insured and no new cause of action is created, then, in the case at bar, the alleged "equitable subrogation" can be regarded as an "equitable assignment" of the rights of Rodney and Connie Wallace, the insured defendants, against the tortfeasor defendant, Jack Rankin Watts, Jr. Therefore, defendant Watts says this action is based on an assignment of rights arising out of a cause of action for the personal injury of the insured's dependent. The law of North Carolina is clear in its statement "that few legal principles are as well settled, and as universally agreed upon, as the rule that the common law does not permit assignment of causes of action to recover for personal injuries." *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 534, 374 S.E.2d 844, 847 (1988), *citing* Annotation, *Assignability of claim for personal injury or death*, 40 A.L.R.2d 500, 502 (1955). Such an assignment is considered to be "invalid as contrary to public policy." *N.C. Baptist Hospitals, Inc. v. Mitchell*, 88 N.C. App. 263, 266, 362 S.E.2d 841, 843 (1987), *aff'd*, 323 N.C. 528, 374 S.E.2d 844 (1988). Plaintiff cites cases in its

brief from "a variety of circumstances" to support its theory of equitable subrogation; however, none of these cases involve personal injury claims brought by the insurer against the tortfeasor, as here.

Plaintiff further discusses the possibility that plaintiff's payment to the insured may not have covered the "entire loss" of the insured. "Presumably, the plaintiff did not pay the parents' entire loss, since their loss includes the expected services and earnings of the minor child, if any, and discovery may reveal that the parents incurred some out of pocket medical expenses." If an action for "equitable subrogation" were allowed in this case, and the insured brought an action against the tortfeasor for the above-mentioned expenses, then there would be two suits against the tortfeasor based on identical causes of action. Under North Carolina law, a plaintiff is entitled to "one compensation for all loss and damage, past and prospective, which were the certain and proximate results of the single wrong or breach of duty," and "[t]he demand cannot be split and several actions maintained for the separate items of damage." *Eller v. Railroad*, 140 N.C. 140, 142, 52 S.E. 305, 306 (1905). *See also Security Fire & Indem. Co. v. Barnhardt*, 267 N.C. 302, 148 S.E.2d 117 (1966). The trial court correctly dismissed this action against the defendant Watts.

II: Alleged lack of an alternate remedy

Plaintiff contends in its brief: "If the court affirms the dismissal of this action, the plaintiff will be left without a remedy for the loss it suffered as a result of the defendant Watts' negligence." This Court will not direct anyone as to how to pursue possible remedies at law. Plaintiff is pursuing an opportunity to recover its loss under contract principles, presumably, in plaintiff's employee benefit program. Plaintiff could have appealed from the denial of its attempt to intervene in the prior related suit. If plaintiff had chosen to appeal that decision, any rights which the plaintiff may have against the defendant Watts could have been determined in that prior suit. Plaintiff, however, failed to perfect its appeal in the earlier related action.

Affirmed.

Judges JOHNSON and COZORT concur.

TODD W. KNOTE AND WIFE, TAMMY KNOTE, PLAINTIFFS v. ARCHIE TRAVIS NIFONG, DEFENDANT

No. 8922SC27

(Filed 16 January 1990)

1. Automobiles and Other Vehicles § 89.1 (NCI3d)— motorcycle-truck collision—last clear chance—instruction required

In an action to recover for injuries sustained in an automobile accident the trial court erred by failing to instruct the jury on the issue of last clear chance where the evidence tended to show that plaintiff was negligent by driving too fast and that he was unable to take action to avoid a collision; defendant, through the exercise of reasonable care, could have seen plaintiff's motorcycle skidding toward his truck, the doctrine not being made inapplicable by the fact that defendant never saw plaintiff; an eyewitness testified that, if defendant had proceeded across the highway a little farther, plaintiff would have been able to get past defendant's truck without striking it; defendant's truck came to a stop in the intersection and defendant took no action to avoid the collision; and plaintiff suffered severe knee injuries as a result of the collision.

Am Jur 2d, Automobiles and Highway Traffic § 1118.

2. Automobiles and Other Vehicles § 90.5 (NCI3d)— automobile accident—excessive speed of plaintiff—instructions proper

In an action to recover for injuries sustained in an automobile accident the trial court did not err in instructing that plaintiff was traveling over the posted speed limit and in instructing that the jury could find plaintiff contributorily negligent, since one of the eyewitnesses to the collision testified that plaintiff was going 55 or 60 m.p.h.; the investigating officer testified that plaintiff told him a couple of hours after the accident that he was going about 60 m.p.h.; and the posted speed limit at the accident scene was 55 m.p.h.

Am Jur 2d, Automobiles and Highway Traffic §§ 218, 627, 1112.

APPEAL by plaintiffs from Judgment entered by *Judge Ralph A. Walker* on 18 August 1988 in DAVIDSON County Superior Court. Heard in the Court of Appeals 29 August 1989.

Barnes, Grimes & Bunce, by Jerry B. Grimes and D. Linwood Bunce, II, for plaintiff appellants.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by D. Clark Smith, Jr., and Stephen W. Coles, for defendant appellee.

COZORT, Judge.

This case involves a collision between plaintiff's motorcycle and defendant's pickup truck, which pulled out in front of plaintiff. The jury found that defendant was negligent and that plaintiff was contributorily negligent. The dispositive issue on appeal is whether the trial court erred in failing to submit the issue of last clear chance for the jury's consideration. We find error, and we remand the cause for a new trial.

The plaintiff's evidence tends to show that the plaintiff, Todd Knote, was riding his motorcycle to work at approximately 6:30 a.m. on 27 August 1986. Plaintiff was proceeding north on U.S. Highway 52 in northern Davidson County. The portion of the highway over which plaintiff had been traveling was a two-lane highway. As plaintiff approached the intersection of Enterprise Road to his left, Highway 52 changed to a four-lane highway, with two lanes running in each direction. Ahead of plaintiff, three or four vehicles pulled out from Enterprise Road and proceeded north, the same direction in which plaintiff was traveling, on Highway 52. All of the vehicles pulled into the right-hand lane. Plaintiff moved his motorcycle into the left-hand lane to pass those vehicles. The estimates of plaintiff's speed varied from 50 m.p.h. to 60 m.p.h. The posted speed limit on that portion of the highway was 55 m.p.h. The roadway was straight and there were no obstructions to impair vision. Farther north and on plaintiff's right was Thomas Road, and across Highway 52 from Thomas Road was a ramp leading to new Highway 52, a four-lane highway. The northbound portion of Highway 52, upon which plaintiff was traveling, became three lanes just prior to the Thomas Road intersection, with a left-turn-only lane on the left, a middle lane, and a right-hand lane.

As plaintiff approached this intersection while going past the cars in the right-hand lane, he saw defendant's pickup truck stopped at the stop sign on Thomas Road. Plaintiff then observed defendant's truck pull out of Thomas Road and proceed across Highway 52 in front of plaintiff. Defendant's truck cleared the right-hand lane but then stopped, blocking portions of the middle lane in

which plaintiff was traveling and the left-turn-only lane. Plaintiff attempted to slow down to avoid defendant's truck. He then locked his brakes to try to avoid a collision. At the time he began trying to stop, he was just about even with, or possibly a slight distance ahead of, the lead car in the right-hand lane. Plaintiff was unable to stop his motorcycle or avoid the truck by moving farther to his right. Plaintiff's motorcycle struck the defendant's truck near the rear bumper, causing injuries to plaintiff.

The driver of the lead vehicle in the right-hand lane testified that the truck was completely stopped when plaintiff hit it. The driver of a vehicle who was traveling behind plaintiff in the middle lane testified that plaintiff did not have room to get around the truck. He also testified that if defendant had moved a little farther across the highway, plaintiff would have been able to get by. He testified that plaintiff tried to avoid the pickup but was unable to do so.

Defendant testified that he stopped when he came to the intersection of Thomas Road and Highway 52. He looked to his left and saw the cars in the right-hand lane but did not see anything in the other lanes. He proceeded across the highway and was almost across the second lane when he heard a noise like a "softball" hitting his truck. He did not know what had hit him. He never saw plaintiff. He testified that his truck never completely stopped as he proceeded across Highway 52. Defendant introduced testimony from a State Highway Patrol trooper that plaintiff told the trooper shortly after the accident that he was going about 60 m.p.h.

[1] Plaintiff contends the trial court erred by failing to instruct the jury on the issue of last clear chance. We agree.

The doctrine of last clear chance provides as follows:

> A plaintiff is entitled to an instruction on last clear chance when the evidence considered in the light most favorable to the plaintiff establishes each and every element of the doctrine, which are the following: (1) plaintiff, by his own negligence, placed himself in a position of peril from which he could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered plaintiff's perilous position; (4) the defendant failed or refused to use

> every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury. *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E.2d 307, *disc. rev. denied*, 300 N.C. 203, 269 S.E.2d 628 (1980).

Pegram v. Pinehurst Airlines, Inc., 79 N.C. App. 738, 740, 340 S.E.2d 763, 765 (1986).

The evidence in the case below satisfies the first element, that is, that plaintiff was negligent by driving too fast and that he was unable to take action to avoid a collision. There was evidence from eyewitnesses that plaintiff did not have enough room to move over into the right-hand lane to avoid the collision.

The second element is satisfied by the evidence which, taken in the light most favorable to plaintiff, shows that defendant, through the exercise of reasonable care, could have seen the plaintiff skidding toward defendant's truck. The doctrine is not made inapplicable by the fact that defendant never saw plaintiff. There was plenary evidence that the defendant *could* have seen plaintiff.

The third element is established by plaintiff's testimony from an eyewitness that, if defendant had gone a little farther, plaintiff would have been able to get by defendant's truck. We also note that, at oral argument, counsel for defendant admitted that defendant might have been able to avoid the collision if he had "gassed it" and moved on across the intersection.

The fourth element is satisfied by plaintiff's evidence that defendant's truck came to a stop in the intersection and that defendant took no action to avoid the collision. The final element of the doctrine has been satisfied by the plaintiff's evidence which showed that he suffered severe knee injuries as a result of the collision.

In his definitive opinion on the doctrine of last clear chance, Justice Lake observed the following:

> [I]t is well established in this State that where the defendant does owe the plaintiff the duty of maintaining a lookout and, had he done so, could have discovered the plaintiff's helpless peril in time to avoid injuring him by then exercising reasonable care, the doctrine of the last clear chance does impose liability if the defendant failed to take such action to avoid the in-

jury. *Wanner v. Alsup*, 265 N.C. 308, 144 S.E.2d 18; *Wade v. Jones Sausage Co.*, 239 N.C. 524, 80 S.E.2d 150.

Exum v. Boyles, 272 N.C. 567, 576, 158 S.E.2d 845, 853 (1968). We find the evidence below sufficient to invoke the doctrine of last clear chance, and we find the trial court erred in failing to instruct on that doctrine. The cause must be remanded for a new trial.

[2] The plaintiff has raised two other issues which may arise upon a new trial, and we shall discuss them briefly here. Plaintiff contends that it was error for the trial court (1) to instruct that plaintiff was traveling over the posted speed limit and (2) to instruct the jury that they could find the plaintiff committed contributory negligence. We find no merit to these arguments. One of the eyewitnesses to the collision testified that plaintiff was doing 55 or 60 m.p.h. Also, the State Highway Patrol trooper who investigated the accident testified that plaintiff told him a couple of hours after the accident that he was going about 60 m.p.h. We find this evidence sufficient to support an instruction to the jury that it could find that plaintiff was traveling more than 55 m.p.h. Likewise, it would support an instruction to the jury that it could find plaintiff to be contributorily negligent.

Plaintiff has also argued that the trial court erred in a reinstruction to the jury on the issue of proximate cause. We do not find this issue likely to occur at retrial, and we decline to discuss it here.

For the reasons expressed, we remand the cause for a

New trial.

Judges ARNOLD and BECTON concur.

CHARLES WOODY MOON, PLAINTIFF v. BOSTIAN HEIGHTS VOLUNTEER FIRE DEPARTMENT, DEFENDANT

No. 8919SC504

(Filed 16 January 1990)

1. **Negligence § 57.4 (NCI3d)— step at firehouse exit—violation of building code—negligence per se—negligence in construction as cause of fall—sufficiency of evidence**

In an action to recover for injuries sustained in a fall at defendant's firehouse the trial court erred in entering judgment n.o.v. for defendant where a licensed engineer and architect testified that in his opinion the construction of the firehouse door violated the N.C. Building Code which prohibits a riser, the vertical portion of a stair step, at exit doors; a violation of the N.C. Building Code is negligence per se; evidence permitted the finding that the negligent construction of the firehouse door proximately caused plaintiff's fall and resulting injuries in that plaintiff lost his balance because of the difference in elevation between the top of the threshold and the firehouse floor; plaintiff tore cartilage in his knee as a result of his fall; and the evidence did not show that plaintiff was contributorily negligent as a matter of law in failing to notice the difference in elevation between the threshold and the firehouse floor.

Am Jur 2d, Premises Liability §§ 32, 257.

2. **Rules of Civil Procedure § 59 (NCI3d)— new trial on issue of damages—denial proper**

The trial court did not err in denying plaintiff's motion for a new trial on the issue of damages where plaintiff contended that the jury award of $2,500 was less than his medical expenses which the evidence showed to be $4,900, but the evidence in fact showed that some of plaintiff's surgery was to relieve arthritic symptoms unrelated to the fall in defendant's firehouse, and the arthritis related surgery, not the surgery to remove cartilage torn in plaintiff's fall, caused plaintiff's post-surgery complications.

Am Jur 2d, Damages §§ 208, 933.

ON appeal from judgment entered 6 February 1989 by *Judge W. Douglas Albright* in ROWAN County Superior Court. Heard in the Court of Appeals 13 November 1989.

Plaintiff brought this action seeking damages for injuries suffered as a result of a fall at the Bostian Heights Volunteer Fire Department firehouse. Plaintiff alleged that defective construction of the doorstep to the firehouse caused his fall. Defendant, in its answer, denied plaintiff's allegations of negligence and, in the alternative, alleged plaintiff's contributory negligence in defense of plaintiff's claim.

Defendant made motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence, both of which were denied. The case was tried to a jury and the jury returned a verdict in favor of plaintiff, awarding him $2,500 in damages. Plaintiff moved pursuant to N.C.R. Civ. Proc. 59 for a new trial on the damages issue alone. Defendant moved pursuant to N.C.R. Civ. Proc. 50 for judgment notwithstanding the verdict. The judge denied plaintiff's motion and granted defendant's motion. From these rulings, plaintiff appeals.

Donald L. Weinhold, Jr. for plaintiff appellant.

Weinstein & Sturges, by James P. Crews, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff first assigns error to the trial court's granting defendant's motion for judgment notwithstanding the verdict. We agree and accordingly reverse.

A motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 132, 252 S.E.2d 826, 834 (1979). The same standards which are applied to a motion for directed verdict are applicable to a motion for judgment notwithstanding the verdict. *Id.* Both motions test the legal sufficiency of the evidence to take the case to the jury. *Everhart v. LeBrun*, 52 N.C. App. 139, 141, 277 S.E.2d 816, 818 (1981). In ruling on defendant's motion for a directed verdict, plaintiff's evidence must be taken as true, and all the evidence must be considered in the light most favor-

able to plaintiff, giving him the benefit of every reasonable inference, with contradictions, conflicts and inconsistencies resolved in plaintiff's favor. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-8 (1985). Under these principles defendant is not entitled to judgment notwithstanding the verdict unless plaintiff has failed as a matter of law to establish the elements of negligence, *Everhart* at 141, 277 S.E.2d at 818, or unless the evidence establishes plaintiff's contributory negligence so clearly that no other reasonable inference could be drawn. *Clark v. Moore*, 65 N.C. App. 609, 611, 309 S.E.2d 579, 581 (1983).

Applying these principles to the evidence here, we find the following:

Plaintiff entered defendant's firehouse through a personnel door. There was a six inch step up from the outside to the top of the threshold of the personnel door and a two and a quarter inch step down from the top of the threshold to the inside floor of the firehouse. Thus, the firehouse floor was three and three-quarters inches higher than the ground outside the firehouse. A licensed engineer and architect testified that in his opinion the construction of the firehouse door violated the North Carolina Building Code which prohibits a riser, which is the vertical portion of a stair step, at exit doors. A violation of the North Carolina Building Code is negligence per se. *Sullivan v. Smith*, 56 N.C. App. 525, 527, 289 S.E.2d 870, 871, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982). The engineer's testimony thus permitted a finding of negligence in the construction of the firehouse door.

Further evidence permitted the finding that the negligent construction of the firehouse door proximately caused plaintiff's fall and resulting injuries. Plaintiff testified that he saw the step up to the top of the threshold, but not the step down, and when he stepped over the threshold onto the firehouse floor below, he lost his balance and fell. He further testified that the difference in elevation between the top of the threshold and the firehouse floor caused him to fall.

Testimony from plaintiff and his two doctors permitted the finding that plaintiff tore cartilage in his knee as a result of his fall. By the foregoing evidence plaintiff established the elements of negligence, and defendant is not, therefore, entitled to judgment notwithstanding the verdict on this basis.

Plaintiff acknowledged on cross-examination that had he stopped at the entrance and stood and looked around, he probably would have seen the difference in elevation between the threshold and the firehouse floor. Defendant presented testimony from several witnesses who had used the personnel door and seen others use the door without stumbling or falling. While this evidence could have supported a jury finding of contributory negligence, this was not the only reasonable inference a jury could draw. Defendant was not, therefore, entitled to judgment notwithstanding the verdict on the basis of contributory negligence by plaintiff. *See Clark* at 611, 309 S.E.2d at 581.

[2] Plaintiff next assigns as error the trial court's denial of plaintiff's motion for a new trial, pursuant to N.C.R. Civ. Proc. 59, on the issue of damages. Plaintiff contends that the jury award of $2,500 for damages against defendant was inadequate since plaintiff's evidence showed medical expenses in excess of $4,900. In light of the standard for appellate review and the evidence presented at trial, we reject this assignment of error.

A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial judge and may be reversed on appeal only where an abuse of discretion is clearly shown. *Pearce v. Fletcher*, 74 N.C. App. 543, 544-45, 328 S.E.2d 889, 890 (1985), *citing Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

A review of the evidence reveals the following: Testimony from plaintiff's orthopedic surgeon showed that some of plaintiff's surgery was to relieve arthritic symptoms unrelated to the fall at defendant's firehouse. The surgeon also testified that the arthritis-related surgery, not the surgery to remove cartilage torn in plaintiff's fall, caused plaintiff's post-surgery complications. Although the surgeon testified that he could not rule out whether plaintiff's arthritis might have contributed to his fall, the jury could weigh the evidence and determine questions of fact. *See Coletrane v. Lamb*, 42 N.C. App. 654, 657, 257 S.E.2d 445, 447 (1979). The foregoing evidence shows the trial judge did not abuse his discretion in denying plaintiff's motion for a new trial on the issue of damages.

The ruling on plaintiff's motion for new trial is affirmed. However, the judgment notwithstanding the verdict is reversed, and the cause remanded to the trial court to reinstate judgment upon the jury's verdict.

Affirmed in part, reversed in part, and remanded.

Judges PHILLIPS and GREENE concur.

VILLAGE OF PINEHURST v. REGIONAL INVESTMENTS OF MOORE, INC., WACHOVIA BANK AND TRUST COMPANY, N.A., PINEHURST ENTERPRISES, INC., RESORT HOLDING CORPORATION, PINEHURST WATER COMPANY, INC., PINEHURST SANITARY COMPANY, INC., THE CITIBANK, N.A., FIRST NATIONAL BANK OF CHICAGO, THE CHASE MANHATTAN BANK, N.A., CROCKER NATIONAL BANK, WELLS FARGO, N.A., FIRST PENNSYLVANIA BANK, N.A., FIRST NATIONAL STATE BANK OF NEW JERSEY, J. WALTER McDOWELL, III, JOHN KARSCIG, JR., ROBERT W. VAN CAMP AND JAMES R. VAN CAMP

No. 8920SC441

(Filed 16 January 1990)

Vendor and Purchaser § 2.1 (NCI3d)— right of first refusal to purchase utilities—no time stated—rule against perpetuities violated

A consent judgment giving plaintiff's predecessor a right of first refusal to purchase water and sewer systems serving its residents was void ab initio, since the consent judgment did not state a time within the rule against perpetuities.

Am Jur 2d, Perpetuities and Restraints on Alienation §§ 61, 65; Vendor and Purchaser § 49.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from judgment entered 15 December 1988 by *Judge Thomas W. Seay, Jr.* in MOORE County Superior Court. Heard in the Court of Appeals 8 November 1989.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Gaither S. Walser, D. Clark Smith, Jr. and Stephen W. Coles, for plaintiff-appellant.

Hunton & Williams, by Edward S. Finley, Jr., Julius A. Rousseau, III, and Frank A. Schiller, for defendant-appellees.

GREENE, Judge.

Plaintiff Village of Pinehurst ("Pinehurst") appeals the trial court's grant of summary judgment for defendants, dismissing Pinehurst's action for declaratory judgment, to set aside deeds and deeds of trust, to give notice of lis pendens and for specific performance of a prior consent judgment. Pinehurst's purpose in filing the complaint was to prevent sale of water and sewer facilities serving the residents of Pinehurst to an entity other than Pinehurst. Defendants include the buyer of the utilities ("RIM"); the seller of the utility systems, Pinehurst Enterprises, Inc.; parent corporation of the seller, Resort Holding Corporation; several banks owning Resort Holding Corporation; the water and sewer companies serving Pinehurst, owned by seller Pinehurst Enterprises; and various officers, trustees and principals of defendants. The consent judgment had been executed on 3 December 1973 between class-action plaintiffs who were residents of Pinehurst and defendants Diamondhead Corporation and its subsidiary, Pinehurst, Inc., the Village Council [governing body] of Pinehurst, North Carolina, and others. At the time of the consent judgment, Pinehurst was not an incorporated municipality; it was a privately-owned town developed by Diamondhead. The consent judgment included the following provision:

SALE OF UTILITIES

13. *In the event* that the Defendants Pinehurst and Diamondhead shall receive a bona fide offer for the sale of said utilities, prior to accepting said offer, said Defendants shall give to the Village Council for a period of ninety (90) days a right of first refusal to purchase said utilities on behalf of the residents of the Village of Pinehurst at a price and on terms at least equal to the price and terms of the highest offer to said Defendants by a bona fide purchaser. This provision is conditioned upon adequate assurance on behalf of the Village Council that those services as then rendered by the said utilities shall be maintained at their then level, including rendering services or agreeing to render services to areas outside the Village Boundary if said service is then being rendered or has been provided or committed to said areas. It is agreed that the sale and purchase of the said utilities shall be consummated within one hundred eighty (180) days of the Village Council exercising the right of first refusal.

> In the event that control of the Defendant Pinehurst, Inc. shall be transferred by a sale of the stock or the majority of the stock of said corporation, or in the event a majority of the assets of the Defendant Pinehurst, Inc. are sold or transferred, then in either event the right of first refusal to purchase said utilities shall survive said sale but shall not be exercisable as a result of said sale. (Emphasis added.)

Pinehurst alleges that after execution of the consent judgment, defendants in this case, Pinehurst Enterprises, Resort Holding Corporation, the water and sewer corporations, and the banks succeeded to and were assigned the interests of consent judgment defendants Diamondhead and Pinehurst, Inc. Pinehurst further claims that after execution of the consent judgment Pinehurst was incorporated as a municipality and assumed the powers granted to the Village Council in the consent judgment. Pinehurst seeks to assert the right of first refusal to buy the water and sewer systems pursuant to the consent judgment, as set out above. Pinehurst alleges that Pinehurst Enterprises offered to sell the systems to RIM without first offering Pinehurst the opportunity to exercise its right of first refusal.

Defendants answered Pinehurst's complaint by asserting that the right of first refusal provision and the consent judgment containing it was void ab initio. Defendants moved for summary judgment pursuant to N.C.G.S. § 1A-1, Rule 56 (1983). The trial court considered Pinehurst's complaint, defendants' answer, record pleadings, and counsels' arguments in granting summary judgment for defendants.

The deciding issue before us is whether the right of first refusal provision of the consent judgment is void because it lacked a time limit for exercise of the right.

Summary judgment is appropriate when there exists no material issue of fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56. The parties do not dispute any material factual issue concerning the right of first refusal provision. Defendants, as movants, submit that the provision is void as a matter of law.

Whether a right of first refusal provision is valid or void is a question of law for the trial court. *Snipes v. Snipes*, 55 N.C.

App. 498, 503, 286 S.E.2d 591, 594, *aff'd*, 306 N.C. 373, 293 S.E.2d 187 (1982). We determine that the forecast of evidence before the trial court relating to the right of first refusal provision shows that no genuine issue of material fact existed as to whether the right was valid and defendants were entitled to judgment as a matter of law.

A 'right of first refusal' is also known as a 'preemptive right.' *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980). "[F]or a preemptive right to be valid, it must meet a two-prong test of reasonableness. First, the preemptive right must not violate the rule against perpetuities. Second, it must link the price to the fair market value of the land or to a figure that the seller is willing to accept." *Coxe v. Wyatt*, 83 N.C. App. 131, 133, 349 S.E.2d 75, 77, *rev. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987), citing *Smith*, at 65, 269 S.E.2d at 613.

The preemptive right in this case does not meet the first prong of reasonableness because it violates the rule against perpetuities. *Coxe*, at 134, 349 S.E.2d at 77. As illustrated by our emphasis in the provision, above, the provision does not state the time within which the right must be exercised. Whenever the utilities owner receives a bona fide offer to purchase the utilities, the right comes into being, and may be exercised. The right is perpetual in nature, and violates the reasonable time requirement. *Coxe*, at 134, 349 S.E.2d at 77; *Peele v. Wilson County Board of Education*, 56 N.C. App. 555, 560, 289 S.E.2d 890, 893, *rev. denied*, 306 N.C. 386, 294 S.E.2d 210 (1982).

Pinehurst contends that although no time is stated in the consent judgment, we should presume that a reasonable time for exercise of the right flows from the commercial nature of the consent judgment. Pinehurst asserts that this commercial transfer is unlike the private property transfers in which we traditionally find preemptive rights.

The subject matter of the preemptive right in this case is no different than the subject matter in previous cases which required some statement of a reasonable duration for exercise of the right. The consent judgment clearly affects property interests, because the water and sewer systems necessarily are intermingled with the lands beneath them. Also, we note that both public and private utilities have the power to exercise eminent domain to acquire and expand existing utility facilities. N.C.G.S. § 40A-3

(1984) (private condemnors), §§ 62-183 (1982), 162A-89.1 (1987) (public condemnors).

Pinehurst also urges us to consider its exercise of the right to purchase the utilities as a "benevolent use" so that the statutory "charity transfer" exception to the rule against perpetuities applies to this case. *See* N.C.G.S. § 36A-49 (1984). We decline to do so because a commercial purchase is not a "gift, grant, bequest or devise," as provided in the statute. *Id.*

Based on these factors, we determine that the trial court properly entered summary judgment for defendants.

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion: (1) The right of first refusal granted by the 1973 consent judgment is valid and legally binding upon the parties; (2) the rule against perpetuities does not apply to the circumstances recorded; and (3) because of its, and its predecessors', acceptance of the benefits of the consent judgment Pinehurst Enterprises, Inc. is estopped from disputing its validity.

CAROL A. WILLIAMS, PETITIONER v. LAUREN R. WILLIAMS, DEFENDANT

No. 896DC652

(Filed 16 January 1990)

1. Parent and Child § 10 (NCI3d)— URESA action—proper documents submitted to clerk

The trial court properly denied defendant's motion to dismiss plaintiff's action instituted pursuant to the Uniform Reciprocal Enforcement of Support Act when plaintiff submitted the proper documents to the clerk of court in Hertford County.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149.

2. Parent and Child § 10 (NCI3d)— plaintiff's filing and registering of foreign divorce decree proper—uncontested finding

The trial court's uncontested finding of fact that plaintiff properly filed and registered a foreign child support decree alone adequately supported the court's conclusion of law that the decree was registered.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149.

3. Parent and Child § 10 (NCI3d)— URESA action—duty of father to support child past 18—father's contractual duty enforceable in North Carolina

There was no merit to defendant's argument that the trial court did not have the authority under North Carolina law to order child support for a child who had attained the age of 18, since defendant contractually bound himself to make support payments beyond the age of 18, and North Carolina recognizes the enforceability of such agreements.

Am Jur 2d, Desertion and Nonsupport § 123.

APPEAL by defendant from *Williford, Robert E., Judge.* Order entered 1 March 1989 in HERTFORD County District Court. Heard in the Court of Appeals 12 December 1989.

In 1985 defendant obtained a divorce from petitioner (plaintiff) in the Supreme Court of Ontario, Canada. In the decree issued by that court, it was also ordered and adjudged that certain paragraphs from a separation agreement dated 15 June 1984 be incorporated into the decree.

The portions of the separation agreement incorporated into the divorce decree concerned the support duties of defendant toward his two children, Christopher and Lawrence. In pertinent part the agreement provided:

> (b) The Husband shall pay to the Wife the sum of $300.00 per month upon the eldest child, CHRISTOPHER WILLIAMS, reaching the "age of majority" (as such term is hereinafter defined) for the support, maintenance and benefit of the youngest child LAWRENCE WILLIAMS, until the said child reaches the age of majority.
>
> (c) The term "age of majority" as such herein shall be defined to mean:

(I) When a child reaches the age of 18 years or more and ceases to be in normal full-time attendance at a university, college or accredited educational institution;

(II) When a child reaches the age of 23 years while still in normal full-time attendance at a university, college or accredited educational institution;

(III) When a child ceases to reside with the Wife.

(IV) When a child marries; or

(V) When a child dies.

On 14 January 1988, plaintiff, alleging defendant's nonpayment of support, instituted this action pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), N.C. Gen. Stat. § 52A-1 *et seq.* (1984). In December 1987 copies of the parties' Canadian decree, plaintiff's sworn statement, and a copy of the Reciprocal Enforcement Act of Ontario, Canada were transmitted to the Clerk of Court of Hertford County for registration in accordance with URESA as provided in G.S. § 52A-26 *et seq.* On 14 January 1988 the clerk of court issued a summons and notice and the defendant was served with the same on 11 February 1988. On 17 February 1988 defendant filed a motion to dismiss which was denied. After two continuances, a hearing was held on 16 February 1989. After the hearing, the trial court entered an order which affirmed the registration and enforcement of the Canadian decree. The order decreed that defendant owes plaintiff $19,350.00 in back due child support and that defendant shall pay plaintiff $300.00 per month child support until further ordered by the Court. From this order defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith and Associate Attorney General Bertha Fields, for petitioner-appellee.

Joseph J. Flythe for defendant-appellant.

WELLS, Judge.

[1] Defendant's first and second assignments of error challenge the registration of plaintiff's Canadian decree. Defendant first assigns as error the trial court's denial of his 17 February 1988 motion to dismiss based on Rules 12(b)(6) and 12(b)(1) of the N.C. Rules of Civil Procedure. Defendant argues that plaintiff failed to comply

with the provisions of N.C. Gen. Stat. § 52A-29 for registration of a foreign decree and thus the court had no subject matter jurisdiction. In addition, defendant contends that the documents filed by plaintiff in order to register her Canadian decree failed to state a claim for relief.

A primary function of the Uniform Reciprocal Enforcement of Support Act (URESA), N.C. Gen. Stat. § 52A-1 *et seq.* is to simplify and streamline the procedure by which an action to enforce a court order rendered in another jurisdiction can be instituted. In a URESA registration proceeding one is not required to file a complaint in the traditional sense. G.S. § 52A-29 requires only that certain documents be transmitted to the clerk of court. After submitting the required documents, an obligee seeking registration has no other duties under the statute. In this case plaintiff has met these requirements. For these reasons, we hold that the motion to dismiss was properly denied. This assignment is overruled.

[2] Defendant next assigns as error the trial court's conclusion of law that the Canadian decree was registered and due notice was served on respondent. We note for the record that the conclusion of law to which defendant excepts addresses only *proper registration* in the office of the clerk of court. (Emphasis supplied.) The trial court's order contains an uncontested finding of fact that "[p]laintiff filed and registered the . . . Canadian decree in the Office of the Clerk of Superior Court of Hertford County on January 14, 1988 pursuant to the Uniform Reciprocal Enforcement of Support Act and defendant was duly served with due notice on February 11, 1988." A finding of fact not excepted to is binding on appeal. *Anderson v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982). Therefore, the trial court's uncontested finding of fact that the plaintiff properly filed and registered the foreign decree alone adequately supports its conclusion of law that the decree was registered. For this reason and the reasons discussed, *supra*, we overrule this assignment of error.

[3] In his third assignment of error, defendant argues that the trial court did not have the authority under North Carolina law to order child support for a child who has attained the age of eighteen. Under North Carolina's version of URESA duties of support available 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." *See* N.C. Gen. Stat. § 52A-8. It is the law of the state where the obligor was present during the legally material times provided for in the statute that controls what duties of support may be enforced in North Carolina. *Pieper v. Pieper*, 323 N.C. 617, 374 S.E.2d 275 (1988). In this case no effort has been made to rebut the statutory presumption that the obligor was present in the responding state. Therefore, that presumption prevails and duties of support imposable under North Carolina law may be enforced through our URESA against this obligor. *Id.*

Defendant relies on N.C. Gen. Stat. § 48A-2 (1984), which defines a minor as "any person who has not reached the age of 18 years," and N.C. Gen. Stat. § 50-13.4(c) (1987 & Supp. 1989), which provides that parental support obligations terminate when a child reaches 18 except in two situations, neither of which is applicable here. We hold that on the facts of this case neither G.S. § 48A-2 nor G.S. § 50-13.4(c) is controlling. We instead look to our case law which clearly establishes that a parent can assume contractual obligations to his child greater than the law otherwise imposes. *See, e.g., Mullen v. Sawyer*, 277 N.C. 623, 178 S.E.2d 425 (1971); *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E.2d 444 (1978). Thus, a parent may expressly agree to support his child after emancipation and beyond majority, and such agreements are binding and enforceable. *Church v. Hancock*, 261 N.C. 764, 136 S.E.2d 81 (1964); *Shaffner, supra.* In this case the defendant and plaintiff agreed that the age of majority could extend beyond age 18. The separation agreement defined the age of majority to mean when a child reaches the age of 18 years or more and ceases to be in normal full-time attendance at a university, college or accredited educational institution, reaches the age of 23, marries, dies, or ceases to reside with his [defendant's] wife. Defendant does not contend that the younger son was not enrolled in college, had reached age 23, or had married or ceased to reside with plaintiff. Defendant having bound himself to make support payments beyond the age of 18, the trial court properly validated the Canadian decree giving effect to defendant's continued obligation of support. This assignment of error is overruled.

The decision of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

COMMONWEALTH LAND TITLE INSURANCE COMPANY v. N. V. STEPHENSON, JR., AND RACHEL STEPHENSON

No. 8911DC502

(Filed 16 January 1990)

Insurance § 148 (NCI3d)— action for breach of warranty against encumbrances—insured grantee as necessary party

In an action for breach of warranty against encumbrances the insured grantee was a necessary party in plaintiff title insurer's action against defendant grantors to recover expenses incurred by grantee and paid by insurer, since insured grantee had been paid for only certain but not all expenses incurred; insurer was attempting to recover all expenses from grantors; but the equitable assignment doctrine of subrogation permits an insurer to assert the remedy of the insured only to the extent the insurer's payments have discharged the alleged wrongdoer's primary liability to the insured.

Am Jur 2d, Insurance §§ 526, 1807, 1823.

APPEAL by plaintiff from judgment entered 27 March 1989 by *Judge William A. Christian* in HARNETT County District Court. Heard in the Court of Appeals 8 November 1989.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellant.

Bain and Marshall, by Edgar R. Bain and Alton D. Bain, for defendant-appellees.

GREENE, Judge.

The trial court entered summary judgment for defendants and substituted plaintiff Commonwealth Land Title Insurance Company ("Company") appeals.

The original plaintiff ("insured-grantee") who filed this action for breach of the warranty against encumbrances was the grantee of residential property and the insured in a title insurance policy issued by Company. Defendants are grantors of the property, and issued the deed containing the warranty against encumbrances to insured-grantee. The deed contained this covenant:

> Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated.

Insured-grantee alleged in his complaint that his septic tank was found to be located on neighboring property several years after defendants conveyed the property to insured-grantee. When insured-grantee informed his neighbor of the mislocation of the septic tank, the neighbor demanded that insured-grantee remove the septic tank from neighbor's property. Insured-grantee complied, spending approximately $3,000.00 in removing and relocating the tank. Neither defendants, insured-grantee nor neighbor were aware of the mislocation of the tank. Insured-grantee alleged that the septic tank mislocation was an "encumbrance caused by the septic tank encroaching on the property of another" which caused insured-grantee to incur expense "to relocate the septic tank on his own property" and "lose funds he had spent on an appraisal and credit report," which breached defendants' warranty against encumbrances.

Insured-grantee also complained that:

> 12. As a proximate result of defendants' breach of warranty, plaintiff has been damaged in an amount less than $10,000.00, *being the funds forfeited when his loan could not be refinanced, the extra interest paid (and foreseeably to be paid) on his current loan,* and the expense to relocate the septic tank on the property. [Emphasis added.]

Insured-grantee moved for summary judgment pursuant to N.C.G.S. § 1A-1, Rule 56 (1983). Prior to the trial court's hearing of insured-grantee's motion for summary judgment, defendants moved to add Company as a "necessary and proper" party to the action because "the title insurance company paid all or any portion of [the damages alleged in the complaint]," pursuant to N.C.G.S. § 1A-1, Rule 19 (1983). In the same motion, defendants had prayed that "plaintiff be required to advise the defendants as to what title insurance company has paid for all or any part of the damages alleged in the complaint." The record showed that Company had reimbursed insured-grantee's expenses for removing and relocating the septic tank pursuant to the insurance contract between Company and insured-grantee. By consent of all parties, the trial court

substituted Company for insured-grantee as the "real party in interest" in the action. Insured-grantee thereafter took no part in the litigation.

After Company answered defendants' complaint, it also filed a motion for summary judgment. After reviewing the pleadings, affidavits, interrogatory answers and "other matters submitted by the parties," the trial court denied Company's motion for summary judgment and granted defendants' motion for summary judgment.

The issue presented is whether the original plaintiff (insured-grantee) is an unjoined necessary party, precluding the trial court from entering judgment until he is joined.

Rule 19 dictates that all necessary parties must be joined in an action. *Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 451, 183 S.E.2d 834, 837 (1971). "Rule 19 requires the [trial] court to join as a necessary party any persons 'united in interest' and/or any persons without whom a complete determination of the claim cannot be made . . . [s]ince a judgment without such necessary joinder is void." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 17, 362 S.E.2d 812, 822 (1987) (citations omitted). A party does not waive the defense of failure to join a necessary party; an objection on this basis can be raised at any time. *See Kimball v. The Florida Bar*, 537 F.2d 1305, 1306-07 (5th Cir. 1976). A reviewing court is required to raise the issue ex mero motu to protect its jurisdiction. *J & B Slurry Seal Co.*, at 17, 362 S.E.2d at 822.

When the court substituted Company for insured-grantee as a party-plaintiff, insured-grantee had been reimbursed by Company only for expenses insured-grantee incurred to relocate the septic tank. Company did not pay insured-grantee's claims for forfeited funds and extra interest. In consenting substitution of Company for insured-grantee as plaintiff in this action, the parties sought to place Company in the position of the party prosecuting all claims asserted in the complaint. However, the 'equitable assignment' doctrine of subrogation permits an insurer to assert the remedy of the insured (here, original plaintiff) against the alleged wrongdoer only " 'to the extent' the insurer's payments have discharged the [alleged wrongdoer's] primary liability to the insured." *J & B Slurry Seal Co.*, at 11, 362 S.E.2d at 818. "The insured is a necessary party plaintiff where the insurance company has paid only a por-

tion of the loss." *Security Fire & Indemnity Company v. Barnhardt*, 267 N.C. 302, 304, 148 S.E.2d 117, 119 (1966).

The record does not reveal that insured-grantee released or otherwise dismissed his claims for forfeited funds and extra interest. In fact, the record indicates that Company's complaint seeks recovery for these damages. Based on this record, we determine that insured-grantee is a necessary party to this action. Dismissal of the complaint is proper if a necessary party is not joined. *G & S Business Services, Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 489, 380 S.E.2d 792, 795, *appeal dismissed, rev. denied*, 325 N.C. 546, 385 S.E.2d 497 (1989). Therefore, we vacate the trial court's entry of summary judgment dismissing this action and remand the case to the trial court to give Company a reasonable time to join any necessary party. *Id.* at 488-89, 380 S.E.2d at 795.

Vacated and remanded.

Judges BECTON and PHILLIPS concur.

GARY W. SWINDELL AND WIFE, LILLIAN R. HARRIS SWINDELL v. THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SKYLINE MORTGAGE CORPORATION

No. 8926SC617

(Filed 16 January 1990)

Usury § 1.1 (NCI3d)— excessive late payment charge—no "interest"—usury penalties not invoked

The provision in plaintiff's note requiring a 5% late charge did violate N.C.G.S. § 24-10(e) (now N.C.G.S. § 24-10.1) because it exceeded 4% as allowed by the statute; however, this violation did not invoke the usury penalties provided in N.C.G.S. § 24-2, since a late payment charge pursuant to N.C.G.S. § 24-10 is not considered "interest" as that term is used in the usury statute. A violation of N.C.G.S. § 24-10.1 by exceeding the 4% late charge allowed results in forfeiture of the right to collect a late charge on the loan for the balance of the term of the loan.

Am Jur 2d, Interest and Usury § 182.

APPEAL by plaintiffs from order entered 3 April 1989 by *Judge Frank W. Snepp* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 5 December 1989.

Plaintiffs-appellants Gary W. Swindell and wife, Lillian R. Harris Swindell were denied their motion for summary judgment and defendants-appellees The Federal National Mortgage Association ("FNMA") and Skyline Mortgage Corporation ("Skyline") were granted their cross-motion for summary judgment.

On 22 March 1985, the plaintiffs executed a Note and Deed of Trust in the original amount of $112,500.00 on a home loan to EPIC Mortgage, Inc. as agent for Community Savings & Loan, Inc. This was an adjustable rate note with an initial interest rate of 10.625%, subject to change on 1 April 1986 and annually thereafter. The Note and Deed of Trust were executed on multistate FNMA Uniform Instrument forms.

Prior to June 1987, Community Savings & Loan, Inc. and EPIC Mortgage, Inc. went into receivership and the plaintiffs-appellants' contract was taken by the FNMA. Skyline became the servicing agent for FNMA on the plaintiffs' mortgage loan contract.

On 14 October 1987, Skyline sent plaintiffs a notice of uncollected late charges. The late charges which were allegedly due applied to the payment due from appellants under the loan on 1 June 1987. The late charge equaled 5% of the principal and interest of the payment due on 1 June 1987.

On or about 6 November 1987, appellants informed defendant Skyline of the North Carolina ceiling of 4% on late payment charges. G.S. 24-10(e) (now G.S. 24-10.1). In response to this information, defendant Skyline advised the plaintiffs on 17 February 1988, that the late payment charge for their loan had been reduced from five percent to four percent to conform to North Carolina law. This reduction in interest was made in accordance with the provisions contained in paragraph six of the plaintiffs' Note:

> 6. LOAN CHARGES: If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit. . . .

Plaintiffs seek to apply the penalty provisions of G.S. Section 24-2, which is invoked upon a finding of usury by "the taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter. . . ."

Plaintiffs-appellants appeared pro se.

Alexander and Brown, by William G. Alexander, for defendants-appellees.

LEWIS, Judge.

Plaintiffs contend that the initial late charge of five percent violates G.S. Section 24-10(e) (now 24-10.1) and as such would therefore violate G.S. 24-2. G.S. 24-2 imposes a specific penalty for the charging or collecting of usurious interest. We hold this penalty does not apply to G.S. 24-10(e) (now G.S. 24-10.1). G.S. 24-10(e) states:

> (e) Any lender may charge a party to a loan made under G.S. 24-1.1A, a late payment charge on any installment of principal, interest or both in an amount not to exceed four percent (4%) of such installment. The charges authorized by this subsection may not be charged by a lender unless an installment is more than 15 days past due; provided, however, for the purposes of this subsection, a late payment charge may not be charged until an installment is more than 30 days past due where interest on such installment is paid in advance.

While it is true that the plaintiffs' Note did provide for an initial five percent late payment charge, the contract did provide for the reduction of this charge if applicable law held the charges exceeded permissible limits. The parties executed a multi-state adjustable-rate note, a "Fannie Mae" Uniform Instrument. The purpose of such an instrument is to insure that it complies with federal law, North Carolina law, and the laws of every other state. Upon learning of the above statutory limitation, and to conform with paragraph six of their agreements, defendants accordingly reduced the late charge rate to four percent.

We find that the plaintiffs' Note and their assertion of a late charge did violate 24-10(e). However, this violation does not invoke the usury penalties provided in N.C.G.S. 24-2.

G.S. 24-2 states as follows:

> Penalty for Usury; Corporate bonds may be sold below par. The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carriers with it, or which has been agreed to be paid thereon.

The key word in said statute is "interest." The issue presented is whether a late payment charge pursuant to N.C.G.S. 24-10 is considered "interest." We hold that the legislature did not intend for late charges to be considered interest.

There is a gap in the law relative to the penalty for misuse of G.S. 24-10.1. Though we find the penalties imposed for violation of the usury statute, G.S. 24-2, do not apply here, we do hold that the collection of the late charge would be unfair to the borrower where the lender has erroneously sought to impose a late charge. It is no less important that lenders should be encouraged to determine carefully the applicable law on late charges. If late charges were knowingly assessed in error, they should suffer nevertheless fair penalty. Public policy demands that there be something to discourage wrongful or erroneous assessment of late charges. The violation of G.S. 24-2 as to interest would invoke the penalty of forfeiture of the entire interest on the loan. Since we find G.S. 24-10.1 does not deal with interest but rather late charges, we find the forfeiture of late charges to be consistent. Our holding is consistent with the purpose of the usury statutes. These statutes are for the protection of borrowers against greedy lenders who seek to take unfair advantage of their debtors. However, our usury statutes should not be converted from a shield of protection into a sword of unwarranted expectation.

We hold that the defendants thus have forfeited their right to collect a late charge on this loan for the balance of the term of the loan. They have not, however, forfeited their right to receive principal and interest and abuse would permit foreclosure.

Affirmed in part and reversed in part.

Judges JOHNSON and COZORT concur.

ABERDEEN WHITE, PLAINTIFF v. HUGH CHATHAM MEMORIAL HOSPITAL, INC., DEFENDANT

No. 8817SC821

(Filed 16 January 1990)

Master and Servant § 8 (NCI3d)— personnel policies handbook— insurance coverage after employee disabled—unilateral contract

Defendant's personnel policies handbook which stated that a full time employee who became disabled during his employment would be able to maintain his group insurance constituted a unilateral contract based upon defendant's offer of extra benefits to employees who continued in its employment until disabled and plaintiff's acceptance of that offer by remaining in defendant's employment until she was disabled, and the trial court therefore erred in granting summary judgment for defendant on plaintiff's breach of contract claim.

Am Jur 2d, Insurance § 1852; Master and Servant §§ 15, 127.

APPEAL by plaintiff from *Brown, Frank R., Judge.* Order entered 9 May 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 14 March 1989.

Mills & Rives, by G. Wilborn Rives, for plaintiff appellant.

R. Lewis Alexander and R. Lewis Alexander, Jr., for defendant appellee.

PHILLIPS, Judge.

Plaintiff's complaint alleging claims for breach of contract and for intentionally inflicting emotional distress was dismissed by an order of summary judgment under authority of Rule 56, N.C. Rules of Civil Procedure. The order is erroneous as to the breach of contract claim and correct as to the claim for intentionally inflicting emotional distress.

The affidavits and other materials before the court indicate in pertinent part that: Plaintiff was employed by defendant as a full-time nurses' assistant from March, 1951 to December, 1985 when she was discharged because of a disabling illness. The parties never had a written contract covering the employment. For several

years before her dischage plaintiff was covered by the company's low cost group medical insurance plan that had limits of $1,000,000. In January, 1983 defendant distributed to its employees, including plaintiff, a "Personnel Policies Handbook," which stated that: "A full time employee who becomes disabled during his employment will be able to maintain his group insurance." Plaintiff knew of the statement and became disabled while a full-time employee but was not permitted to continue her group medical insurance, as the policy of defendant's group carrier did not permit disabled former employees to continue under it. The individual policy that plaintiff was able to obtain costs more than the group policy, though its limits are only $100,000. Defendant's representation as to disabled employees being able to continue the group coverage was not withdrawn or disavowed before plaintiff became disabled. In denying that it was legally bound to make the coverage available and in discussing the matter with plaintiff defendant's employees were neither abusive nor demeaning but, as plaintiff testified in her deposition, were kind and considerate.

Obviously, the foregoing forecast of proof raises no genuine issue of material fact in the claim for intentionally inflicting emotional distress, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), and that claim was properly dismissed. Since plaintiff did not argue otherwise in the brief she abandoned the claim in any event. Rule 28(a), N.C. Rules of Appellate Procedure.

It is equally clear, however, that the forecast of evidence does raise a genuine issue of fact as to plaintiff's claim for breach of contract. For the contract that plaintiff alleged and that her materials support is not a mutually binding bilateral employment contract, as the court and defendant mistakenly assumed, but a unilateral contract based upon defendant's offer of extra benefits to employees who continued in its employment until disabled and upon plaintiff accepting that offer by remaining in defendant's employment until she was disabled. Defendant's argument that the record contains no indication that after receiving the handbook plaintiff promised to continue her employment is irrelevant, since unilateral contracts are not based upon mutual promises or obligations as bilateral contracts are:

> A unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed . . . It has also been defined as a promise by one

> party or an offer by him to do a certain thing in the event the other party performs a certain act . . . .

17 C.J.S. *Contracts* Sec. 8, pp. 578-579 (1963). As is deducible from the foregoing, the distinctive features of an unilateral contract are that the offeror is the master of his offer and can withdraw it at any time before it is accepted by performance, and that while the offer is still outstanding the offeree can accept it by meeting its conditions. Such contracts have been enforced by our courts in many cases involving circumstances similar to those recorded here. One such case is *Brooks v. Carolina Telephone and Telegraph Co.*, 56 N.C. App. 801, 290 S.E.2d 370 (1982), where we held that plaintiff's suit for severance benefits unilaterally promised by the employer was not dismissible because the employer could have amended or withdrawn the offer before the employee met its conditions, but failed to do so; and another is *Roberts v. Mays Mills, Inc.*, 184 N.C. 406, 114 S.E. 530 (1922), where an employer's promise to pay a bonus to all employees who remained continuously employed until Christmas was held to be enforceable.

The statement in defendant's personnel book concerning the additional benefits that disabled employees could enjoy if they remained in its full-time employment until they became disabled—seriously and responsibly made from all appearances—is evidence that it was an offer to make its group insurance available to any employee who met the conditions stated; and that plaintiff knew about the offer and continued in defendant's employment until she became disabled is evidence enough that she accepted the offer. Nor is it a legal defense to the claim, as defendant argues, that defendant's group carrier may have no policy that permits full-time employees who become disabled to continue under it. For the benefit represented can be supplied either by similar coverages by other carriers or by money. If the contract was made it was certainly breached and defendant is obligated to pay the difference between the cost of the substitute coverage obtained and the cost of defendant's group coverage of $1,000,000 for one employee, which is the benefit that it stated would be available. That the substitute coverage obtained has limits less than $1,000,000 would not increase defendant's obligation as long as those limits cover her medical and hospital expenses, but upon the lesser limits ceasing to cover her medical expenses defendant's obligation would increase accordingly up to the difference between the limits and $1,000,000.

Affirmed in part; reversed in part; and remanded.

Judges ARNOLD and JOHNSON concur.

ASHEVILLE MALL, INC. v. SAM WYCHE SPORTS WORLD, INC.

No. 8928SC353

(Filed 16 January 1990)

Injunctions § 6 (NCI3d)— breach of lease requiring store to stay open—injunction inappropriate

The trial court properly granted defendant's motion for summary judgment in plaintiff's action for an injunction restraining defendant from further violation of the terms of a lease where defendant had breached the lease by keeping its store closed during hours which it was required to be open, but there was no evidence that defendant had on any other occasions in the past closed its store or had otherwise displayed any intention to do so in the future in violation of the lease.

Am Jur 2d, Injunctions §§ 50, 51, 87, 92; Landlord and Tenant § 177.

APPEAL by plaintiff from order entered 6 January 1989 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 22 September 1989.

Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon and Allan R. Tarleton, for defendant-appellee.

GREENE, Judge.

The plaintiff sought an injunction restraining defendant from further violation of the terms of a lease. The trial court granted defendant's motion for summary judgment.

The trial court's findings of fact, which are not challenged on appeal, are as follows:

1. On April 1, 1987 Plaintiff and Defendant entered into an Indenture of Lease whereby Plaintiff leased to Defendant a certain store located in the Asheville Mall Shopping Center in Asheville, North Carolina (hereinafter "the Mall").

2. By the terms of the lease Defendant is to remain open for business during all such days (including Sundays), nights and hours when one or more of the Sears or Belks department stores adjoining the Mall are open for business.

3. The Sears and Belks department stores in the Mall were open for business during the hours of 1:00 p.m. to 6:00 p.m. on July 30, 1988 and from 10:00 a.m. to 9:00 a.m. [sic] on August 1, 2 and 3.

4. Defendant's store at the Mall was closed between the hours of 5:00 p.m. on July 31 and 5:00 p.m. on August 3.

The trial court concluded as follows:

1. Defendant breached the terms of its lease with the Plaintiff on July 31, August 1, 2, and 3.

2. Notwithstanding the Defendant's breach of the lease, Plaintiff is not entitled to injunctive releaf [sic].

The issue presented is whether injunctive relief is appropriate in light of a single breach of a lease agreement.

The plaintiff argues that the trial court erred in granting the defendant's motion for summary judgment since defendant breached the lease, and injunctive relief is the only meaningful relief available. The plaintiff cites cases from other jurisdictions for the proposition that the plaintiff should be granted injunctive relief rather than forced to seek monetary damages for the breach since it is nearly impossible to calculate the monetary damages sustained by plaintiff by reason of defendant's closing his business for four days. *See Dover Shopping Center Inc. v. Cushman's Sons, Inc.*, 164 A.2d 785 (N.J. Super. Ct. App. Div. 1960); *Lincoln Tower Corp. v. Richter's Jewelry Co.*, 12 So.2d 452 (Fla. 1943); *Jerrico Inc. v. Washington Nat. Ins. Co.*, 400 So.2d 1316 (Fla. Dist. Ct. App. 1981), *rev. denied*, 411 So.2d 382 (1981).

However, we note that in those cases the breach of the lease was ongoing or repeated, but here we have evidence only of one

isolated breach. We reject plaintiff's argument that defendant's failure to keep its store open for business from July 31 to August 3, 1988 equals four separate and distinct breaches. Rather, the closing is more in the nature of one isolated incident.

Injunctive relief is not available unless irreparable injury is proven and damages are not reasonably obtainable, and it is proper only where the injury is "of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949). Furthermore, "acts and practices will not, as a rule, furnish a basis for injunctive relief when they have been discontinued or abandoned before institution of the suit to restrain them, . . . particularly where there is nothing to indicate a probability that they will be resumed . . . ." 42 Am. Jur. 2d *Injunctions* § 5, at 731 (1969). The danger sought to be enjoined must be real and immediate. *See Dorsett v. Group Development Corp.*, 2 N.C. App. 120, 124-25, 162 S.E.2d 653, 656 (1968) (action to restrain an anticipated nuisance). "[T]here must be at least a reasonable probability that the injury will be done if no injunction is granted. . . ." 43 C.J.S. *Injunctions* § 22, at 802 (1978).

A similar situation was presented in *Yandell v. American Legion*, 256 N.C. 691, 124 S.E.2d 885 (1962), where the plaintiff sought an injunction against future rabbit hunts by the defendant who had conducted rabbit hunts in the past "wherein sticks were used to kill rabbits in the field." 256 N.C. at 691, 124 S.E.2d at 885. The Court there concluded:

> Completed acts and past occurrences in the absence of any evidence tending to show an intention on the part of the defendants to sponsor or engage in future rabbit hunts to be conducted in the manner complained of in the plaintiff's complaint, will not authorize the exercise of the court's injunctive power.

256 N.C. at 693, 124 S.E.2d at 886-87.

As there is no evidence in this record that defendant had on any other occasions in the past closed its store or had otherwise displayed any intention to do so in the future in violation of the lease, summary judgment was appropriate. *See Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977) (summary judgment appropriate where no material issue of fact exists

and the movant is entitled to summary judgment as a matter of law).

Affirmed.

Judges EAGLES and PARKER concur.

GREENVILLE BUYERS MARKET ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF-APPELLEE v. ST. PETERSBURG FASHIONS, INC., A FLORIDA CORPORATION; APPAREL AMERICA, INC., A FLORIDA CORPORATION; GERALD ROSENBLOOM, INDIVIDUALLY; RICHARD ROSENBLOOM, INDIVIDUALLY; AND RICHMOND GARMENT COMPANY, INC., A VIRGINIA CORPORATION, DEFENDANTS-APPELLANTS

No. 8810SC1290

(Filed 16 January 1990)

Corporations § 1.1 (NCI3d)— defendant as sham corporation—individual defendants subject to personal jurisdiction in North Carolina

Defendant St. Petersburg Fashions was a sham corporation under the control and dominion of the individual nonresident defendants; the apparel business involved was in fact conducted by defendants Richmond Garment Co., Apparel America, Inc., and the individual defendants; and the acts of their alter ego, St. Petersburg Fashions, were in law their acts and subjected them to the personal jurisdiction of our courts.

Am Jur 2d, Corporations §§ 43, 45, 55, 56.

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.

Plaintiff seeks to recover damages of defendants upon allegations of fraud, breach of contract, and unfair trade practices in connection with the rental of space in a Greenville, North Carolina shopping center. The appeal from a denial of the motions of all defendants except St. Petersburg Fashions, Inc. to dismiss the action for a lack of personal jurisdiction has no merit and we affirm the trial court.

The trial court's ruling is supported by the following facts: Apparel America, Inc. and St. Petersburg Fashions, Inc. are Florida corporations that are wholly owned by defendant Richmond Garment Company, Inc., a Virginia corporation. The individual defendants, who are citizens of Florida, are the only officers and directors of all the corporations and own all the corporate stock of Richmond Garment Company, Inc. On 11 June 1986 defendant St. Petersburg Fashions, acting through the defendants Rosenbloom, rented the shopping center space involved from plaintiff for the declared purpose of operating a retail clothing store. The lease was for a period of five years beginning 15 July 1986 at a minimum monthly charge of $2,104, and under its terms, negotiated by defendant Irving (Richard) Rosenbloom after examining the premises, plaintiff agreed to advance the lessee $36,000 to defray the cost of "upfitting" the premises for use as a ladies clothing store. On the same trip here Irving (Richard) Rosenbloom negotiated a similar lease for shopping mall space in Morrisville; and near that time both individual defendants traveled to Wilmington, North Carolina in the matter of still another similar lease. Plaintiff's checks amounting to $36,000 were endorsed by the named lessee to Apparel America and then stamped by Gerald Rosenbloom "For Deposit Only Richmond Garment Company, Inc. 404 6513638." Only a small part of the $36,000 defendants received to "upfit" the premises was spent for that purpose; the place was never fully stocked as an apparel store; no rent has been paid since 20 May 1987 and on 7 June 1987 all fixtures, property and apparel were removed from the store; and St. Petersburg Fashions is now defunct. In answering plaintiff's interrogatories all the defendants professed not to know who made the decision to vacate the leased premises or what became of the St. Petersburg Fashions' assets and they could produce no records of that company's financial activities, capitalization or status, including the disposition of plaintiff's $36,000 payment.

The circumstances of this case, except for the identity of the named lessee, are essentially the same as those reported in *Copley Triangle Associates v. Apparel America, Inc.*, 96 N.C. App. 263, 385 S.E.2d 201 (1989), in which we ruled that the facts *prima facie* indicated that West Side Fashions, the nominal lessee of the shopping center space involved, was a sham corporation under the dominion and control of the appellants, and that the trial court justifiably disregarded the lessee's corporate veil and ruled that it was the *alter ego* of the appellants and that its acts subjected all of them to the personal jurisdiction of our courts. As in that case, the record in this one *prima facie* indicates that St. Petersburg Fashions, Inc. is a sham corporation under the control and dominion of the appellants; that the apparel business involved was in fact conducted by Richmond Garment Company, Inc., Apparel America, Inc. and the individual defendants and that the acts of their *alter ego*, St. Petersburg Fashions, Inc., were in law their acts and subjected them to the personal jurisdiction of our courts.

And the individual appellants' contention that service upon them at their place of business, rather than at their residence, was invalid under the provisions of Rule 4, N.C. Rules of Civil Procedure, is also overruled for the same reasons stated in *Copley*.

Affirmed.

Judges BECTON and LEWIS concur.

IN THE MATTER OF: WILLIAM E. BRUCE, PETITIONER

No. 8910SC580

(Filed 16 January 1990)

1. Professions and Occupations § 1 (NCI3d)— defective designs approved by engineer—gross negligence—professional incompetence—sufficiency of evidence

Evidence was sufficient to support findings of fact by the North Carolina Board of Registration for Professional Engineers and Land Surveyors as to deficient designs approved by petitioner, and such evidence was sufficient to support the

conclusions of law that petitioner was grossly negligent and demonstrated professional incompetence.

Am Jur 2d, Occupations, Trades, and Professions §§ 9, 75.

2. Professions and Occupations § 1 (NCI3d)— suspension of engineer's license—imposition of fine—only one punishment allowed

The North Carolina Board of Registration for Professional Engineers and Land Surveyors was authorized to suspend petitioner engineer's license to practice or to fine him but not to do both upon a finding that he was grossly negligent and professionally incompetent.

Am Jur 2d, Occupations, Trades, and Professions §§ 9, 75.

APPEAL by petitioner from judgment entered 23 January 1989 by *Brewer, Judge*, in WAKE County Superior Court. Heard in the Court of Appeals 13 November 1989.

John T. Hall and McMillan, Kimzey & Smith, by Duncan A. McMillan, for petitioner appellant.

Bailey & Dixon, by Wright T. Dixon, Jr. and Patricia P. Kerner, for respondent appellee N.C. State Board of Registration for Professional Engineers and Land Surveyors.

PHILLIPS, Judge.

The North Carolina State Board of Registration for Professional Engineers and Land Surveyors, under the provisions of Chapter 89C of the N.C. General Statutes, has licensing and disciplinary authority over professional engineers and land surveyors. Following notice and a hearing, the Board fined petitioner Bruce, a professional engineer, $500 and suspended his license to practice in this state for two years upon findings and conclusions that in approving two school building designs that were structurally deficient in several respects he demonstrated professional incompetence and was grossly negligent. The Board's decision was affirmed in all respects by the Superior Court of Wake County. That petitioner was the engineer responsible for the structural integrity of the two building designs, one for a building constructed in Caldwell County, the other in Mecklenburg County, is not disputed. His contentions, in gist, are only that: (1) The Board's findings of fact

as to the deficient designs are inadequate and unsupported by competent evidence and do not support the conclusions of law that he was grossly negligent and demonstrated professional incompetence; (2) the hearing was unfair because one of the Board's members was biased against him; and (3) the Board had no authority to both fine and suspend his license to practice.

[1] The first two of these contentions, manifestly without merit, can be summarily disposed of. Though some of the Board's findings of fact are mixed findings of fact and conclusions of law, they adequately specify the structural deficiencies that petitioner approved and they are supported by the competent testimony of three qualified professional engineers. The findings included that: The design for one building failed to provide for an adequate piling foundation; the design for the other was deficient in regard to (a) the structural beams, (b) the steel roof joists, (c) certain steel columns, (d) the thickness of the masonry bearing walls in view of their height, (e) the footings for certain columns and sections of the building, and (f) the roof system was not properly anchored to the building. These facts clearly indicate that the designs petitioner approved did not provide for the structural integrity of the buildings involved in several fundamental respects and thus support the Board's conclusion that in approving the designs petitioner exhibited professional incompetence and was grossly negligent. And as to the contention that the Board was not impartial because one of the nine members who heard the case was an engineer who testified against him in litigation involving another job, it is enough to note that appellate courts review only questions that were raised in the trial court, *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), and petitioner did not raise this question before the Board. We add, however, that in our search of the record we found nothing to indicate that the Board member now complained of was biased against petitioner or that he influenced the decision of the other eight members.

[2] But petitioner's contention that the Board exceeded its authority in both suspending his license to practice and fining him is well taken. For G.S. 89C-21, the Board's only authority for sanctioning professional engineers, provided at the time involved: "The Board may suspend, refuse to renew, or revoke the certificate of registration, require reexamination, *or* levy a fine not in excess of five hundred dollars . . . ." (Emphasis supplied.) The word "or" in

this punitive statute is not a synonym for "and," as the Board argues; the statute meant, as it plainly stated, that for the offenses listed therein, including gross negligence and professional incompetence, the Board was authorized to "suspend," etc. petitioner's certificate of registration *or* to fine him up to $500, but was not authorized to do both. Thus, the sanctions part of the Board's decision is vacated, and upon remand the Board may either fine or suspend petitioner as the statute authorized, but may not do both.

Affirmed in part; vacated in part; and remanded.

Judge GREENE concurs.

Judge BECTON concurs in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 JANUARY 1990

BISHOP v. OUTBOARD MARINE CORP. No. 8924SC103	Yancey (89CVS176)	Reversed
CAPITAL FORD INC. v. GODWIN ASSOC. No. 8910DC501	Wake (87CVD10072)	Affirmed
CARTER v. McPHAIL No. 8918SC359	Guilford (88CVS8841)	Reversed & remanded
COVINGTON v. COVINGTON No. 8920DC220	Richmond (87CVD384)	Vacated & remanded
CRENSHAW v. CRENSHAW No. 8914DC60	Durham (87CVD00545)	Reversed
GUNTER v. ZEOK No. 8910SC275	Wake (88CVS340)	Affirmed
MATTHEWS v. N. C. DEPT. CORRECTION No. 8910SC240	Wake (87CVS6876)	Appeal dismissed
MORRISETTE PAPER CO. v. WADE No. 8818DC787	Guilford (86CVD5066)	No Error
PARRISH v. LUMBERTON MOTORS No. 8916DC564	Robeson (87CVD2046)	Affirmed in part, reversed in part & remanded
POSTON v. MORGAN-SCHULTHEISS, INC. No. 8818SC1133 No. 8818SC1165	Guilford (76CVS2096) (79CVS7468)	Affirmed
RALPH W. SCOTT FAMILY TRUST v. URBINE No. 8818SC1067	Guilford (86CVS7490)	Affirmed in part, vacated & remanded in part
STATE v. ABBOTT No. 8927SC468	Gaston (85CRS22855) (85CRS22856) (85CRS25147)	No Error

STATE v. BRUNER No. 8922SC395	Iredell (88CRS7006) (88CRS7007) (88CRS7008) (88CRS5599) (88CRS5600)	No Error
STATE v. HAMILTON No. 8818SC1401	Carteret (87CRS6779)	No Error
STATE v. HARRINGTON No. 8911SC484	Lee (85CRS5762) (85CRS5843)	Affirmed
STATE v. MONTGOMERY No. 8826SC1426	Mecklenburg (87CRS61752)	No Error
SULLIVAN v. ELMORE No. 8826SC1306	Mecklenburg (87CVS2266)	No Error
TAKACH v. TAKACH No. 8821DC1300	Forsyth (88CVD1916)	Affirmed in part, vacated in part & remanded
WARD v. HILLHAVEN, INC. No. 893SC663	Pitt (88CVS560)	Affirmed

THOMAS K. WHITE v. THE NORTH CAROLINA STATE BOARD OF EXAMINERS OF PRACTICING PSYCHOLOGISTS

No. 8810SC1137

(Filed 6 February 1990)

1. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—psychologist's code of ethics—test for constitutionality**

The test for determining the constitutionality of a professional code of ethics, such as the Ethical Principles of Psychologists, is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden; the facts of the case at hand determine the decision of the courts as to vagueness and overbreadth. N.C.G.S. § 90-270.15.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 28-30, 132.

2. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—psychologists—Preambles to Ethical Principles—unconstitutionally vague**

The Preambles to the Ethical Principles of Psychologists are unconstitutionally vague under the North Carolina and the United States Constitutions and a psychologist should not have been sanctioned for violation of the preambles. U. S. Constitution Amendments V and XIV; North Carolina Constitution Art. I, § 19.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 28-30, 132.

3. **Physicians, Surgeons, and Allied Professions § 6 (NCI3d)—psychologists—Ethical Principles of Psychologists—not unconstitutionally vague**

The Ethical Principles of Psychologists are not unconstitutionally vague, a reasonably intelligent psychologist would understand that the conduct in question is forbidden, and a psychologist may be sanctioned for violations of those principles.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 28-30, 132.

4. Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violations of ethical principles—revocation of license

The Board did not have sufficient evidence under the whole record test to find and conclude that a psychologist had violated Ethical Principle 5c, dealing with confidentiality, in that the psychologist had lost diagnostic testing materials and results. While the psychologist's behavior might evidence certain professional failures, there was no showing that the psychologist's filing system violated a client's right to confidentiality under Principle 5c. It was uncontested that the file was lost, but there was no evidence that anyone had access to the information.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

5. Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violation of ethical principles—misuse of influence—(violating or diminishing legal and civil rights of others)—no violation

There was sufficient evidence to support the finding of the Board that petitioner psychologist violated Ethical Principle 3c, which requires that psychologists avoid any action that will violate or diminish legal and civil rights of clients and others, where petitioner violated a custodial mother's civil rights by examining her child without the mother's consent. Principle 3c does not intend nor state that a psychologist cannot testify in a custody dispute, but petitioner should have notified the custodial parent that he was providing treatment. There was insufficient evidence of a violation of Principle 1f, which requires psychologists to be alert to situations and pressures which might lead to misuse of their influence, where the Board's finding of fact stated that petitioner's testimony about which parent had custody was not credible.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

6. Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violations of ethical principles—actions affecting civil or legal rights—misuse of influence

Although there was sufficient evidence to support the Board's findings of fact, the findings did not support the Board's

conclusion that petitioner psychologist had violated Ethical Principle 3c, which requires psychologists to avoid any action that would violate or diminish legal or civil rights of others, where the court concluded that petitioner's opinion in a case summary was not supported by evidence in the record. The Board also improperly concluded that petitioner violated Principle 1f, which reminds psychologists not to submit to pressures which might lead to misuse of their influence, where the Board presented no evidence that petitioner in fact misused his influence by giving his professional opinion.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

7. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violation of ethical principles—maintaining adequate records—understanding of testing and test results**

The Board improperly concluded that petitioner psychologist violated Ethical Principle 3c by failing to maintain adequate and consistent records where a noncustodial father paid more than he owed because of an incorrect statement from petitioner. Although petitioner's billing records are incomplete and somewhat haphazard, the error in billing which totaled $80.00 does not constitute a violation of the father's legal and civil rights, particularly since a refund was paid. There was sufficient evidence to support the conclusion that petitioner violated Ethical Principle 2e in diagnosing the child with dyslexia where there was unrebutted substantial evidence that the diagnosis could not have been ethically done in a child of that age.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

8. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violation of ethical principles—misuse of influence—adherence to laws and regulations—cooperation with other professional groups**

There was insufficient evidence to support the Board's conclusion that petitioner psychologist violated Ethical Principle 1f, dealing with misuse of influence, in diagnosing sexual abuse in two children and in treating their mother; there was insufficient evidence of a violation of Ethical Principle 3c, which

requires avoidance of any action which will violate or diminish legal and civil rights of clients, where petitioner's actions may have been inappropriate but did not violate the principle; there was sufficient evidence to support a violation of N.C.G.S. § 7A-543 and Ethical Principle 3d by failing to report suspicion of child abuse to the proper governmental agency even though petitioner contended that he thought the matter was already in the judicial system; and there was insufficient evidence of a violation of Ethical Principle 7b, requiring cooperation with other professional groups, where petitioner did not offer his services in substitution of the mother's therapist, but recommended that the patient seek help from another practitioner with a different philosophy.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

9. Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d) — psychologist — violation of ethical principles — child custody and visitation dispute

There was insufficient evidence for the Board to conclude that petitioner's actions in a child custody and visitation dispute violated Ethical Principles 1f and 3c, where petitioner's testimony indicated that he made conclusions about visitation based solely on the patient's natural mother's statements that the stepmother was unstable. There is nothing in the evidence to indicate that petitioner was under any obligation under the Principles to conduct further investigation before making his recommendations and, although petitioner's recommendation may have had an effect on civil and legal rights, there was no evidence that he was under a professional obligation to collect additional information before he made his recommendations. However, there was substantial evidence in the record to support the findings of a violation of Principle 7b, which requires cooperation with other professional groups, and petitioner did not except to those findings or conclusions in the record on appeal and did not argue this issue in his brief.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

10. Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—psychologist—violation of ethical principles—use of inappropriate test

There was sufficient evidence to support the Board's conclusions that petitioner violated Ethical Principle 8d in the use of an outdated intelligence test, but insufficient evidence to support a violation of Principle 8c, regarding misuse of tests and interpretations by others, where petitioner contended that he would not release such a report without a cover letter explaining the report.

Am Jur 2d, Divorce and Separation §§ 984, 985; Physicians, Surgeons, and Other Healers §§ 82, 92, 99.

APPEAL by petitioner from *Stephens (Donald W.), Judge*. Judgment entered 11 May 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 11 April 1989.

On 22 December 1983, the North Carolina State Board of Examiners of Practicing Psychologists (the Board) sent a letter to petitioner, Dr. Thomas K. White, stating that information had been obtained regarding Dr. White's professional conduct which, if true, would constitute grounds to revoke or suspend his license to practice psychology. In a letter dated 27 December 1983, petitioner requested the Board to grant him a formal evidentiary hearing before the full Board.

On 22 June 1984, the Board filed an action in Superior Court of Wake County against petitioner. After a hearing, the court ordered that the Assistant Attorney General (who regularly represented the Board) could prosecute the Board's case against Dr. White. Further, the court ordered that there be no *ex parte* communication regarding this matter between the Assistant Attorney General and the Board.

The administrative hearing was held on 20 and 21 February 1986. The Board entered its decision to permanently revoke petitioner's license to practice psychology on 24 July 1986. Respondent found that petitioner committed various violations of the "Ethical Principles of Psychologists" (hereinafter the Principles) and maintained the authority to revoke a license or take disciplinary action pursuant to these Principles and G.S. 90-270.15. The specific findings and conclusions will be addressed later in the opinion. Generally, respondent made the following findings, among others, with

regard to petitioner's (hereinafter Dr. White) professional conduct in evaluating various patients between 1979 and 1982: (1) Dr. White failed to adequately safeguard test materials and records by misplacing a patient file; (2) Dr. White overcharged a parent for services rendered on his child and failed to inform clients of billing charges or adequately maintain accurate billing records; (3) Dr. White's notes and tests failed to coincide with summary evaluations made concerning particular patients; (4) Dr. White opposed a second opinion as commonly used in accordance with the customary standard of practice of psychology; (5) Dr. White used an outdated version of an intelligence test to gauge a child's activity; and (6) Dr. White failed to notify a custodial parent that White was providing psychological services to the child.

On 29 September 1986, Dr. White filed a petition in the Superior Court of Wake County pursuant to the North Carolina Administrative Procedure Act (formerly G.S. 150A, now 150B). Dr. White requested a reversal of respondent's decision and a stay of the action revoking his license pending further review. According to the "Statement of Stay of Execution," the Superior Court granted a stay and preliminary injunction on 8 October 1986 pending the outcome of the trial in the Superior Court.

On 11 May 1988, the Superior Court entered its judgment upholding the respondent's administrative decision and withdrew the previously entered stay of execution. A stay was again granted on 14 July 1988 pending a decision by this Court. From the order affirming the respondent's decision to revoke his license, petitioner appeals.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by C. D. Heidgerd, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for respondent-appellee.

ORR, Judge.

I.

[1] We shall first address whether, as Dr. White maintains, the Ethical Principles of Psychologists are vague and unconstitutional under the North Carolina and United States Constitutions.

Under G.S. 90-270.15, the Board may refuse, revoke, suspend or limit under subsection (e) a license upon proof of one of the ten criteria under subsection (a). Under (a)(8), the Board revoked Dr. White's license based upon his alleged guilt "of unprofessional conduct as defined by the then-current code of ethics . . . ." Such code is the Ethical Principles of Psychologists.

In determining the constitutionality of such code of ethics, "[t]he test is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden." *In re Wilkins*, 294 N.C. 528, 548, 242 S.E.2d 829, 841 (1978) (*abrogated on unrelated issue* by *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989)); *see also In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540, *cert. denied*, 283 N.C. 393, 196 S.E.2d 275, *cert. denied*, 414 U.S. 1001, 38 L.Ed.2d 237, 94 S.Ct. 355 (1973). We agree with Justice Lake's reasoning in *Wilkins* that:

> It is reasonable to assume . . . that as one goes toward the outer edges of the concepts of 'unprofessional,' 'dishonorable,' or 'professional and ethical standards,' with reference to the practice of medicine, as in the practice of law or the other learned professions, he reaches an area in which there is no room for difference of opinion among the most honorable and respected practitioners. There is, we are satisfied, no sharply defined drop off point between ethical and professional . . . practice and that which is unethical and unprofessional. However, there is at and around the central core of these concepts much conduct which so clearly constitutes improper practice that few, if any, members of the profession would seriously claim to be unaware that such conduct is not consistent with these concepts.

Id. at 548, 242 S.E.2d at 840.

In setting forth the above test, Justice Lake noted that it would be "futile to attempt to catalog in a statute, or in an order of the Board . . ., every conceivable improper practice in which the licensee is forbidden to engage." *Id.* at 548, 242 S.E.2d at 840-41. Furthermore, the State and Federal Constitutions do not require such for a statute or regulation to survive an attack on grounds of vagueness and overbreadth. *Id.* For these reasons, "the facts of the case at hand must determine the decision of the courts as to vagueness and overbreadth." *Id.* (citation omitted).

[2] The Board concluded that Dr. White violated the Preamble to the Ethical Principles and Preamble to Principles 1, 2, 6, 7, and 8, and committed specific violations of Principles 1f, 2e, 3c, 3d, 5c, 7b, 8c, and 8d. Dr. White was charged with a total of 34 violations, any one of which potentially subjected his license to revocation under G.S. 90-270.15.

We conclude, however, that all of the above mentioned Preambles fail the test under *Wilkins*. Looking at the Preambles and the facts surrounding the alleged violations, a reasonably intelligent member of the profession would not understand that the conduct in question is forbidden.

For example, the Preamble to the Ethical Principles requires "respect" for the patients, "knowledge of human behavior," "objectives," "accept[ing] responsibility," and "competence, objectivity in the application of skills." The Preambles to Principles 1 and 2 discuss maintaining the "highest standards of [the] profession," accepting "responsibility for the consequences of their acts," using "techniques for which they are qualified," "take whatever precautions are necessary to protect the welfare of their clients." The Preambles to Principles 6, 7, and 8 are equally vague.

The above Preambles do not contain any specific behavior which is prohibited. They do not put a "reasonably intelligent member of the profession" on notice that any particular conduct is forbidden, and therefore fail the test under *Wilkins*.

Moreover, we believe that it would be difficult to sanction Dr. White for a violation of the Preambles. First, as we stated above, there is no specific behavior prohibited by the Preambles. They are only statements of vague general concepts of behavior.

Second, a preamble, by its very definition, is not a rule or regulation which lends itself to violation. A preamble is defined as an "*introduction*," such as that to a "statute, ordinance, or regulation that states the reasons and intent of the law or regulation or is used for other explanatory purposes . . . ." Webster's Third New International Dictionary (1968).

Each of the above Preambles contains only precatory language to explain what general professional behavior each Principle covers. Each *Principle* then sets forth what a reasonably intelligent member of the profession may or may not do to meet the requirements of the Principle.

Therefore, for purposes of being cited for specific violations, we hold that the above Preambles are unconstitutionally vague under the North Carolina and United States Constitutions. U.S. Const. amend. V and XIV; N.C. Const. art. I, sec. 19; *see generally In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1975) (statute must be held void only if it is so loosely and obscurely drawn as to be incapable of enforcement). Moreover, the Preambles fail the test set forth in *Wilkins* because a reasonably intelligent psychologist "would [not] understand the conduct in question is forbidden." Because we hold that the Preambles are unconstitutional for these purposes, we will not address them further as specific charges against Dr. White.

[3] Therefore, we hold that Dr. White may be sanctioned only for violations of the specific Principles 1f, 2e, 3c, 3d, 5c, 7b, 8c, and 8d, and we shall limit our subsequent discussion to their constitutionality. In applying the test of *Wilkins* to the Principles before us, we hold that they are not unconstitutionally vague, and that a reasonably intelligent psychologist would understand that the conduct in question is forbidden.

Principle 1 is entitled "Responsibility." Specifically, Principle 1f directs psychologists to be "alert to personal, social, . . . financial or political situations and pressures that might lead to misuse of their influence." This Principle alerts psychologists concerning misuse of their influence in certain situations. Because Dr. White was specifically charged with allowing his influence to be misused in several situations pursuant to this Principle, we find that it meets the *Wilkins* test.

Principle 2 is entitled "Competence." Principle 2e specifies that if a psychologist is involved in testing individuals and decisions affecting individuals, that psychologist must understand the testing methods and research. We find this Principle to be very clear as applied to Dr. White's alleged violations in his methods of testing and use of outdated tests. A reasonably intelligent psychologist would understand from reading this Principle that actions allegedly committed by Dr. White are forbidden.

Principle 3 is entitled "Moral and Legal Standards." Dr. White allegedly violated Principles 3c and 3d.

Principle 3c states that a psychologist shall avoid any action violating or diminishing "the legal and civil rights of

clients . . . ." Almost any action involving custody and visitation affects someone's civil and legal rights. This Principle, however, specifically notifies a psychologist that in any matter involving a client's civil and legal rights, he should proceed cautiously and do everything possible to prevent violating these rights. We believe this Principle meets the requirements set forth in *Wilkins*.

Principle 3d states that psychologists obey relevant laws and regulations. This Principle is clear. Dr. White allegedly violated G.S. 7A-543, and in violating a statute, he would also violate Principle 3d.

Principle 8d states that psychologists "make every effort to avoid and prevent the misuse of obsolete measures." This Principle notifies a psychologist not to use an obsolete test. Dr. White allegedly used obsolete psychological tests. We find that Principle 8d is not vague, and that a professional psychologist would be aware of testing methods considered obsolete by the majority of other psychologists.

Based upon our analysis, we therefore conclude that the above Principles are constitutional under the North Carolina and United States Constitutions, and meet the test set forth in *Wilkins*.

II.

[4] Dr. White further contends the Board's findings of fact and conclusions of law were not supported by substantial evidence in view of the entire record as submitted.

The standard of review under the Administrative Procedure Act is found in G.S. 150A-51 (now 150B-51), which governs those cases commenced before January 1, 1986. Although the case before us was not heard by the Board until February 1986, Dr. White was notified of the allegations on 22 December 1983, and he requested a hearing on 27 December 1983.

Under G.S. 150A-51, the court must consider whether the administrative decision is supported by substantial evidence based upon the entire record as submitted. This is commonly known as the "whole record" test, which requires the reviewing court to consider all of the evidence, including that which supports the findings and that which is contradictory. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted). The court is not allowed to replace the agency's judgment when there are two reasonably conflicting views, although the

court could have reached a different decision had the matter been before it *de novo*. *Id.* Moreover, the credibility of the witnesses and the resolution of conflicting testimony is a matter for the administrative agency to resolve, not the reviewing court. *State ex rel. Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300-01 (1980).

With these Principles in mind, we now turn to whether there was substantial evidence to support the findings of fact and conclusions of law. Substantial evidence has been defined as more than a scintilla or a permissible inference; it is relevant evidence which is adequate to support a conclusion. *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted).

A.

The first incident before the Board involves Dr. White's administration of diagnostic tests to a minor (Beth) who was his patient on or about 3 December 1980. In this matter, the Board concluded that Dr. White violated Principle 5c. Principle 5c requires psychologists to "make provisions for maintaining confidentiality in the storage and disposal of records."

The evidence also indicates that Dr. White saw Beth a total of four times in late December of 1980 and early January of 1981. During one of these appointments, Dr. White conducted psychological testing and evaluation. Sometime after his January 1981 appointment with Beth, Dr. White referred her to David Wiley, a counselor in his office. Wiley saw the patient for several months, and during that time Wiley kept records of his meetings with the patient. Wiley testified that he never had in his possession the testing materials and results that Dr. White had conducted concerning Beth.

In December 1981, Beth's parents consulted Dr. Mary Kilburn. Dr. Kilburn wrote Dr. White on 16 December 1981 requesting his records of the results of the diagnostic tests he administered to Beth the previous year. Dr. Kilburn made repeated requests for Dr. White's file on Beth because the results of the testing were necessary to make treatment plans for Beth, including the possibility of hospitalization. Dr. Kilburn subsequently notified the Ethics Committee of the American Psychological Association of Dr. White's failure to satisfy her requests. Dr. Kilburn testified that she

finally reached Dr. White's wife on 3 February 1982, who assured Kilburn that Beth's file was on White's desk. On 10 February 1982, Dr. Kilburn finally reached Dr. White who confirmed that he was unable to find Beth's records.

Dr. White testified that he was unable to find the file or material which he believes was misplaced when he was operating out of two offices or was mislabeled and thrown out during his move in February 1982. In November 1982, Dr. White contacted Wiley to see if he had Beth's file. In late December 1982, Wiley forwarded Beth's file, but it did not contain Dr. White's original notes. Dr. White, however, contacted the A.P.A. Ethics Committee and told them the missing file had been located. When Dr. Kilburn received the file, the diagnostic test results she wanted were not included.

The Board found as fact and concluded that:

> In losing all diagnostic testing materials and results and all materials on file as to Respondent's seeing Beth [ ] professionally, and in failing to appropriately respond to Dr. Kilburn's repeated requests for the test materials or conclusions, or in failing to provide Dr. Kilburn at least some statement as to what he remembered as a result of this testing . . . Respondent has further violated principle 5c, in failing to make provisions for maintaining confidentiality in the storage and disposal of records; . . . .

While Dr. White's behavior in this matter might evidence certain professional failures, there is no showing in the case *sub judice* that Dr. White's filing system violated a client's right to confidentiality under Principle 5c. It was uncontested that the file was lost, but there was no evidence that anyone had access to the information.

We therefore conclude that the Board did not have sufficient evidence to support their findings of fact and conclusions of law that Dr. White violated Principle 5c.

B.

[5] Dr. White had a patient named Shannon, whom he saw several times between July 1979 and summer of 1980. In October 1979, Shannon's parents signed a separation agreement which gave Shannon's mother custody and her father visitation rights. Dr.

White only saw Shannon on Fridays and Saturdays at the request of her father when she was visiting her father. Gregory Stott, Shannon's mother's attorney in the custody matter, testified that Shannon's parents separated in March 1979, and Shannon lived with her mother when the separation occurred. There was substantial evidence before the Board that Dr. White was, in fact, aware that Shannon's mother had custody of her during a majority of the time he was seeing Shannon.

The Board found the doctor's actions violated Principle 3c and Principle 1f as follows:

> In seeing Shannon [ ] repeatedly while she was in the custody of her mother, during visitations on weekends with her father, without involving Shannon's mother in the therapy process or obtaining her consent to the therapy process or informing her of the therapy or sessions with Shannon, Respondent acted in violation of Principle 3c of the Ethical Principles of Psychologists which requires psychologists '[i]n their professional roles' to 'avoid any action that will violate or diminish the legal and civil rights of clients and of others who may be affected by their actions.' Respondent's repeated sessions with Shannon [ ] during visits to her father, while she was in the legal and physical custody of her mother, and his preparation or development of a basis during those visits for testimony to support the father's motion for custody, was inconsistent with and in violation of the obligation that he avoid an action that would violate or diminish the legal or civil rights of Shannon['s] [ ] mother, a person who clearly could be affected by his actions. In this regard, Respondent also violated Principle 1f, which requires psychologists to know 'that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others' and to be 'alert to personal, social, financial or political situations and pressures that might lead to misuse of their influence.' Each of these violations of the Ethical Principles of Psychologists is grounds for revocation or suspension of Respondent's license to practice psychology under G.S. [sec.] 90-270.15(a).

(Exception omitted.)

This conclusion of law was based upon findings of fact numbers 15, 16, 17, and 18, to which Dr. White did not except. After

reviewing the findings, we hold that there are sufficient findings of fact upon which to base the above conclusions. We now turn to whether the evidence supports these findings.

Principle 3c reads:

> In their professional roles, psychologists avoid any action that will violate or diminish the legal and civil rights of clients or of others who may be affected by their actions.

The Board claims that Dr. White violated Shannon's mother's civil rights by examining Shannon without the mother's consent. Principle 3c does not intend nor does it state that a psychologist cannot testify in a custody dispute since one parent's civil rights are always affected. However, pursuant to Principle 3c, Dr. White should have notified the custodial parent that he was providing treatment to Shannon.

Dr. Robert Grew, child psychologist, testified as follows as an expert for the Board regarding the practice of notifying both the custodial and noncustodial parents of a child that the child is receiving psychological treatment.

> Q Do you have an opinion as to the standard of practice in seeing a child—the standard of practice in North Carolina in early 1981 or the end of 1980—in seeing a child brought in by a noncustodial parent?
>
> A Yes.
>
> . . .
>
> Q What is the standard of practice in dealing with children in a custody situation with regard to custodial and noncustodial parents?
>
> A I think there has been a lot of literature and research in this area, both clinical and empirical. I think *what is recommended and has been recommended for some time, that when one is working in a two-family situation, that not only must one obtain permission from the custodial parent to see the child, but one must obtain permission from the custodial parent to involve the noncustodial parent*; [emphasis added] and that if permission is not obtained, I personally will not work in that kind of situation. I don't think that is for the benefit of the child, nor does it fall under taking special care of the child. It is not a way for me to helpful [sic] to the child.

Dr. Grew further testified that unless all parties in a two-family situation are informed concerning psychological treatment of a child, then the treatment itself is unlikely to be effective. Therefore, the evidence supports the finding that Dr. White violated Principle 3c.

The Board also concluded that Dr. White violated Principle 1f in treating Shannon. Principle 1f reads:

> As practitioners, psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others. They are alert to personal, social, organizational, financial, or political situations and pressures that might lead to misuse of their influence.

The Board's finding of fact concerning Shannon states that Dr. White's testimony about which parent had custody of Shannon was "simply not credible." Dr. White's actions are not in violation of Principle 1f, whether or not he lied about which parent had custody. With regard to Shannon, we find that Dr. White violated only Principle 3c.

C.

[6] Dr. White was also charged with violating Principles 3c and 1f in his treatment of the "M" family. In early December 1981, Dr. White and his associate, Ms. Edwards, began seeing the "M" family which consisted of both parents and two children. The couple had already been to court, and they needed to settle custody and visitation issues. In November 1981, the court issued a restraining order to keep Mr. "M" from harassing his wife.

Dr. White's notes taken during sessions with the members of the "M" family indicated the children were afraid of their father. White sent the attorneys for both parties a letter dated 1 February 1982 stating the children should be in the custody of their mother and the father's visitation should be extremely limited.

Dr. White and Ms. Edwards indicated in their case notes that in December 1981, January, February and March 1982, Mr. "M" showed aggressive, threatening behavior toward Mrs. "M" and the children, and that Mrs. "M" and the children were afraid for their lives.

On 10 March, 19 March, 26 March and 2 April 1982, case notes from sessions with Mr. "M" indicate that he threatened

to take the children to another state, that he was "defensive, very unpredictable and erratic now," that he had been following Mrs. "M" around (in violation of the prior court order), and that he would continue to harass Mrs. "M" until "she breaks and begs him to quit." There are no other case notes concerning sessions or contacts with Mr. or Mrs. "M" between 2 April 1982 and 15 April 1982.

On 15 April 1982, White and Edwards filed a case summary. The case summary favored the father regaining some rights which had been taken away from him. For example, the case summary concluded:

> that Mr. and Mrs. M[ ] have not followed the recommendations of counseling in that Mr. M[ ] has continued to take actions as reported to us that harass and provoke Mrs. M[ ] (example: following her in his truck), and in that Mrs. M[ ] has withheld visitation to Mr. M[ ] and continues to try to make Mr. M[ ] appear a dangerous person to the children which is contrary to his family history and present psychological status. Mr. M[ ] feels that he has a need and a right to see his children, and that he is going to continue his behavioral operations until his needs and rights are respected. Mrs. M[ ] feels that Mr. M[ ] is going to harm her, that he is going to take the children, and that he is deliberately and intentionally harassing her. The counselors see this behavior of both parties as very adolescent and immature. Both parties agree that they should not conduct these operations, but seem unable to cease and desist at this time. The situation with Mrs. M[ ] has been greatly accentuated by what are apparently outside suggestions that (1) she move in with her mother (Melaine does not relate well to her maternal grandmother and this is disruptive to the children); (2) that she travel with a bodyguard; (3) that she keep a gun by the door (the discussion, contemplation and effecting of these actions are extremely anxiety provoking to the children).

White and Edwards then recommended that the court assume custody of the "M" children and consider foster care placement, that the court restore full visitation rights to Mr. "M," and that the court require Mr. and Mrs. "M" to strictly adhere to guidelines regarding visitation, harassment and negative statements about each other.

The Board concluded Dr. White violated Principles 3c and 1f as follows:

> 6. In signing and submitting the April 15, 1982, case summary regarding the M[ ] family, Respondent violated . . . Principle 3c in failing to avoid an action that would violate or diminish the legal or civil rights of Pat M[ ]; and Principle 1f requiring psychologists to know 'that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others' and to be 'alert to personal, social, . . . financial, or political situations and pressures that might lead to misuse of their influence,' which violations are grounds for revocation or suspension of Respondent's license to practice psychology under G.S. [sec.] 90-270.15(a).

This conclusion is based upon findings of fact numbers 19 through 27. The conclusion of law, however, does nothing but repeat the Principle and does not tie the findings of fact to the conclusion of law. Although there is substantial evidence to support the findings of fact, those findings do not support the above conclusion of law.

We find that Dr. White cannot be sanctioned for violating Principle 3c in this case solely because his opinion in the case summary was not supported by the evidence in the record. Principle 3c, quoted earlier in this case, deals with a psychologist avoiding a situation which would violate or diminish anyone's civil or legal rights. It simply does not follow that when a psychologist forms an opinion apparently not supported by his earlier case notes, and makes recommendations based upon that opinion, then the psychologist violates Principle 3c.

The Board also concluded that Dr. White violated Principle 1f when he signed and submitted the Case Summary. This Principle (quoted above) reminds psychologists not to submit to "pressures that might lead to misuse of their influence." The Board presented no evidence that Dr. White in fact misused his influence by giving his professional opinion in the "M" family Case Summary. Therefore, with regard to the "M" family, we find that Dr. White violated no Principles.

D.

[7] In late February 1981, Dr. White began seeing a child named Laura. Laura was in the custody of her mother, but Dr. White

sent his bills for his regular visits with Laura to her father. Laura's father had not known she was seeing Dr. White until he received the bill. Laura's father did not pay this bill or the next bill he received from Dr. White. Laura's father contacted Dr. White trying to obtain the total figure he owed Dr. White. White claimed he had sent complete bills to Laura's mother's attorney who was supposed to forward them to Laura's father.

In May 1982, there was a hearing in Wake County which resulted in a court order requiring Laura's father to pay her psychological bills. Dr. White's next statement to Laura's father reflected the wrong hourly billing rate ($10.00 too high for eight visits). The only statement in Dr. White's file had been altered to reflect the correct billing amount. Laura's father paid more than he owed because of the incorrect statement, and he never received a later bill which covered sessions subsequent to those on the statement. Dr. White refunded the overcharge to Laura's mother.

The Board claims Dr. White violated Principle 3c (quoted above) by "failing to maintain adequate and consistent records" of Laura's charges and billings. Although Dr. White's billing records are incomplete and somewhat haphazard, Dr. White's error in billing which totaled $80.00 does not constitute a violation of Laura's father's "legal and civil rights," particularly since a refund was paid.

The Board also concluded that Dr. White violated Principles 2e and 1f as follows:

> By inappropriately concluding that Laura [ ] had dyslexia or a dyslexic condition and testifying in court of this tentative diagnosis and that she had a learning disability, when the February 1981, test data did not prove or even suggest such a diagnosis, Respondent violated Principle 2(e), which provides that psychologists responsible for decisions involving individuals or policies based on test results have an understanding of psychological or educational measurement and test research, and Principle 1(f), which provides that psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others.

Principle 2e states:

> e. Psychologists responsible for decisions involving individuals or policies based on test results have an under-

standing of psychological or educational measurement, validation problems, and test results.

We agree with the Board's conclusion which is supported by the findings of fact, and we also find that there is sufficient evidence to support the conclusion that Dr. White violated this Principle. Dr. Grew testified extensively on this matter as follows:

Q Were you able to find any basis from which one could or should conclude there was a learning disability there?

A No.

Q Was there any evidence of any problem in that test data?

A Well, it was very hard to tell, because instruments were used that were either inappropriate or obsolete or inconclusive. And you know, also observing material from a distance and not having been with the child, you know, it is a very indirect observation.

Q Have you reviewed the narrative of Dr. White's testimony at the hearing regarding Laura [ ]?

A Yes; I have.

Q In your opinion, could a licensed psychologist in North Carolina ethically make any statements about the probability of a learning disability in a court hearing at that time on the basis of the information available?

A No.

Q Do you have an opinion as to precisely why it could not ethically be done?

A At that time, the child—the initial testing; at the time of the initial testing—the child was only four. It is very difficult to diagnose a learning disability in children under school age, primarily because the whole diagnosis is school based. One thing that I try to communicate to parents is that 'learning disability' is a label that school systems apply to categorize children who learn differently from the mainstream. And while it is a cultural phenomenon, it is an organic one as well.

But to diagnose a child prior to her entry into school with a learning disability doesn't make much sense to me.

I can't think of how much benefit that would be to the child, since the diagnosis—the diagnostic label—is directly related to predicting her performance in school.

. . .

Q Did you also review the material—testing material—which Dr. White supplied regarding the second round of testing?

A Yes.

Q Did you hear his comments about that testing?

A Yes.

Q And based on those materials and his own statements, do you find any basis for concluding or testifying that the child might have learning disability in the nature of the testimony which he gave?

A In the nature of his testimony?

Q Yes.

A No. Let me qualify that by saying that I was unable to determine on the basis of those test data whether the child's difficulties were either emotionally based or organically based. And the reason for that was that the instrumentation used to determine the presence of a learning disability was obsolete.

Dr. Grew's testimony, which was not rebutted by Dr. White, provided substantial evidence to support the Board's findings and conclusion. Dr. White testified only that if "[Laura] continued to have these kinds of problems, that indeed it would be like dyslexia."

The Board also concluded that Dr. White violated Principle 1f which provides that "psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others." It is unclear from the record the findings upon which this violation is based; therefore, we are unable to determine whether the evidence supports these findings and conclusions.

With regard to Laura, we therefore find that the evidence establishes that Dr. White violated only Principle 2e.

E.

[8] In late December 1980, Dr. White first saw Sandra and Kevin. The children's father brought them to Dr. White after the children told their father about incidents of sexual abuse by their stepfather. As a result of the children's testimony and Dr. White's conclusion that the children had been abused, the court awarded the children's father temporary custody.

The children's mother then requested a second psychological opinion. Dr. White was opposed to such an evaluation because he thought that the children would suffer from having to recount the details of the abuse. The judge allowed a second opinion by Drs. Kilburn and Inman after Dr. Kilburn convinced the judge that a second opinion does not require the children to tell of the abusive incidents directly.

Dr. White accompanied the children to the second evaluation and requested that he be permitted to attend and tape record the session. He did not go into the session but he accompanied Kevin to his session and waited outside the doctor's office. The second evaluation affirmed Dr. White's conclusions and the court awarded the children's father custody and the mother was allowed limited visitation. The children's mother subsequently separated from her husband. Dr. White recommended that the children's mother undergo therapy to cope with what had happened and that her visitation with the children cease.

Dr. White saw the children's mother for awhile, but he did not think she was progressing. He referred the patient to the Wake County Mental Health Center.

The children's mother then began seeing Ms. Sandy Preissler, therapist. Dr. White sent Ms. Preissler a letter outlining the questions and the approach he thought she should take with this patient before reinstating visitation privileges. Ms. Preissler responded that she would handle her patient how she saw fit. Dr. White contacted the patient and her attorney and said he no longer recommended the Mental Health Center because the patient needed the help of an M.D. psychiatrist or a Ph.D. psychologist.

The Board found that Dr. White's actions violated Principles 1f and 3c. Principle 1f directs psychologists to know that their recommendations may influence other people's lives, and they should not misuse this influence.

We have reviewed findings of fact numbers 35 through 42 and hold that these findings do not support the Board's conclusion that Dr. White violated Principle 1f. There is nothing in the findings which establishes that Dr. White misused his influence.

Principle 3c requires a psychologist to avoid any action which "will violate or diminish the legal and civil rights of clients . . . ." Again, we have reviewed the above findings of fact and hold that these findings simply do not support the conclusion that Dr. White violated a client's legal and civil rights. While his actions in this case may be considered inappropriate, and Dr. Grew testified to such, Dr. White's actions do not violate Principle 3c.

The Board also found Dr. White violated G.S. 7A-543 and Principle 3d by failing to report his suspicion of child abuse to the proper government agency. We agree with the Board that Dr. White violated this Principle.

Principle 3d states that "psychologists [must] adhere to relevant governmental laws and institutional regulations." G.S. 7A-543 states in part:

> Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found.

Dr. White testified that he did not report the allegations of child sexual abuse as required by G.S. 7A-543. Dr. White argues on appeal that he did not report this as required because he thought the matter was already in the judicial system and the parents and attorneys knew of the alleged sexual abuse. G.S. 7A-543 makes no exceptions for extenuating circumstances in reporting suspected child abuse. Therefore, Dr. White technically violated the statute. In doing so, he also technically violated Principle 3d.

Finally, the Board also found Dr. White violated Principle 7b when he contacted the children's mother to persuade her to stop seeing Ms. Preissler at the Wake County Mental Health Center. Principle 7b states:

> Psychologists know and take into account the traditions and practices of other professional groups with whom they work and cooperate fully with such groups. If a person is receiving similar services from another professional, psy-

> chologists do not offer their own services directly to such a person. If a psychologist is contacted by a person who is already receiving similar services from another professional, the psychologist carefully considers that professional relationship and proceeds with caution and sensitivity to the therapeutic issues as well as the client's welfare. The psychologist discusses these issues with the client so as to minimize the risk of confusion and conflict.

In this instance, Dr. White did not offer his services in substitution of Ms. Preissler's but recommended the patient seek help from another practitioner with a different philosophy than Ms. Preissler. There is no evidence that this suggestion was made for any reason other than for the benefit of the client. Therefore, we find that the evidence establishes that Dr. White violated G.S. 7A-543 and Principle 3d with regard to Sandra and Kevin.

F.

[9] In the spring or summer of early 1981, Dr. Patricia Ramsey and Dr. White became involved in court proceedings regarding a minor patient, Lucrettia. Dr. White first evaluated Lucrettia in 1979, when she was visiting with her father and stepmother, Mr. and Mrs. "B." Sometime in 1981, the "Bs" began seeing Dr. Ramsey on a regular basis. Lucrettia's mother and stepfather, the "Ds," subsequently began seeing Dr. White along with Lucrettia for psychotherapy.

At the court proceeding in 1981, Drs. White and Ramsey submitted their opinions about custody and visitation concerning Lucrettia. The court entered an order that the parties continue counseling. Dr. White would continue to see the "Ds," and Dr. Ramsey, the "Bs" and Lucrettia. Dr. White later notified Dr. Ramsey and testified in the present hearing before the Board that the "Ds" had never been in therapy with him, and that he provided only minimal parental counseling to them.

Around Thanksgiving 1981, Dr. Ramsey was trying to arrange holiday visits for Lucrettia with the "B" family. The evidence indicates that Dr. White tried to inhibit the visits by failing to respond to letters and phone calls from Dr. Ramsey. Dr. White was supposed to get information from Dr. Ramsey about the visits and relay the messages to Mrs. "D."

On two occasions when joint sessions were planned between Dr. White, Dr. Ramsey and Lucrettia's parents or her stepparents, Dr. White cancelled at the last minute. When confronted about the cancellations, Dr. White responded that it was Mr. and Mrs. "B" who caused all the problems for Lucrettia.

Dr. Belovicz, a psychologist, was going to perform an independent evaluation of Lucrettia. Dr. White informed Dr. Belovicz that Mr. "B" was not Lucrettia's biological father, which Mr. "B" allegedly told Dr. White in professional confidence. Based on Dr. Belovicz's subsequent report, Dr. White wrote the families and their attorneys and recommended very restricted visitation for Mr. "B," but not the "Ds."

Findings of fact numbers 43 through 52 deal with the matter of Lucrettia. Dr. White excepted only to finding number 52:

> The pattern of Respondent's actions and communications in connection with his services to Lucrettia [ ] and the surrounding events establishes an increasing loss of objectivity along with an acceptance and identification with the [ ] point of view. The frequent criticism of actions by the [ ], and the lack of criticism of any action by the [ ], plus the frequent recommendations for termination or limitation of visitation (often shortly before the scheduled visitation) were inconsistent with the treatment goals of decreasing the hostility and tension in Lucrettia's surroundings and of treatment of her emotional disturbance. Such conduct by Respondent was not conducive to treating emotional disturbance and in fact would possibly increase or cause her additional emotional distress.

The Board concluded Dr. White's actions in Lucrettia's case violated Principles 1f, 3c, and 7b.

Dr. White's testimony at the hearing indicates that he made conclusions about visitation based solely on the patient's natural mother's statements that the child's stepmother was unstable.

Dr. White admits that Mrs. "D" (the child's natural mother) was his sole source for information, upon which he concluded that Lucrettia could not have overnight visits with the "Bs" (her father and stepmother). We find nothing in the evidence before us that Dr. White was under any obligation under the Principles to conduct further investigation before making his recommendations based

upon information from Mrs. "D" and therefore did not violate Principle 1f.

Dr. White was also charged with violating Principle 3c. As we previously stated, all custody and visitation matters affect someone's civil and legal rights. Again, Dr. White based his recommendations in this matter solely upon Mrs. "D's" information, who had an interest in preventing visitation with the father and stepmother. Although this may have had an effect on the "B's" civil and legal rights, there is no evidence that Dr. White was under a professional obligation under *Principle 3c* to collect additional information before he made his recommendations.

The Board further concluded that Dr. White violated Principle 7b which requires psychologists to "know and take into account the traditions and practices of other professional groups with whom they work and cooperate fully with such groups." Findings of fact 45, 47, 48 and 50 support this conclusion, and there is substantial evidence in the record to support the findings. Moreover, Dr. White did not except to these findings or conclusions in the record on appeal and did not argue this issue in his brief. Under Rule 10(a) and (b) of the N.C. Rules of Appellate Procedure, only exceptions noted in the record and brought forward as the basis for assignments of error may be considered on appeal. *State v. Kidd*, 60 N.C. App. 140, 143, 298 S.E.2d 406, 408 (1982), *disc. rev. denied*, 307 N.C. 700, 301 S.E.2d 393 (1983). *See also Anderson Chevrolet Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982) (in the absence of exceptions, an appeal duly taken from a final judgment may present for review the question of whether the judgment is supported by the findings of fact and conclusions of law if properly raised in the brief). Therefore, we hold that Dr. White violated Principle 7b in the matter of Lucrettia.

G.

[10] The Board also concluded that Dr. White administered the wrong test to children. White used the Wechsler Intelligence Scale for Children (WISC) rather than the revised WISC-R which was issued in 1974. Dr. White failed to use the more updated version of the test when it was standard practice to do so in North Carolina. White also used the wrong computer program when he analyzed the test data. In addition, White administered the test to children who were too young to be taking it.

The Board found Dr. White's use of the WISC test on someone too young to take it violated Principle 2e. Principle 2e reads:

> Psychologists responsible for decisions involving individuals or policies based on test results have an understanding of psychological or educational measurement, validation problems, and test research.

We conclude Dr. White violated Principle 2e if the evidence supports the conclusion that the test is unreliable at a certain age. The transcript illustrates through the testimony of Dr. Robert Grew that "[t]he WISC is both inappropriate and obsolete." Dr. White maintains that there are few, if any, substantive differences between the WISC and the WISC-R, and he presented two professional articles in support of his argument. Upon closer examination of the articles, however, we find that these articles do not completely support his assertions. We therefore agree with the Board's ruling that Dr. White violated Principle 2e.

The Board further found that Dr. White violated Principle 8d for relying on the Wechsler Intelligence Scale for Children (WISC) in 1981, 1982, and thereafter, instead of the revised test (WISC-R), which generally replaced the WISC in 1974. We find that Dr. Grew's testimony contains substantial evidence of this violation.

Principle 8d requires psychologists to "recognize that assessment results may become obsolete . . . [and to] make every effort to avoid and prevent the misuse of obsolete measures." Dr. Grew's testimony that the WISC is an obsolete test substantially supports the Board's findings and conclusion.

Finally, the Board found that Dr. White violated Principles 8c and 8d by using WISC data in a computer program designed to analyze WISC-R results. Dr. White then allegedly permitted release of the report with no explanation that WISC data were used instead of WISC-R data. The report in question was placed in a child's school file.

We hold that the evidence supports the Board's conclusions that Dr. White violated Principle 8d for the same reasons set forth above. However, Dr. White did not violate Principle 8c which states:

> In reporting assessment results, psychologists indicate any reservations that exist regarding validity or reliability because of the circumstances of the assessment or the inappropriateness

of the norms for the person tested. Psychologists strive to ensure that the results of assessments and their interpretations are not misused by others.

Dr. White does not contest the fact that the report was placed in a child's school file. He contends, however, that he would not release such report without a cover letter explaining the report. There was insufficient evidence to the contrary. We therefore find that Dr. White did not violate Principle 8c in this instance.

In summary, we hold that the Preambles to the Ethical Principles of Psychologists are unconstitutionally vague for purposes of being cited for specific violations under amendments V and XIV to the United States Constitution and under article I, sec. 19 to the North Carolina Constitution. *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978). We further hold that Principles 1f, 2e, 3c, 3d, 5c, 7b, 8c, and 8d are constitutional under the test in *Wilkins* discussed in section I of this opinion.

Dr. White was charged with a total of 34 violations of the Preambles and Principles, any one of which potentially subjected his license to revocation. Of these charges, we hold that there was substantial evidence under the "whole record" test to support the Board's findings of fact and conclusions of law that Dr. White could be sanctioned for his violations of only six matters involving these Principles as follows: Principle 3c in the matter of "Shannon"; Principle 2e in the matter of "Laura"; Principle 3d and G.S. 7A-543 in the matter of "Sandra and Kevin"; Principle 7b in the matter of "Lucrettia"; and Principles 2e and 8d in administering the wrong test to children.

We note that although we hold these Principles constitutional, the Principles and the evidentiary application of them to the facts of this case are extremely general and troublesome to this Court. Psychologists, as well as all other professionals, have a right and fundamental need to be guided by Ethical Codes of Conduct of sufficient clarity and specificity to meet applicable constitutional standards and to adequately apprise practitioners of the boundaries of conduct. While we have concluded that those Principles in question meet such standards, suffice it to say that for the most part it is by the slimmest of margins.

We have also considered Dr. White's remaining assignments of error and find them to be without merit.

Therefore, we remand this case under G.S. 150A-51 (recodified to 150B-51(b)) to the Board to consider whether, in view of the above violations of the Principles, Dr. White's license should be revoked or suspended under G.S. 90-270.15(a), or to take any other appropriate action under G.S. 90-270.15(e).

Affirmed in part, reversed in part and remanded.

Judges BECTON and JOHNSON concur.

CHAPEL HILL COUNTRY CLUB, INC., PETITIONER v. TOWN OF CHAPEL HILL, RESPONDENT

ERNESTINE PENDERGRAPH; P. H. CRAIG; VERNON L. PARRISH; EMMY PARRISH; CHARLES M. STANCELL; RODERICK L. ROBERSON; DONNA ROBERSON; ESTHER R. TRIPP; HERMAN B. LLOYD; THELMA LLOYD; LILLIAN G. LLOYD; GEORGE K. THOMPSON; ROY A. OLIVE; MARY OLIVE; WILLIAM BARNES; HOWARD BUCKNER; CATHERINE R. BUCKNER; BRUCE H. CURRAN; NANCY L. CURRAN; MARTHA EDWARDS; RONALD C. CROUCH; PHILLIP M. SPARROW; AND ROGER SPARROW, PETITIONERS v. TOWN OF CHAPEL HILL, RESPONDENT

D. ST. PIERRE DU BOSE AND WIFE, VALINDA H. DU BOSE; D. ST. PIERRE DU BOSE, JR. AND WIFE, ANNA S. DU BOSE; J. MCNEELY DU BOSE AND WIFE, LYNNE K. DU BOSE; JOHN T. BOHLAYER AND WIFE, FRANCES FAISON DU BOSE BOHLAYER; AND LILLARD H. MOUNT, TRUSTEE U/A DATED MAY 15, 1987, FOR THE BENEFIT OF DAVID ST. PIERRE DU BOSE, JR., JOHN MCNEELY DU BOSE, AND FRANCES FAISON DU BOSE BOHLAYER, PETITIONERS v. TOWN OF CHAPEL HILL, RESPONDENT

No. 8915SC83

(Filed 6 February 1990)

1. Municipal Corporations § 2.2 (NCI3d)— annexation—country club golf course—institutional use

Property owned by a private country club, much of which consisted of its golf course, could properly be classified as in institutional use for annexation purposes. N.C.G.S. § 160A-48(c)(3).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

2. Municipal Corporations § 2.2 (NCI3d)— annexation—institutional use—different use on prior plans—no estoppel

A town was not estopped from classifying private country club property as being put to institutional use for annexation purposes because the property was labeled "recreational" and "conservation/open space" in prior land use plans.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

3. Municipal Corporations § 2.2 (NCI3d)— annexation—nonurban areas—necessary land connection not required

A municipality could annex nonurban property if it met the criteria set forth in N.C.G.S. § 160A-48(d)(1) or (d)(2), and the municipality was not required also to show that the nonurban area constitutes a necessary land connection between the municipality and an area developed for urban purposes or between two or more areas developed for urban purposes.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

4. Municipal Corporations § 2.2 (NCI3d)— annexation—property developed for urban purposes—different tests for subareas

A municipality may divide an annexation area into subareas and qualify each of these subareas as property "developed for urban purposes" pursuant to separate subdivisions of N.C.G.S. § 160A-48(c).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

5. Municipal Corporations § 2.6 (NCI3d)— annexation—police and fire protection—response time

The evidence supported the trial court's finding that a town's plan to provide police and fire protection to an annexed area met the requirements of N.C.G.S. § 160A-47 although the town failed to promise additional personnel and equipment and there was expert testimony that the average response time to a fire alarm in the annexed area would be greater than in the municipality as a whole and that the average response time for police emergencies would be longer because of the increase in the town's area.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

6. **Municipal Corporations § 2.6 (NCI3d)— annexation—services by water and sewer authority**

A town's plan for the extension of water and sewer services to an annexed area by a water and sewer authority rather than by the town met the requirements of N.C.G.S. § 160A-47.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

7. **Municipal Corporations § 2.1 (NCI3d)— annexation—amendment of annexation report after public hearing—new hearing not required**

A town council's amendment of the annexation report after a public hearing did not require a new hearing before the annexation ordinance was adopted where the amendment did not bring any new land within the scope of the ordinance, and the changes did not involve qualification of the land for annexation under additional subsections of N.C.G.S. § 160A-48(c) or (d) not listed in the original report.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

8. **Municipal Corporations § 2.5 (NCI3d)— annexation—immediate effect for one subdivision**

The trial court did not err in granting respondent town's motion to allow immediate effectiveness of an annexation ordinance with respect to one subdivision in the annexed area where the court found that no property owner in the subdivision had taken legal action in opposition to annexation, and no question was raised as to the qualification of the subdivision for annexation.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 61, 65-67.

APPEAL by petitioners Chapel Hill Country Club, Inc., Ernestine Pendergraph, et al., and D. St. Pierre Du Bose, et al., from Judgment of *Judge Robert L. Farmer* entered 31 August 1988 in ORANGE County Superior Court. Heard in the Court of Appeals 12 September 1989.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for petitioner appellant, Chapel Hill Country Club, Inc.

Barrett and Associates, by Grainger R. Barrett, for petitioner appellants, Ernestine Pendergraph, et al.

Mount White Hutson & Carden, P.A., by James H. Hughes and Daniel E. Garner, for petitioner appellants, D. St. Pierre Du Bose, et al.

Ralph D. Karpinos; and Petree Stockton & Robinson, by Kenneth S. Broun and J. Anthony Penry, for respondent appellee.

COZORT, Judge.

Petitioners are owners or residents of a tract of land, approximately 874 acres in size located in Orange and Durham Counties. On 25 April 1988 the Town Council of Chapel Hill, a municipality with a population exceeding 5,000, adopted an ordinance annexing this tract, referred to as Annexation Area 1. Pursuant to N.C. Gen. Stat. § 160A-50, petitioners appealed to the trial court for review of the Town Council's action. The trial court affirmed the annexation ordinance, and petitioners appealed. We affirm the trial court's judgment.

On 8 December 1986 the Town Council of Chapel Hill (the Council), in keeping with N.C. Gen. Stat. § 160A-49(i), passed a resolution identifying some thirty areas as being under consideration for annexation. The tract of land at issue was among the areas described in the resolution. On 13 January 1988 the Council, in compliance with § 160A-49(a), passed resolutions stating the Town's intent to consider annexation of two areas and fixing 14 March 1988 as the date for a public hearing on the annexation of both areas.

On 8 February 1988 the Council approved an annexation report (the Report) for a tract of land, designated Area 1, extending east of Chapel Hill on both sides of N.C. Highway 54, including "The Oaks II subdivision, Chapel Hill Country Club, portions of the DuBose and Lloyd properties and [the] Pearl Lane-Little John Road area east of Barbee Chapel Road." The Report, prepared by the Town's staff pursuant to N.C. Gen. Stat. § 160A-47, noted that the "Town's general policy, as reflected in annexation decisions in the last 10 years, has been to annex areas when they qualify under State law and the Town can practically extend and finance municipal

services to the qualifying areas." The Report summarized the statutes dealing with annexation, divided Area 1 into subareas (1a, 1b, and 1c), set out the statutory basis under which each of these subareas qualified for annexation, and contained maps, data, and service plans required by § 160A-47.

On 14 March 1988 at the public hearing, the Town's planning director, an attorney for the Chapel Hill Country Club, a member of the Club's Board of Governors, and approximately ten property owners or their attorneys commented on the Report or spoke about other matters relating to the annexation of Area 1. The Council then referred the matter to the Town Manager and Attorney for further consideration. On 11 April 1988 the Council passed a resolution supplementing and amending the Report initially adopted on 8 February. As amended, the Report incorporated the Town Manager's report dated 11 April 1988, prepared after public comment and a review of tax maps and other data. The Council deferred final action on the annexation of Area 1 until the Town Manager and Town Attorney had conferred again with concerned parties.

On 25 April 1988 the Council passed a resolution that again supplemented and amended the Report. Two changes were made in the proposed area of annexation: Phase B5A of the Oaks III development was deleted from Area 1a and a strip of golf course, previously included in Area 1a, was designated Area 1d. In final form the Report divided Area 1 into four subareas, qualified for annexation as follows:

Area	Approximate Size	Statutory Basis
1a	227 acres	§ 160A-48(c)(3)
1b	66 acres	§ 160A-48(c)(2) and (c)(3)
1c	566 acres	§ 160A-48(d)(2)
1d	15 acres	§ 160A-48(c)(3)

The Council then adopted an ordinance extending the corporate limits of Chapel Hill to include Area 1, effective 30 June 1988. After affirming this annexation ordinance on 31 August 1988, the superior court granted motions that (1) allowed immediate effectiveness of the annexation ordinance as to the Oaks development portion of Area 1a and (2) stayed the operation of the annexation ordinance as to the remainder of Area 1.

When a petitioner seeks review of an annexation ordinance, the trial court may receive evidence "(1) That the statutory pro-

cedure was not followed, or (2) That the provisions of G.S. 160A-47 were not met, or (3) That the provisions of G.S. 160A-48 have not been met." N.C. Gen. Stat. § 160A-50(f) (1989). Regarding the questions presented on appeal, we note initially that the trial court concluded that the Report and the record of annexation proceedings demonstrated, *prima facie*, substantial compliance with applicable statutes. Thus, the burden was upon petitioners "to show by competent evidence that the . . . [municipality] in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights." *Dunn v. City of Charlotte*, 284 N.C. 542, 544-45, 201 S.E.2d 873, 875-76 (1974); *accord In re Annexation Ordinance (New Bern)*, 278 N.C. 641, 647, 180 S.E.2d 851, 856 (1971). With this standard of review in mind, we turn to petitioners' numerous assignments of error.

[1] Petitioners contend first that the trial court erred in holding that the Town could properly classify property of the Chapel Hill Country Club as being used for commercial or institutional purposes. Much of the Country Club's property in Area 1a and all of its property in Area 1d consists of its golf course. Petitioners argue that a private golf course can be neither commercial nor institutional property.

N.C. Gen. Stat. § 160A-48 provides in pertinent part that

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> (1) Which meets the general standards of subsection (b), and
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> * * * *
>
> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation *are used for residential, commercial, industrial, institutional or governmental purposes*, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size. [Emphasis added.]

In *Food Town Stores v. City of Salisbury* our Supreme Court held that a little league baseball park operated by a nonprofit corporation may be classified as used for institutional purposes. 300 N.C. 21, 38, 265 S.E.2d 123, 134 (1980). The court noted that

> [t]he term "institutional" is not specially defined in the laws governing annexation by cities of more than 5,000 in population. . . . The term "institutional" refers to or pertains to matters originated by an "establishment, organization, or association, instituted for the promotion of some object, [especially] one of public or general utility . . . . Within the context of G.S. 160A-48(c)(3), "institutional" refers to an urban use of land which directly advances the goals or objects of the organization making use of the land.

Id. at 38-39, 265 S.E.2d at 134.

Petitioners argue that the "quoted definition of institutional includes an element of public or general utility which is not present in this private, non-profit, country club facility. . . . Unlike a little league baseball facility, this golf course is of little or no benefit to the public or any significant segment thereof." We do not adopt petitioner's interpretation of "institutional." Even if we did, their contention that the Country Club provides no benefit to the public

overlooks evidence tending to support a contrary conclusion. At the public hearing on annexation, Ralph Mason, representing the Board of Governors of the Country Club, said that

> it served the Town by providing jobs with a year-round payroll of thirty people and in the summer additional part-time workers made the payroll 85 people. . . . He said the Club provided a practice golf course for the local high schools and encouraged their use and provide[d] the golf course for local charity drives. . . . Mr. Mason said all members of the community were welcome to join the Country Club.

Mr. Mason's remarks were recorded in the minutes of the 14 March meeting of the Council; a certified copy of those minutes was moved into evidence before the Superior Court as "Plaintiff's [Petitioners'] Exhibit 32."

[2] Petitioners also argue, in effect, that because the Country Club's property was labeled "recreational" and "conservation/open space," respectively, in a 1977 Comprehensive Land Use Plan and a 1986 Draft Interim Land Use Plan, the Town should be estopped from classifying Country Club property in the Report as being put to institutional use. However, petitioners cite no authority for that proposition, and it is at odds with our case law. This Court has held that the general intent of the annexation statutes is "to provide municipalities with a flexible planning tool." *Lowe v. Town of Mebane*, 76 N.C. App. 239, 243, 332 S.E.2d 739, 742 (1985). The burden is upon petitioners to demonstrate that respondents misclassified land under § 160A-48. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 19-20, 293 S.E.2d 240, 244 (1982). Petitioners have failed to carry that burden.

[3] Petitioners next assign as error the trial court's conclusion that Area 1c was properly annexed as a non-urbanized area. In annexing Area 1c, the Town relied on § 160A-48(d), which provides that

> (d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:
>
> (1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent

to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) *Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes* as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes. [Emphasis added.]

Petitioners concede that if Areas 1a and 1d were properly annexed under § 160A-48(c) then the adjacency test, above, has been met. However, they contend that the Town's annexation of Area 1c is contrary to the plain language of § 160A-48(d) and to the legislature's intent.

Specifically, they argue that Area 1c, an essentially rural, undeveloped tract, is not a "necessary land connection" within the meaning of § 160A-48(d). They submit that uncontroverted, expert testimony before the trial court tended to show that it was not only unnecessary to extend water or sewer lines across Area 1c to serve Areas 1a and 1b but also that "it would be very expensive and illogical." They also submit that expert testimony tended to show that the annexation of Area 1c was unnecessary for the provision of any other municipal services to Areas 1a and 1b. Thus, they argue, annexation of Area 1c violated the purpose of § 160A-48(d), because the unnumbered paragraph at the end of subsection (d) refers to the entire subsection "and not merely to subpart (1) of subsection (d)."

Petitioners' position is not entirely without merit, but it is contrary to the holding in *Southern Glove Mfg. Co. v. City of Newton*, 75 N.C. App. 574, 578, 331 S.E.2d 180, 183, *disc. review denied*, 314 N.C. 669, 336 S.E.2d 401 (1985), and the holding in

Wallace v. Town of Chapel Hill, 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989). Petitioners in *Wallace* contended, as do petitioners in the case below, that § 160A-48(d) "requires [that] all non-urban properties 'constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.'" *Wallace*, 93 N.C. App. at 429, 378 S.E.2d at 229. Relying on *Southern Glove*, the Court in *Wallace* reiterated the proposition that a municipality may annex non-urban property if it meets the criteria in either (d)(1) or (d)(2). *Id.* at 430, 378 S.E.2d at 230. The municipality need not "show that the non-urban area constitutes a necessary land connection." *Id.* When one panel of this Court "has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Harris*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

[4] Petitioners next assign as error the trial court's conclusions that the Town

> has substantially complied with the requirements of N.C. Gen. Stat. § 160A-48 in determining that the specific subareas of Annexation Area 1 are properly qualified for annexation. Specifically, the court concludes that subareas 1a, 1b, and 1d meet the standards for qualification as areas that are developed for urban purposes . . . .

Petitioners cite *In re Annexation Ordinance (Charlotte)*, 284 N.C. 442, 202 S.E.2d 143 (1974), to support the proposition that a municipality may not divide an annexation area into subareas and qualify each of these pursuant to separate subdivisions of § 160A-48(c).

In 1972 the City of Charlotte adopted an ordinance annexing the Albemarle Road-York Road Area. That area was initially broken down by the City into six "Study Areas," each of which was qualified for annexation pursuant to N.C. Gen. Stat. § 160-453.16(c)(1). *In re Annexation (Charlotte)*, 284 N.C. at 453, 202 S.E.2d at 149. That statute has been superseded by § 160A-48, but, except for a single change not relevant to the case below, the language in subsection (c) of both statutes is identical (see text quoted above). Construing § 160-453.16(c)(1), the Court held

> that the Legislature intended "the area to be annexed" to mean the entire 17,899 acres embraced in the Albemarle Road-

> York Road Annexation Area rather than numerous "study areas" into which the area to be annexed has been divided. Not only must the entire annexation area *meet* the requirements of G.S. 160-453.16(c)(1), but even more importantly, the tests to determine whether an area is developed for urban purposes must be *applied* to the annexation area as a whole.

In re Annexation Ordinance, 284 N.C. at 456, 202 S.E.2d at 152 (emphasis in original). In dissent Chief Justice Bobbitt found "no valid objection to the annexation proceedings. Since each of the study areas is in full compliance, it follows that the composite of these areas is in full compliance." *Id.* at 457, 202 S.E.2d at 153.

In 1980 our Supreme Court again construed the language of § 160A-48(c). The Court held:

> The urban area that a city seeks to qualify for annexation under one of the urban purposes tests set forth in G.S. 160A-48(c)(1)—(3) must be considered as a whole; i.e., as one area and may not be divided into sub-areas or study areas. This requirement, however, does not preclude annexation of intervening undeveloped land pursuant to G.S. 160A-48(d).

In re Annexation Ordinance (Albemarle), 300 N.C. 337, 342, 266 S.E.2d 661, 664 (1980).

More recently, however, our Supreme Court denied review of a decision which affirmed qualification of an annexation area by means of subareas. *Little Red School House, Ltd. v. City of Greensboro*, 71 N.C. App. 332, 338, 322 S.E.2d 195, 198, *disc. review denied and appeal dismissed*, 313 N.C. 514, 329 S.E.2d 392 (1985). This Court approved the following findings and conclusions: "Area M is divided into subareas M-1, M-2, and M-3. Subareas M-1 and M-3 meet the requirements of G.S. 160A-48(c)(1) . . . . Subarea M-2 . . . [complies] with the requirements of G.S. 160A-48(d) . . . ." *Id.*

In *Wallace v. Town of Chapel Hill*, cited above, this Court reviewed an annexation proceeding in which the Town determined that each subarea was " 'developed for urban purposes' by the use of a different standard, either (c)(1), (c)(2) or (c)(3) of N.C.G.S. Sec. 160A-48." *Wallace*, 93 N.C. App. at 426, 378 S.E.2d at 227. In affirming the regularity of the annexation proceeding, this Court, citing *In re Annexation Ordinance (Albemarle)*, stated that the

> principles set forth by our Supreme Court are not read by this court to require that *every* non-contiguous subarea a

> municipality seeks to qualify as urban property be qualified under the *same* urban purpose test. Instead, *each* such subarea must be considered as a whole and must qualify under *one* of the urban purposes tests set forth in Section 160A-48(c).

Id. at 427, 378 S.E.2d at 228 (emphasis in original). Therefore, we are constrained to hold in the case below that the Town's method of qualifying Area 1 fulfilled the requirements of § 160A-48(c). *In re Harris*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

[5] Petitioners next assign as error the trial court's conclusion that the Town has substantially complied with N.C. Gen. Stat. § 160A-47. Petitioners contend that the Town's Plan for Extending Services (the Plan) is fatally deficient. We disagree.

As a prerequisite to annexation, § 160A-47 provides:

> A municipality . . . shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> (1) A map or maps of the municipality and adjacent territory to show . . .
>
> * * * *
>
> b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls . . . .
>
> * * * *
>
> (2) A statement showing that the area to be annexed meets the requirements of G.S. 160A-48.
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within

the rest of the municipality prior to annexation. A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. . . .

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality . . . .

c. If extension of major trunk water mains, sewer outfall lines, sewer lines and water lines is necessary, set forth a proposed timetable for construction of such mains, outfalls and lines as soon as possible following the effective date of annexation.

The legislative purpose behind our annexation statutes is to assure that in return for the burden of municipal taxes all residents receive the benefit of municipal services. *In re Annexation Ordinance (No. 300-X)*, 304 N.C. 549, 554, 284 S.E.2d 470, 474 (1981). The "minimum requirements" of § 160A-47

> are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. If such services are not provided, the residents of the annexed area would be entitled to a Writ of Mandamus requiring the municipality to live up to its commitments. G.S. 160A-49(h) . . . .
>
> . . . We believe that the report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services.

In re Annexation Ordinance, 304 N.C. at 554-55, 284 S.E.2d at 474.

With regard to police and fire protection, petitioners maintain that these minimum requirements have not been met. They cite

the Town's failure to promise additional personnel and equipment. They note, too, expert testimony to the effect that the average response time to a fire alarm in Area 1 would be greater than in the municipality as a whole and that the average response time for police emergencies would decline because the Town's area would increase by nearly ten percent.

As this Court noted in *In re Durham Annexation Ordinance (No. 5791)*, "there are many variables that affect the level of fire protection afforded to different areas of a municipality: height and size of buildings, construction materials, proximity of buildings to one another and street pattern, among others." 66 N.C. App. 472, 480, 311 S.E.2d 898, 903, *disc. review denied*, 310 N.C. 744, 315 S.E.2d 701 (1984). Response time is a factor for the court's consideration, but it is not dispositive "of whether an annexation report reflects plans to provide certain required municipal services 'on substantially the same basis and in the same manner' as in the preannexation City area." *Id.* at 481, 311 S.E.2d at 903; *see also In re Durham Annexation Ordinance (No. 5991)*, 69 N.C. App. 77, 88, 316 S.E.2d 649, 655-56, *disc. review denied and appeal dismissed*, 312 N.C. 493, 322 S.E.2d 553 (1984). Under § 160A-47(3) a municipality's Plan is required to show only that a nondiscriminatory level of services will be provided. *In re Annexation Ordinance (No. 300-X)*, 304 N.C. 549, 555, 284 S.E.2d 470, 474 (1981) (citing *Moody v. Town of Carrboro*, 301 N.C. 318, 328, 271 S.E.2d 265, 271-72 (1980)).

In its Plan the Town stated:

> The Town will provide patrol and other police services with existing personnel and equipment, which will be sufficient to provide these services on the same basis and in substantially the same manner as for other areas of the Town. Costs will be financed from the General Fund. There is no anticipated need for additional equipment or personnel to serve the area in the next two years.
>
> * * * *
>
> Fire department personnel and equipment based at the Headquarters Station on Columbia Street; the Glen Lennox Station; and public safety personnel on patrol in the patrol district including the annexation area will respond to fire calls. . . .
>
> The Town anticipates entering into a 5-year first-responder contract with the Parkwood Volunteer Fire Department for

> the portion of Area 1 that Parkwood currently serves. Both the Town and the Parkwood Volunteer Fire Department personnel will respond to fire emergency calls from the annexation area.
>
> The contract with the Parkwood Fire Department would include payments by the Town to the volunteer department in accord with G.S. 160A-49.1.

Moreover, the Town's fire chief and police chief testified that services would be provided in Area 1 on substantially the same basis as elsewhere in the municipality. On this issue, the trial court had ample evidence from which to find that the Town complied with § 160A-47.

[6] Regarding the extension of water and sewer services to Area 1, petitioners contend that the Town improperly delegates responsibility to Orange Water and Sewer Authority (OWASA), an independent authority operated pursuant to N.C. Gen. Stat. Chap. 162A. They maintain that OWASA has no defined service area and no written policies "concerning the extension of water [and] sewer services into an area." Thus, they infer that the Town's performance depends "upon a doubtful contingency," making the annexation ordinance invalid. *In re Annexation Ordinance (Jacksonville)*, 255 N.C. 633, 646, 122 S.E.2d 690, 700 (1961).

In *Moody v. Town of Carrboro* the court upheld a Plan which provided for extension of water and sewer lines by OWASA. 301 N.C. 318, 328, 271 S.E.2d 265, 272 (1980). The same procedure was affirmed in *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 428-29, 378 S.E.2d 225, 229 (1989). *See also* N.C. Gen. Stat. § 160A-461, which provides for authority for interlocal cooperation; and *Trask v. City of Wilmington*, 64 N.C. App. 17, 26-27, 306 S.E.2d 832, 837 (1983), *disc. review denied*, 310 N.C. 630, 315 S.E.2d 697 (1984), which discusses the desirability of intergovernmental cooperation.

In the case below, the Town's Plan provided that water and sewer

> service, as within the present Town limits, will be provided in accord with policies adopted by . . . (OWASA) to be applicable within the existing Town limits and the annexed area. OWASA's operating expenses . . . will be financed from OWASA revenues. . . .
>
> * * * *

Appendix D-6 shows the location of existing major water mains in the vicinity of this area. Major trunk water mains required to make service generally available to this area have already been completed.

The extension of OWASA water services to areas proposed for annexation by the Town of Chapel Hill will be provided in accord with OWASA policies, regulations and standards applicable throughout the entire OWASA service area (which includes the Town of Chapel Hill in its entirety) at the time extensions are made. . . .

Appendix D-7 shows the location of existing sewer outfalls in the vicinity of area 1. Two wastewater collection system improvements are necessary to support the proposed annexation of Area 1. These improvements will be completed within two years of the effective date of annexation.

1. *Improvements for Westernmost Portion of Area 1c.* Gravity sewer service is in close proximity to the western boundary of, but not within, Area 1c. There are two alternatives for making sewer service generally available to the western portion of Area 1c: the extension of a gravity sewer main along NC Highway 54, or the extension of a gravity sewer main near the southern edge of the annexation area. . . .

2. *Improvements in Pearl Lane/Little John Road Area 1b.* The Pearl Lane/Little John Road area cannot be served by conventional extension of the gravity sewer system within the OWASA system. Construction of a small wastewater pumping station and associated force main would be required to serve this area. . . .

   Property owners in the area to be annexed would be able to secure public sewer service from OWASA according to the policies in effect within the Town of Chapel Hill for extending sewer lines to individual lots and subdivisions.

Copies of OWASA documents entitled "Sewer Extension Policy" and "Policy for Extension of Water Service," each of which included a schedule of fees, were appended to the Plan. Also appended to the Plan was an OWASA Report, dated 8 January 1988, on the extension of water and sewer services to Area 1. At trial the executive director and the chief engineer of OWASA testified that water and sewer services would be provided in Area 1 on

the same basis as within the Town and that connection procedures were and would continue to be uniformly applied.

Upon review, the petitioners' other contentions regarding the Town's Plan to extend water and sewer service to Area 1 have been found without basis in law. In light of the documentary evidence and testimony before it, the trial court correctly concluded that the Town substantially complied with § 160A-47.

[7] Petitioners next assign as error the trial court's conclusion that the Town has substantially complied with the procedural requirements of N.C. Gen. Stat. § 160A-49. They contend that the Town's amendment of the Report after the public hearing of 14 March 1988 required a new hearing before the ordinance was adopted. Petitioners focus their attack on the changes made to Area 1a as described in the original Report.

N.C. Gen. Stat. § 160A-49(e) provides in part that the

> municipal governing board shall take into consideration facts presented at the public hearing and shall have *authority to amend the report required by G.S. 160A-47 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-47, provided that if the annexation report is amended to show additional subsections of G.S. 160A-48(c) or (d) under which the annexation qualifies that were not listed in the original report, the city must hold an additional public hearing* on the annexation not less than 30 nor more than 90 days after the date the report is amended . . . . [Emphasis added.]

In his memorandum dated 25 April 1988 (noted above), the Town Manager explained that a final plat of the Oaks III, Phase B5A development was recorded on 22 April 1988, eight days after the public hearing on annexation. The plat subdivided tax map lot 479A-1, previously counted as one lot, into thirty lots. To continue to qualify Area 1a under § 160A-48(c)(3) the Town deleted the approximately twenty-eight acres contained in Oaks III, Phase B5A from the area to be annexed. The Town further concluded that a street right-of-way (Pinehurst Drive) separated a strip of land near Burning Tree Drive from the remainder of Area 1a and required separate qualification of that strip (redesignated Area 1d).

These changes did not bring any new land within the scope of the annexation ordinance. Nor did the changes involve additional

"subsections of G.S. 160A-48(c) or (d), under which the annexation qualifies, that were not listed in the original report . . . ." N.C. Gen. Stat. § 160A-49(e) (1989). Area 1a was originally qualified under § 160A-48(c)(3); Area 1d was qualified under the same subsection.

Petitioners' reliance on *Gregory v. Town of Plymouth*, 60 N.C. App. 431, 299 S.E.2d 232, *disc. review denied*, 308 N.C. 544, 304 S.E.2d 237 (1983) is misplaced. That case dealt with N.C. Gen. Stat. § 160A-37(e), which, for municipalities with a population less than 5,000, is the analogue of § 160A-49(e). As *Gregory* noted, "the relevant inquiry is whether the amendment effected a substantial change to the ordinance, necessitating notice to those affected thereby." *Gregory*, 60 N.C. App. at 433, 299 S.E.2d at 234 (1983). We hold that, in the case below, the Town's amendment made no substantial change in the annexation ordinance and that petitioners were not prejudiced by the absence of a second public hearing.

[8] We address, lastly, the petitioners' contention that the trial court erred in granting respondent's post-trial motion to allow immediate effectiveness of the annexation ordinance with respect to the Oaks subdivision portion of Area 1a.

Appeal from the trial court's review of the municipality's annexation proceedings is governed by N.C. Gen. Stat. § 160A-50(h), which provides that the

> appealing party may apply to the superior court for a stay in its final determination, or a stay of the annexation ordinance, whichever shall be appropriate, pending the outcome of the appeal to the appellate division; provided, that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made.

The trial court found that no property owner in the Oaks subdivision had joined petitioners or taken other legal action in opposition to annexation. No question has been raised as to the qualification of the Oaks subdivision for annexation. Thus, the trial court correctly concluded that the Oaks subdivision area could be incorporated into the Town "without regard to the remainder of the annexation area concerning which an appeal is being made."

For the reasons stated above, we hold that petitioners failed to show either that the Town did not meet the statutory requirements for annexation or that some irregularity in the proceedings prejudiced petitioners' rights. The trial court's orders of 31 August 1988 are

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. CAROLYN JONES

No. 8922SC149

(Filed 6 February 1990)

1. **Searches and Seizures § 39 (NCI3d)— warrant not executed by officer who obtained it**

A search was not unlawful because the officer who executed the warrant was not the same officer to whom the warrant was issued, it being sufficient that the officer who executed the warrant was acting within his territorial jurisdiction and investigative authority. N.C.G.S. § 15A-247.

Am Jur 2d, Searches and Seizures §§ 62, 71, 108.

2. **Searches and Seizures § 42 (NCI3d)— preliminary search before service of warrant**

Although N.C.G.S. § 15A-252 requires service of the warrant before "any search or seizure," the statute does not preclude a preliminary search of the premises to locate, detain, or frisk individuals on the premises prior to service of the warrant in order to ensure the safety of the officers and to prevent possible suspects from fleeing or destroying evidence. N.C.G.S. §§ 15A-255 and 15A-256.

Am Jur 2d, Searches and Seizures § 107.

3. **Searches and Seizures § 41 (NCI3d)— execution of warrant— knock and announce requirements—forcible entry**

Officers complied with N.C.G.S. §§ 15A-249 and 15A-251 when they forcibly entered defendant's premises to execute

a search warrant for narcotics where they knocked on the door and announced their identity in a loud voice and, after waiting approximately one minute and receiving no response, they forcibly entered the premises.

Am Jur 2d, Searches and Seizures § 91.

4. **Searches and Seizures § 39 (NCI3d)— search pursuant to warrant—receipt for seized items**

Evidence seized in a search under a warrant was not required to be excluded on the ground that officers did not give a receipt for the seized items to defendant as required by N.C.G.S. § 15A-254 where the record on appeal contains a copy of the inventory which indicates that it was tendered to defendant but she refused to acknowledge its receipt. Furthermore, defendant waived her right to challenge the admissibility of evidence on this ground by failing to raise this issue in a written or oral motion to suppress.

Am Jur 2d, Searches and Seizures § 115.

5. **Searches and Seizures § 39 (NCI3d)— warrant in possession of officers—sufficiency of findings**

The trial court's findings were sufficient to establish that a search warrant had been issued and officers had the warrant in their possession at the time of their entry into defendant's residence.

Am Jur 2d, Searches and Seizures § 108.

6. **Criminal Law § 84 (NCI3d); Narcotics § 3.2 (NCI3d)— seized currency—release to federal officials without court order—evidence admissible**

Evidence concerning currency seized from defendant's apartment was not inadmissible in a prosecution of defendant for narcotics offenses because officers released the currency to the Federal Drug Enforcement Administration without obtaining a court order because (1) N.C.G.S. § 15A-258 expressly authorizes seized property to be held by any law enforcement agency and does not require a court order prior to the release of seized property, and (2) even if the statute was violated, the evidence was not excludable on that ground since it was

not "obtained as a result of" a violation of the statute. N.C.G.S. § 15A-974(2).

Am Jur 2d, Searches and Seizures § 117.

7. **Narcotics § 3.2 (NCI3d); Constitutional Law § 65 (NCI3d)— currency seized from defendant—failure to produce at trial—admission of substitute evidence—right to confront witnesses**

The State's failure to produce at trial currency seized from defendant's residence did not preclude the State from offering other evidence concerning the currency where defendant testified that she owned the currency and the admission of substitute evidence of the seized currency thus did not prejudice defendant's rights. N.C.G.S. § 15A-11.1. Nor did the State's failure to produce the money at trial violate defendant's state or federal constitutional rights to confront witnesses against her as those rights do not apply to physical evidence.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

8. **Criminal Law § 43 (NCI3d)— photographs of seized currency—admissibility for illustration**

Photographs of currency seized from defendant's residence were properly admitted for illustrative purposes although the currency was not produced at the trial.

Am Jur 2d, Evidence § 289.

9. **Criminal Law § 77.1 (NCI3d)— statements by defendant—admission of party-opponent**

Evidence that defendant had testified in a prior proceeding that an apartment from which cocaine was seized was her residence and that she lived there alone was admissible as an admission of a party-opponent. N.C.G.S. § 8C-1, Rule 801(d)(A).

Am Jur 2d, Evidence §§ 616, 648.

10. **Narcotics § 4.3 (NCI3d)— trafficking in cocaine—constructive possession—sufficient evidence**

The evidence was sufficient for the jury to infer that defendant had constructive possession of cocaine found in her apartment so as to support a charge of trafficking in cocaine by possession of 28 grams or more but less than 200 grams, although other persons were in the apartment when it was searched by the police, where it tended to show that over

50 grams of cocaine were found in the apartment; defendant lived in the apartment alone; almost all of the cocaine was discovered in an upstairs bedroom of the apartment which was locked when the officers arrived; defendant was in the bedroom at that time, and she hid in the closet when the officers began their search; police discovered some of the cocaine in plastic bags in plain view on top of a cabinet in the bedroom and in other plastic bags under the bed; there was approximately $4,000.00 in currency in plain view on the cabinet and $17,000.00 in a locked compartment of the cabinet; and defendant testified that she owned the currency and the keys to the locked compartment and that she kept the bedroom locked and did not allow anyone to enter it.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

11. Narcotics § 4 (NCI3d)— possession of cocaine with intent to sell or deliver—manufacturing cocaine—sufficiency of evidence

The evidence was sufficient to support charges of possession of cocaine with intent to sell or deliver and manufacturing cocaine where it tended to show that police found in defendant's apartment a large amount of cocaine packaged in numerous plastic bags, large amounts of currency, packaging materials, a set of scales, measuring spoons and sifters.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

12. Narcotics § 4 (NCI3d)— maintaining dwelling for sale of narcotics—sufficiency of evidence

Evidence which supported charges of trafficking in cocaine, possession of cocaine with intent to sell or deliver, and manufacturing cocaine also supported a charge of intentionally maintaining a dwelling for the purpose of keeping or selling a controlled substance when combined with defendant's admission that she maintained as her residence the apartment where the cocaine was found.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

13. Constitutional Law § 48 (NCI3d)— ineffective assistance of counsel—insufficient contention

Defendant's contention that her counsel "failed throughout the trial" to present evidence and cross-examine witnesses "in a sufficient manner" was inadequate to support a claim

of ineffective assistance of counsel where defendant did not indicate what evidence counsel failed to present or what matters he failed to inquire about on cross-examination.

Am Jur 2d, Criminal Law §§ 967, 984, 985.

APPEAL by defendant from judgments entered 21 September 1988 by *Judge J. D. DeRamus, Jr.* in DAVIDSON County Superior Court. Heard in the Court of Appeals 31 August 1989.

Defendant was tried and convicted of intentionally keeping and maintaining a dwelling house for the purpose of keeping or selling a controlled substance, manufacturing cocaine, possession with intent to sell or deliver cocaine, and trafficking in cocaine by possession of 28 grams or more but less than 200 grams. The offenses of manufacturing and possession with intent to sell or deliver were consolidated in a judgment imposing a sentence of three years, to run consecutively with sentences of two years for keeping and maintaining a dwelling house and seven years for trafficking. From the judgments imposing the sentences, defendant appeals.

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

Klass & Klass, P.A., by Mark E. Klass and Michael A. Johnson, Jr., for defendant-appellant.

Scott Y. Curry for defendant-appellant.

PARKER, Judge.

Defendant brings forward 26 assignments of error which raise issues in five broad categories: (i) whether the trial court erred in denying defendant's motion to suppress evidence seized pursuant to a search warrant on the grounds that the execution of the warrant did not comply with certain provisions of G.S., Chap. 15A; (ii) whether the trial court erred in admitting evidence of currency seized pursuant to the warrant on the grounds that the currency was improperly disposed of prior to trial; (iii) whether the trial court erred in admitting evidence of defendant's testimony in a prior proceeding; (iv) whether the trial court erred in denying defendant's motion to dismiss the charges against her for insufficient evidence; and (v) whether defendant was denied her constitutional right to effective assistance of counsel.

I.

On 18 September 1987, police officers searched defendant's residence, an apartment located at 910-E Culbreth Avenue in Thomasville. The officers acted pursuant to a warrant, and they seized several items including large amounts of currency, numerous plastic bags containing cocaine with a total weight in excess of 50 grams, and paraphernalia for measuring and packaging cocaine. Defendant does not contest the validity of the warrant. Prior to trial, defendant made a written motion to suppress the items seized pursuant to the warrant on the grounds that the officers began the search before the warrant had been issued. At trial, defendant also contended that the officers did not properly execute and serve the warrant.

The trial court conducted a *voir dire* on defendant's motion to suppress. The State's evidence on *voir dire* tended to show the following: A magistrate issued a search warrant for the premises at 910-E Culbreth Avenue to Detective Phillips of the Thomasville Police Department at 3:35 p.m. on 18 September 1987. Detective Phillips then gave the warrant to Lieutenant Bratton. Bratton went to the address on the warrant and approached the front door accompanied by another officer. The officers knocked on the door and repeatedly announced in a loud voice that they were police officers and had a warrant to search the premises. The officers could hear people talking and a television in the apartment, but nobody came to the door, which was locked. After waiting for approximately one minute, the officers forced their way into the apartment. Once inside, Bratton went to the second floor of the apartment. He saw Bracy Tyrone Jones, defendant's son, whom he stopped and frisked for weapons. He then took Mr. Jones downstairs where other officers had detained several other individuals. Detective Phillips arrived at the premises at approximately 3:50 p.m. Bratton informed Phillips that defendant had not been found in the residence. Bratton handed the warrant to Phillips, and Phillips read the warrant to Mr. Jones. The officers then began an extensive search of the premises. At approximately 4:30 p.m., the officers discovered defendant in a closet in an upstairs bedroom. The search continued until approximately 8:30 p.m., and the warrant and an inventory of the seized items were returned and sworn to at 8:45 p.m.

Defendant offered the testimony of two witnesses on *voir dire*. Elizabeth Berry testified that she was on the premises on the

date of the search; that she never heard the officers knock or announce themselves before they entered; that the officers did not read the warrant until after they searched the apartment; and that the officers first entered the apartment at 2:35 p.m. Bracy Tyrone Jones testified that the officers entered at approximately 2:30 p.m.; that he did not hear the officers knock or announce themselves; and that the officers read the warrant to him approximately one hour after they entered.

After receiving testimony, the trial court found as facts that the warrant was issued to Detective Phillips at 3:35 p.m.; that Lieutenant Bratton executed the warrant "shortly thereafter"; that Bratton entered the premises approximately one minute after he knocked and announced himself; that there was no search prior to Bratton's entry; that Phillips arrived approximately 35 minutes later and read the warrant to Mr. Jones before a "thorough search" of the premises occurred; and that defendant was on the premises at all times but was hidden in a closet and was not found until approximately 45 minutes after the execution of the warrant. Based on these findings, the court concluded that the search was lawful and denied defendant's motion to suppress the seized items.

[1] Defendant first contends that the search was unlawful because the officer who executed the warrant was not the same officer to whom the warrant had been issued. This contention is meritless. General Statute 15A-247 provides that "[a] search warrant may be executed by any law-enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved." It is clear that the officer who executed the warrant in this case was acting within his territorial jurisdiction and investigative authority. *See State v. Tessnear*, 265 N.C. 319, 322, 144 S.E.2d 43, 46 (1965) (warrant need not be executed by the same officer who made the affidavit upon which the warrant was issued).

[2] Defendant next contends that the trial court erred in denying her motion to suppress because the search was conducted in violation of the statutory requirement that "[b]efore undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched." G.S. 15A-252. The trial court found as facts that Detective Phillips read the warrant to

Mr. Jones approximately 35 minutes after the officers' initial entry and that no "thorough search" had been conducted before the officer read the warrant. Although there was some conflicting evidence, there was competent evidence to support the court's findings and, therefore, the findings are conclusive on appeal. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E.2d 510, 535 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980). Defendant concedes that her son was in "apparent control" of the premises and was the proper person upon whom to serve the warrant. Defendant argues, however, that the officers violated G.S. 15A-252 by conducting a limited search prior to serving the warrant. Defendant further contends that this violation was substantial so as to require suppression of the seized items under G.S. 15A-974(2).

The State's evidence on *voir dire* tended to show that the officers delayed in serving the warrant because they first made a cursory search of the premises to secure the individuals on the premises and to ensure that there were no threats to the officers' safety. The trial court, after weighing the credibility of the evidence, found that no "thorough search" occurred before the officers served the warrant on Mr. Jones. Although G.S. 15A-252 requires service of the warrant before "any search or seizure," we hold that the statute does not preclude a preliminary search of the premises to locate individuals and ensure the officers' safety.

General Statute 15A-252 must be construed with reference to other provisions of Chapter 15A relating to search warrants and, where possible, statutes dealing with the same subject matter must be harmonized to give effect to each. *See In re Brownlee*, 301 N.C. 532, 549, 272 S.E.2d 861, 871 (1981). An officer executing a search warrant is authorized by statute to detain persons present on the premises, G.S. 15A-256, and to frisk those present for weapons if he reasonably believes that there is a threat to the safety of himself or others. G.S. 15A-255. These provisions are clearly designed to enable officers to ensure their safety and to prevent possible suspects from fleeing or destroying evidence. *See State v. Watlington*, 30 N.C. App. 101, 226 S.E.2d 186, *disc. rev. denied and appeal dismissed*, 290 N.C. 666, 228 S.E.2d 457 (1976). To require officers to serve the warrant prior to taking the precautionary measures authorized by G.S. 15A-255 and 15A-256 would frustrate the purposes of the statutes. Accordingly, G.S. 15A-252 does not prevent officers from locating, detaining, or frisking individuals

on the premises prior to serving the warrant, and no violation occurred in this instance.

[3] Defendant next contends that the officers violated G.S. 15A-249 and 15A-251 when they forcibly entered the premises. General Statute 15A-249 requires officers executing search warrants to give appropriate notice of their identity and purpose prior to entering the premises. General Statute 15A-251 provides that officers may forcibly enter the premises if (i) they have given the notice required by G.S. 15A-249 and they reasonably believe that admittance is being denied or unreasonably delayed or that the premises are unoccupied, or (ii) they have probable cause to believe that the giving of notice would threaten the safety of any person. In this case, the trial court found as facts that the officers knocked on the door and announced their identity and purpose in a loud voice and, after waiting approximately one minute and receiving no response, they forcibly entered the premises. These findings are supported by competent evidence, and the facts found show compliance with G.S. 15A-249 and 15A-251. *See State v. Edwards*, 70 N.C. App. 317, 319-20, 319 S.E.2d 613, 615 (1984), *rev'd on other grounds*, 315 N.C. 304, 337 S.E.2d 508 (1985).

[4] Defendant also contends that the evidence obtained in the search must be excluded because the officers did not give a receipt for the seized items to defendant or her son as required by G.S. 15A-254. This argument is meritless. The record on appeal contains a copy of the inventory which indicates that it was tendered to defendant but she refused to acknowledge that she received it. The certified record on appeal is binding upon the appellate court. *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983). The record contains no additional evidence or findings on this issue because defendant never raised it in her written or oral motions to suppress. Therefore, defendant waived her right to challenge the admissibility of evidence on this ground. *See State v. Satterfield*, 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980).

[5] Finally, defendant contends that the trial court failed to find that the officers had the warrant in their possession at the time of entry. There was a conflict in the evidence on this point because defendant's witnesses testified that the officers entered at approximately 2:30 p.m., one hour prior to the time the warrant was issued. Under G.S. 15A-977(f), the trial court was required to make findings to resolve the conflict. *State v. Barfield*, 298 N.C. at 339,

259 S.E.2d at 535. The court found that Lieutenant Bratton was present when the warrant was issued, he executed the warrant "shortly thereafter," and there was no search of the premises before the officers arrived "at sometime after 3:35 p.m." These findings are supported by competent evidence and are minimally sufficient to establish that the officers had the warrant in their possession when they entered the premises. Accordingly, the trial court did not err in denying defendant's motion to suppress the evidence obtained as a result of the search.

II.

Several of defendant's assignments of error concern the disposition of the currency seized in the search of her residence and the admission of testimony and photographs to prove the existence of the currency. Defendant's principal contention is that evidence concerning the currency was inadmissible because the officers improperly disposed of the currency in violation of G.S. 15A-258. Defendant also contends that she is entitled to have the currency returned, that photographs of the currency were improperly admitted without a proper foundation, and that the State's failure to produce the currency at trial violated her constitutional right to confront the witnesses against her as guaranteed by the sixth amendment to the United States Constitution and article I, section 23 of the North Carolina Constitution.

The question of whether defendant is entitled to have the currency returned to her is not properly before this Court. The only information concerning the disposition of the currency in the record on appeal is Detective Phillips' testimony that the currency was released to the Federal Drug Enforcement Administration for forfeiture proceedings. Because there is nothing in the record to show the final disposition of the currency, this Court cannot rule on the matter. *See State v. Hilton*, 271 N.C. 456, 156 S.E.2d 833 (1967). Defendant's arguments based upon the State forfeiture statute, G.S. 90-112(a)(2), are irrelevant because the record shows no State forfeiture proceedings. Furthermore, there is nothing in the record to show that defendant made any attempt to have the currency returned to her, and this Court will not consider issues not raised and ruled upon in the court below. *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980).

[6] Defendant contends that evidence concerning the currency was inadmissible because the officers released the currency to federal

officials in violation of G.S. 15A-258. Detective Phillips testified that he did not obtain a court order to release the currency. General Statute 15A-258 provides:

> Property seized shall be held in the custody of the person who applied for the warrant, or of the officer who executed it, or of the agency or department by which the officer is employed, or of any other law-enforcement agency or person for purposes of evaluation or analysis, upon condition that upon order of the court the items may be retained by the court or delivered to another court.

Contrary to defendant's contentions, the statute does not require that a court order be obtained prior to any release of seized property, and it expressly authorizes property to be held by any law-enforcement agency. Therefore, the release of the currency to the Federal Drug Enforcement Administration did not violate G.S. 15A-258. Even if a violation did occur, evidence of the currency would not be excludable on that ground because the evidence would not have been "obtained as a result of" a violation of the statute. G.S. 15A-974(2); *State v. Richardson*, 295 N.C. 309, 322-23, 245 S.E.2d 754, 763 (1978).

[7, 8] Defendant's remaining arguments concerning the admissibility of evidence of the currency have been previously considered and rejected by this Court under virtually identical circumstances. *State v. Alston*, 91 N.C. App. 707, 712-13, 373 S.E.2d 306, 310-11 (1988). In *Alston*, as in this case, the defendant challenged the admissibility of testimony and photographs to prove that large amounts of currency had been seized from the premises on the grounds that the State failed to produce the currency at trial. We first noted that G.S. 15-11.1 authorizes substitute evidence of seized property so long as the defendant does not suffer prejudice. *State v. Alston*, 91 N.C. App. at 712, 373 S.E.2d at 310. In this case, the defendant testified that she owned the currency in question, so no possible prejudice could have resulted from the admission of other evidence concerning the currency. We also held in *Alston* that the State and federal constitutional rights to confront witnesses do not apply to physical evidence. *Id.* at 712, 373 S.E.2d at 311. Finally, we held that photographs of the currency were admissible to illustrate the testimony of an officer who indicated that the photographs were a fair and accurate representation of what he had observed. *Id.* at 713, 373 S.E.2d at 311. The photographs in this case were

admitted under similar circumstances for illustrative purposes. Although defendant contends that the photographs were admitted as substantive evidence, she did not request a limiting instruction and, therefore, the failure to give such an instruction is not reversible error. *Id.*

Accordingly, we find no reversible error in the trial court's admission of evidence concerning the currency seized from the premises.

III.

[9] Defendant next assigns error to the admission of evidence concerning her testimony in a prior proceeding. Lieutenant Bratton testified that defendant had previously testified that the apartment where the search was conducted was her residence and that she lived there alone. Defendant contends that this testimony was irrelevant and inadmissible hearsay evidence.

Defendant's arguments are meritless. Evidence of defendant's prior statements is not inadmissible hearsay because the statements are admissions of a party-opponent. Rule 801(d)(A), N.C. Rules Evid.; *State v. Nichols*, 321 N.C. 616, 631, 365 S.E.2d 561, 570 (1988). Defendant contends that the evidence is irrelevant because it does not specifically show that she resided at the apartment at the precise time that the search occurred. Under Rule 401 of the N.C. Rules of Evidence, evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. *State v. Wingard*, 317 N.C. 590, 597, 346 S.E.2d 638, 644 (1986). The evidence in question clearly meets this test. Furthermore, defendant could not have been prejudiced by any error in admitting the evidence because she testified at trial that she resided alone in the apartment at the time of the search.

IV.

Defendant next contends that the trial court erred in denying her motions to dismiss the charges against her for insufficient evidence. Defendant has assigned error to the denial of her motions made at the close of the State's evidence and at the close of all the evidence. By offering evidence following the denial of her motion at the close of the State's evidence, defendant waived that motion and, therefore, only her motion at the close of all the evidence is reviewable on appeal. *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). The motion to dismiss was properly denied

if there was substantial evidence of each essential element of the offenses charged and of defendant's being the perpetrator of the offenses. *Id.* at 281, 337 S.E.2d at 515. For purposes of a motion to dismiss, the evidence must be viewed in the light most favorable to the State and the State is entitled to the benefit of all reasonable inferences that may be drawn from the evidence. *Id.* The defendant's evidence is considered to the extent that it is favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

[10] We first consider the sufficiency of the evidence to support the charge of trafficking in cocaine by possession of 28 grams or more but less than 200 grams. The State's evidence tended to show that over 50 grams of cocaine were discovered in defendant's residence. Defendant testified that she did not own the drugs or know of their presence in her apartment. Although the evidence does not show that defendant was in actual possession of the drugs, the evidence is sufficient to support the charge if it establishes constructive possession. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Constructive possession may be inferred from evidence showing that drugs are found on premises under the defendant's control. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). Where the defendant's control of the premises is not exclusive, however, constructive possession may not be inferred in the absence of other incriminating circumstances. *Id.*

The evidence in this case shows that defendant was the only resident of the apartment where the drugs were found. Because there were several other individuals on the premises, however, we shall accept for purposes of argument defendant's contention that her control of the premises was not exclusive. Nevertheless, there was sufficient evidence of other incriminating circumstances to support the charge of trafficking by possession.

Almost all of the drugs were discovered in an upstairs bedroom of the apartment which was locked when the officers arrived. Defendant was in the bedroom at that time, and she hid in the closet when the officers began their search. The police discovered some of the drugs in plastic bags in plain view on top of a cabinet in the room. Other plastic bags containing cocaine were discovered under the bed. There was approximately $4,000.00 in currency in plain view on the cabinet, and approximately $17,000.00 in currency in a locked compartment of the cabinet. Defendant testified that

she owned the currency, she owned the keys to the locked compartment, and she kept the bedroom locked and did not allow anyone to enter it. These circumstances were sufficient to permit the jury to infer that defendant had constructive possession of the cocaine. *See State v. Alston*, 91 N.C. App. at 710-11, 373 S.E.2d at 309-10, *State v. Rich*, 87 N.C. App. 380, 382-83, 361 S.E.2d 321, 323-24 (1987).

[11, 12] The evidence was also sufficient to support the charge of possession with intent to sell or deliver because it shows that a large amount of cocaine packaged in numerous bags, packaging materials, and large amounts of currency were found on the premises. *See State v. Alston*, 91 N.C. App. at 711, 373 S.E.2d at 310; *State v. Rich*, 87 N.C. App. at 383, 361 S.E.2d at 323. Similarly, the evidence is sufficient to support the charge of manufacturing cocaine under G.S. 90-95(a)(1). As used in the statute, the term "manufacture" includes packaging or repackaging a substance. G.S. 90-87(15). In addition to the cocaine and packaging materials, the police also discovered a small set of scales, measuring spoons, and sifters on the premises. This evidence permitted the jury to infer that defendant packaged or repackaged the cocaine. *See State v. Perry*, 316 N.C. at 98-99, 340 S.E.2d at 457-58. The evidence in support of the charges of trafficking, possession with intent to sell and deliver, and manufacturing also supports the charge of intentionally keeping or maintaining a dwelling for the purpose of keeping or selling a controlled substance when it is combined with defendant's admission that she maintained the apartment as her residence. *See State v. Rich*, 87 N.C. App. at 384, 361 S.E.2d at 324.

Therefore, the trial court properly denied defendant's motion to dismiss the charges against her for insufficient evidence.

V.

[13] Defendant's final contention is that she was denied her right to effective assistance of counsel as guaranteed by the sixth amendment to the United States Constitution and article I, sections 19 and 23 of the North Carolina Constitution. Under both the State and federal constitutions, a defendant claiming ineffective assistance of counsel must show that (i) counsel's performance fell below an objective standard of reasonableness and (ii) counsel's errors were so serious that they deprived the defendant of a fair trial. *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 509-10 (1987). There must be a reasonable probability that, absent counsel's deficient

performance, the result at trial would have been different. *Id.* at 399, 358 S.E.2d at 510.

In this case, defendant does not contend that her counsel erred in any particular respect; she merely argues that "defense counsel failed throughout the trial to present evidence and cross examine witness [sic] in a sufficient manner." This argument is clearly inadequate to support a claim of ineffective assistance of counsel. Defendant does not indicate what evidence counsel failed to present or what matters he failed to inquire into on cross-examination. Our review of the record reveals that counsel vigorously opposed the admission of evidence damaging to his client's defense and he could do little else in view of the strength of that evidence. There are no grounds for a new trial when the record and the defendant's arguments on appeal fail to indicate that trial counsel could have taken any legitimate action that would have produced a different result. *State v. Mathis*, 293 N.C. 660, 672, 239 S.E.2d 245, 253 (1977). Accordingly, we find that defendant in this case was not denied her constitutional right to effective assistance of counsel.

For the foregoing reasons, we find that defendant received a fair trial free of reversible error.

No error.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JERRY EDWARD SEABERRY

No. 8911SC332

(Filed 6 February 1990)

1. Constitutional Law § 31 (NCI3d)— assault—request for psychiatrist and ballistics expert—denied

The trial court did not err in an assault prosecution by denying defendant's request for funds for a psychiatrist and a ballistics expert. A suspicion that the outcome of the psychiatric examination may be favorable is insufficient; where evidence other than defendant's confession exists, an indigent criminal defendant requesting a psychiatric expert must show

something more than the fact that he confessed and that his confession will be important in the State's case against him. Defendant here failed to make the specific evidentiary showing as outlined in *State v. Moore*, 321 N.C. 327; moreover, a psychiatrist had already been appointed in a separate prosecution in Wake County. While the ballistics testimony may have been important for the State to prove its case beyond a reasonable doubt, this fact alone is not sufficient to require the appointment of an independent expert and defendant presented no detailed evidence contradicting a psychiatrist's conclusion that he was capable of assisting in his defense. N.C.G.S. § 7A-450(b), N.C.G.S. § 7A-454.

Am Jur 2d, Criminal Law §§ 955, 1006.

2. Constitutional Law § 66 (NCI3d)— assault—hearing on motions for state-appointed experts—defendant not present—no prejudicial error

There was no prejudicial error in defendant's absence at a hearing on his motion for funds to obtain a psychiatrist and a ballistics expert where defendant made no showing that the motion's hearing would have been more reliable due to his physical presence or his contributions to the process of cross-examination. Even assuming that a hearing for a state-appointed expert is a critical stage requiring defendant's presence, defendant here waived his right to attend in that neither the record nor the transcript of the hearing revealed any indication that defendant wanted to be present, defense counsel never objected to defendant's absence, requested that defendant be transported to Johnston County for a hearing, or asked that the hearing be delayed until defendant could attend. Moreover, the right to be present at all critical stages of a trial is subject to harmless error analysis and the decision here had no effect on the outcome of the trial.

Am Jur 2d, Criminal Law § 911.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from judgment entered 20 October 1988 by *Judge Wiley F. Bowen* in JOHNSTON County Superior Court. Heard in the Court of Appeals 16 October 1989.

Defendant Seaberry was tried before a jury on charges of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm upon a law enforcement officer, and robbery with a dangerous weapon. The jury found defendant guilty of all charges. Judge Bowen arrested judgment on the conviction for assault on a law enforcement officer and imposed sentences of twenty years and forty years consecutively for the remaining felonious assault and armed robbery convictions. Defendant appealed.

The state presented evidence tending to show that on the evening of 28 March 1988 the Clayton Food Town was robbed of $4,666.25 by a person wearing a stocking over his head and carrying a gun. As the thief left the store, he shot a uniformed Clayton police officer three times. The store's assistant manager, a customer in the store, and the police officer provided essentially the same description of the intruder. Another witness gave the police a thorough description and the license number of the vehicle driven away by the perpetrator. Investigators traced the vehicle to a friend of the appellant's girlfriend, and then they located his girlfriend.

Seaberry's girlfriend testified that on the night of the robbery he came to her apartment, acted unusually interested in a television news report about the robbery, and gave her $250 in cash. Prior to 28 March 1988 appellant used cocaine excessively and on 28 and 29 March he was using cocaine. Appellant was driving a blue rental car on 30 March.

The state showed that on 29 March 1988 appellant rented a blue car with a Florida license plate tag from a car rental agency in Raleigh. That car was located by police early on 2 April at the Rock Hill, South Carolina Greyhound bus station. Police showed a bus station employee photographs of appellant. Although the employee could not recognize appellant's face, she stated an individual fitting his description had purchased a ticket to Detroit, Michigan on a bus scheduled to arrive there later that day. North Carolina authorities notified the Detroit Police Department of appellant's description and his expected time of arrival.

Detroit police officers arrested appellant at the Detroit Greyhound bus station as he exited an arriving bus. He was carrying a brown tote bag, which contained clothing and a "large amount" of money. The Detroit police also seized a small blue steel revolver containing .32 caliber ammunition.

North Carolina authorities questioned appellant in Detroit on 3 April. After being advised of his constitutional rights, appellant stated he robbed the Clayton Food Town and shot the police officer. According to the officers who interviewed Seaberry, he appeared normal, stated he understood his rights, and signed a waiver form to that effect. However, he also made a number of spontaneous statements that were not responsive to anything he was asked, such as "How about taking me home, man, and let me get a thing?" "Can you give me something for my stomach, man, a hit or something?" and "Are you the one that shot me in the plane, man?"

On the night of the shooting, State Bureau Investigation agents recovered from the crime scene a spent bullet. The SBI's expert in forensic firearms identification testified that in his opinion the spent .32 caliber projectile had been fired from the revolver recovered from the appellant.

Richard Michael Capadano spent about twelve hours in the company of appellant while in custody at Central Prison in Raleigh. During that time appellant told Capadano about committing the crimes in Clayton, being captured, making statements to the Detroit police, and of his plan to fake mental illness and a drug problem to get out of the charges against him.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin Perkins Pendergraft, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant appellant.

ARNOLD, Judge.

[1] Appellant first assigns error to the trial court's denial of his motion for funds to obtain the assistance of a psychiatrist and a ballistics expert to facilitate the preparation and presentation of his defense. The trial court found the testimonial and documentary evidence presented did not demonstrate the threshold showing of a "particularized need" necessary to obtain state funds for independent experts. *State v. Penley*, 318 N.C. 30, 51, 347 S.E.2d 783, 795 (1986). Appellant argues he made the threshold showing and asks for a new trial.

Under N.C.G.S. § 7A-450(b) and N.C.G.S. § 7A-454, the state must provide an indigent criminal defendant with counsel and other necessary expenses. To receive funds for a state-appointed expert,

appellant must show: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood the appointment will materially assist him in the preparation of his case. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988); *see State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *see Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 533, 105 S.Ct. 1087 (1985). The decision whether or not to provide these expenses is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed. 2d 935, 108 S.Ct. 2835 (1988). In determining whether a defendant has made the requisite showing of a particularized need, the court "should consider all the facts and circumstances known to it at the time the motion for . . . assistance is made." *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986). No bright-line rule applies here; instead, the showing demanded is flexible and to be resolved on a case-by-case basis. *See Moore*, 321 N.C. 327, 364 S.E.2d 648.

Appellant claims he needed a psychiatrist to evaluate the effect his cocaine addiction had on his mental capacity at the time the crimes were committed and at the time he made inculpatory statements to law enforcement officers. We agree with the trial court that appellant failed to make the threshold showing of specific necessity required here. A suspicion that the outcome of an examination may be favorable is insufficient to show a reasonable likelihood that an expert will materially assist a defendant in preparation of his defense. *Penley*, at 51, 347 S.E.2d at 795; *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 86 L.Ed. 2d 231, 236 n.1 (1985) (denial of fingerprint and ballistics experts not denial of due process where defendant offered little more than undeveloped assertions).

Appellant argues *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648, controls the determination before us. In *Moore*, an indigent defendant with an IQ of 51 was charged with first-degree sexual offense based almost entirely on his confession and the recovery of his palm print at the scene of the crime. The Supreme Court held the defendant had a constitutional right to psychiatric assistance to dispute the voluntariness of his confession and the right to the help of a fingerprint expert. *Moore*, at 327, 364 S.E.2d at 648.

The defendant in *Moore* established the requisite threshold by showing that: (1) because there was no positive identification

of the perpetrator in the case, the expert testimony and defendant's confession were crucial to the state's case; (2) due to defendant's mental retardation he had limited communication and reasoning ability and thus could not provide defense counsel with much assistance in making a defense; and (3) his confession was of questionable credibility. *Id.* at 335-37, 343, 364 S.E.2d at 652-53, 656.

Certain similarities exist between the case before us and *Moore*. In neither case could the perpetrator be positively identified; in both cases the accused person confessed to committing the crime; and, in both, questions existed concerning the competency of the accused. Nevertheless, we believe the situation here is distinguishable from *Moore*. First, the lack of an eyewitness to the perpetrator's identity standing alone is not sufficient to require the state to provide an indigent defendant with state funds for a psychiatrist in every situation where the state's case is partly dependent on defendant's confession. Where, as in the case before us, other evidence exists, an indigent criminal defendant requesting a psychiatric expert must show something more than the fact that he confessed and that his confession will be important in the state's case against him.

The confession and ballistics evidence were not as important to the state's case here as the confession and palm print were in *Moore*. Eyewitnesses at the scene described the perpetrator's physical build, his clothing, and the vehicle used in the crime. Using this and other information gathered during the ensuing investigation, officials immediately focused on appellant as the main suspect, tracked his movements from Clayton to Raleigh and Rock Hill, and finally apprehended him in Detroit. In addition to the descriptive evidence investigators gathered linking appellant to the crime, this evidence of flight from the scene implicates him, notwithstanding his confession and the ballistics information.

Moreover, while it has been demonstrated that appellant's confession is important to the state's case, unlike the defendant in *Moore*, appellant here has failed to show that his confession was of questionable credibility. As noted above, the defendant in *Moore* had an IQ of 51. More importantly, a forensic psychiatrist for the state testified in *Moore* that because of the defendant's subaverage intelligence he was "easily lead and easily influenced." *Id.* at 337, 364 S.E.2d at 653. Family and friends of the defendant testified to the same effect. Witnesses demonstrated the defendant was

unable to understand complicated subjects. The psychiatrist testified he believed the defendant did not understand the meaning of the term "coercion." *Id.* at 333, 364 S.E.2d at 651. In short, the defendant in *Moore* submitted *detailed* evidence of his suggestible nature and of the potential coercive environment in which his confession was made.

In the present case, appellant has not made such a showing. Instead, the evidence strongly supports the state's contentions that appellant was cognizant of his actions both at the time the crimes were committed and when he made the inculpatory statements. The officers who testified at the motions hearing stated that when interviewed appellant was alert, attentive, and capable of relating the specifics of the case and his involvement in the robbery and shooting.

Appellant's evidence in support of his charge of incapacity primarily comes from a report issued by a state psychiatrist, who evaluated his competency to stand trial, and from appellant's own statements. While the psychiatrist reported he believed Seaberry was a cocaine addict and intoxicated during the period of the alleged crimes, he also concluded appellant was competent to stand trial, that he understood the charges against him, that he was able to cooperate with and assist his attorney in preparing his defense, that he knew right from wrong, and that he was responsible for his actions at the time of the alleged crimes. The only conclusion in the psychiatrist's report supporting appellant's contention of mental incompetency—that he was a cocaine addict when he committed the crimes and when he confessed—was based largely on interviews with appellant, his girlfriend, and his attorney. The psychiatrist also reported he thought appellant was being voluntarily uncooperative during his first evaluation, and he chose to defer his final judgment on competency because he wanted to rule out "malingering" by appellant. In addition, the state presented evidence that Seaberry had made statements to another prisoner soon after he was arrested indicating he intended to fake mental illness and a drug problem to get out of the charges against him. In short, appellant has failed to make the specific evidentiary showing as outlined in *Moore* placing in question his mental condition.

Finally, as a practical matter, appellant had one state appointed psychiatrist when he made his request and did not need a second one. At the time of the motions hearing in Johnston County, ap-

pellant already had been appointed a psychiatrist by a Wake County Superior Court judge for preparation of his defense against separate charges of a similar nature. There appears no reason why appellant could not have subpoenaed the Wake County psychiatrist to provide whatever assistance he needed in the Johnston County case. As the motions hearing judge noted, an indigent is not entitled to more help than someone who is not indigent.

Moreover, we find no error in the trial court's denial of defendant's motion for a state appointed ballistics expert. In *Moore* the palmprint was the only physical evidence the state had against the accused. That is not the situation in this case. While the ballistics expert's testimony may have been important for the state to prove its case against Seaberry beyond a reasonable doubt, our reading of *Moore* is that this fact alone is not sufficient to require the appointment of an independent expert. Second, in reaching its decision in *Moore*, we note that the Supreme Court emphasized the limited communication and reasoning abilities of the mentally retarded defendant and recognized he would be unable to assist his counsel in the preparation of his defense. *Moore*, at 344-45, 364 S.E.2d at 657. Again, that is not the case here. Although Seaberry may be a cocaine addict, he presented no detailed evidence contradicting the psychiatrist's conclusion he was capable of assisting in his defense. Thus, the denial of appellant's motions requesting a ballistics expert is upheld.

[2] Appellant next assigns error to the fact that he was not present at the pretrial hearing on 19 September 1988 when the motions discussed above were denied. The hearings judge proceeded after he inquired concerning appellant's whereabouts and was informed Seaberry was in custody in Wake County for other charges pending against him. Appellant claims this deprived him of his right to be present at the hearing and to confront the witnesses who testified, and that he is entitled to a new trial.

A criminal defendant has the constitutional right to be present at any stage of a criminal proceeding that is critical to the outcome if his presence would contribute to the fairness of the procedure. *Snyder v. Massachusetts*, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330 (1934); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The Confrontation Clause of the Sixth Amendment made applicable to the states by the Fourteenth Amendment grants defendants the right to be present at any stage of the proceedings at which

witnesses are to be questioned. *Illinois v. Allen*, 397 U.S. 337, 25 L.Ed. 2d 353, *reh'g denied*, 398 U.S. 915, 26 L.Ed. 2d 80 (1970); *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969). Similarly, the North Carolina Constitution at Article I, § 23 provides: "[i]n all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ."

A defendant's right to be present at every stage of trial also has a due process component. 3 W. LaFave & J. Israel, *Criminal Procedure* § 23.2(c) (Supp. 1989). Accordingly, this right is not restricted to situations where defendant is actually confronting witnesses or evidence against him, but encompasses all trial-related proceedings at which defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.*

More importantly, whether a particular proceeding is critical to the outcome of the trial is *not* the proper inquiry in determining if a criminal defendant's rights under the Sixth Amendment has been violated. *Kentucky v. Stincer*, 482 U.S. 730, 96 L.Ed. 2d 631 (1987). "The appropriate question is whether there has been any interference with defendant's opportunity for effective cross-examination." *Id.* at 745, n.17, 96 L.E.2d at 647, n.17. Similarly, under the due process analysis, "the question is not simply whether, 'but for' the outcome of the proceeding, the defendant would have avoided conviction, but whether the defendant's presence at the proceeding would have contributed to the defendant's opportunity to defend himself against the charges." *Id.* This privilege of presence is not guaranteed "when presence would be useless, or the benefit but a shadow." *Snyder*, at 106-107, 78 L.Ed. at 678. Defendant has made no showing that the motions hearing would have been more reliable due to his physical presence or his contributions to the process of cross-examination.

Assuming for a moment that a hearing for a state appointed expert is deemed a critical stage requiring the defendant's presence, we believe appellant in this case waived his right to attend his motions hearing. *See Braswell*, at 559, 324 S.E.2d at 246. Neither the record nor the transcript of the hearing reveal any indication appellant wanted to be present at the hearing. Defense counsel never objected to appellant's absence, requested appellant be transported to Johnston County for the hearing, nor asked that

the hearing be delayed until appellant could attend. "In a non-capital case counsel may waive defendant's right to be present through failure to assert it just as he may waive defendant's right to exclude inadmissible evidence by failing to object." *Id.* The most likely reason for appellant's absence from the hearing is that neither appellant nor his counsel felt his presence was necessary.

Finally, in *State v. Braswell*, the Supreme Court recognized a defendant's right to confront witnesses against him, like his right to be present at all critical stages of a trial, is subject to harmless error analysis. *Id.* at 553, 324 S.E.2d at 241; *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L.Ed. 2d 384 (1987). "Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E.2d 677, 682 (1972); *see* N.C.G.S. § 15A-1443(b). Assuming it was improper for the trial judge to conduct the motions hearing without appellant present, we believe that decision had no effect on the outcome of the trial.

Defendant's remaining assignments of error relating to admission of his confession and physical evidence are feckless.

No error.

Chief Judge HEDRICK concurs.

Judge BECTON dissents.

Judge BECTON concurring in part and dissenting in part.

Like the majority, I find no error in defendant's assignments of error relating to the admission of his confession and physical evidence. I agree with the majority that defendant "had one state appointed psychiatrist [in his Wake County cases] . . . and did not need a second one," ante, at 209-10. Believing however that defendant was entitled to funds to pay the psychiatrist any additional necessary expenses incurred in the preparation of his Johnston County case, that defendant made a threshold showing of specific necessity for funds to obtain the assistance of a ballistics expert,

and that defendant had a right to be present at the hearing regarding his requests for experts, I dissent.

Although defendant had no right to the appointment of multiple experts or the expert of his choice, he was entitled to a psychiatrist who could assist him in evaluating, preparing, and presenting his defense against the charges for which he was on trial. *See State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). I believe the trial judge erred in denying defendant's motion for funds for a psychiatrist.

Further, since there were no eyewitnesses who could positively identify defendant as the culprit and the State's case hinged significantly upon the ballistics evidence, I believe defendant made a threshold showing of specific necessity for a ballistics expert. In my view, *Moore* controls. In that case, our Supreme Court considered defendant's right to an independent fingerprint expert when the single piece of physical evidence placing defendant at the crime scene was a palm print which, according to the State's expert, matched defendant's. Noting 1) that a palm print found at the crime scene had been identified by the State's expert as defendant's, 2) that the State's witness could not identify the perpetrator of the crimes charged, 3) that the State's palm print evidence was thus critical to the State's case, 4) that defense counsel lacked the expertise to assess the accuracy of the State's expert's identification of the palm print, and 5) that defendant Moore was mentally retarded and able to provide his counsel with little assistance in making his defense, the Court concluded that defendant had made the requisite threshold showing of specific necessity for a fingerprint expert and that he would have been materially assisted in the preparation of his defense had his motion been granted. In the case before us, defendant made a similar showing. Although he was not mentally retarded, there was evidence that he was a cocaine addict and was under the influence of drugs when the crime occurred.

Further, in denying defendant's motion for funds to hire a ballistics expert, the trial judge operated under a misapprehension of fact and law. First, the trial judge erroneously believed that there was no confession in the *Moore* case. He said that "[i]n the *Moore* case they didn't have a confession. That's a material point. I can't see how I could find that the assistance of a ballistics expert could assist [in] the preparation of this defense." Second,

the trial judge erroneously believed that defendant had to show a likelihood that the requested expert would reach a conclusion favorable to defendant. He said, ". . . I think you have to at least establish probable cause that you might get that result, and you have not done that here . . . . But just on the mere fact [that] 'I might get lucky,' the State is supposed to pay for that?" The *Moore* court rejected a similar assertion:

> The showing suggested by the State is not required. To require as a condition precedent to acquiring an appointed fingerprint expert that the defendant discredit the State's expert testimony stands at odds with the general "threshold" showing of need required under our cases. The State's proposed test would demand that the defendant possess already the expertise of the witness sought.

321 N.C. at 345, 364 S.E.2d at 657.

Finally, defendant was denied his constitutional rights to be present at all critical stages of the trial and to confront witnesses against him. *See Rushen v. Spain*, 464 U.S. 114, 78 L.Ed.2d 267 (1983), *reh'g denied*, 465 U.S. 1055, 79 L.Ed.2d 730 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Defense counsel's failure to request defendant's presence or to expressly consent to defendant's absence is not fatal, in my view, since defense counsel did not have the power to waive defendant's right to be present at a hearing involving felony offenses. Significantly, had defendant been present he may have been in a better position to assist his attorney in some way. Moreover, an opportunity to observe the conduct and demeanor of the defendant reasonably may have affected the trial judge's assessment of defendant's need for the assistance of a psychiatrist. In my view this error cannot be said to be harmless beyond a reasonable doubt. *Braswell*, 312 N.C. at 560, 324 S.E.2d at 247.

For the foregoing reasons, I believe defendant should be awarded a new trial.

ORIN HAYWOOD WEEKS, JR. v. NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT AND NORTH CAROLINA COASTAL RESOURCES COMMISSION

No. 893SC495

(Filed 6 February 1990)

1. **Administrative Law § 5 (NCI3d)— denial of development permit—appeal to superior court—availability of summary judgment**

The trial court did not err by granting summary judgment for the State where the Coastal Resources Commission denied plaintiff a major development permit to build a 900-foot-long pier in Bogue Sound and plaintiff filed a complaint in superior court alleging an unreasonable exercise of police power and requesting relief under N.C.G.S. § 113A-123(b) rather than appealing the Commission's findings pursuant to N.C.G.S. § 113A-123(a). Although plaintiff contended that the grant of summary judgment rendered the statutory provision for a jury trial meaningless, the device of summary judgment allows the court to pierce the pleadings to discern whether the parties' forecast of evidence reveals that more than questions of law are involved. Plaintiff has the right to use the statutory method for determining whether a taking occurred, and within that method can seek a jury trial on the takings issue if he presents an unresolved issue of fact, but is barred from relitigating the same issues of fact that the Commission resolved after hearing evidence concerning plaintiff's application.

Am Jur 2d, Summary Judgment § 4.

2. **Constitutional Law § 23.1 (NCI3d); Waters and Watercourses § 6.1 (NCI3d)— pier in Bogue Sound—permit denied—not a taking**

The trial court did not err by granting summary judgment for the State where plaintiff contended that the Coastal Resources Commission's denial of a major development permit constituted a taking without compensation where the Commission denied the permit; plaintiff filed an action in superior court without appealing the Commission's findings; the State introduced the Commission's findings; plaintiff presented no evidence at the summary judgment hearing to dispute the findings; and the evidence showed that plaintiff was not de-

prived of all practical uses of his property by the denial of his application to build a 900-foot pier into Bogue Sound.

Am Jur 2d, Wharves §§ 8, 25.

APPEAL by plaintiff from order entered 21 February 1989 by *Judge Charles B. Winberry* in CARTERET County Superior Court. Heard in the Court of Appeals 8 November 1989.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by C. R. Wheatly, III, for plaintiff-appellant.

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

GREENE, Judge.

Plaintiff-petitioner appeals the trial court's grant of summary judgment for the State. The undisputed facts show that plaintiff is a littoral[1] property owner on Bogue Sound who applied for a major development permit to build a 900-foot-long pier to reach deep waters in which to dock his sailboat. Bogue Sound is a portion of Atlantic Ocean waters subject to the ebb and flow of the tide. Defendants are administrative bodies of the State of North Carolina. North Carolina Department of Natural Resources and Community Development ("NRCD") is the administrative body administering the Coastal Area Management Act ("CAMA"), pursuant to N.C.G.S. § 113A-100, et seq. North Carolina Coastal Resources Commission ("Commission") is the administrative arm of NRCD, established by the General Assembly to designate areas of environmental concern and to consider applications for development in these areas. N.C.G.S. §§ 113A-104 (1983), 113A-113 (1983), 113A-118 (1987). Plaintiff applied for a major development permit to build the pier pursuant to N.C.G.S. § 113A-118(d)(1). N.C.G.S. § 113A-120 provides:

> (a) The responsible official or body shall deny the application for permit upon finding:
>
> . . . .

1. Although the terms "riparian" and "littoral" are often used interchangeably, plaintiff is a littoral proprietor. A "riparian" right is one "[b]elonging or relating to the bank of a river or stream . . . The term is sometimes used as relating to the shore of the sea or other tidal water . . . [b]ut this is not accurate. The proper word to be employed in such connections is 'littoral.'" Black's Law Dictionary 1192 (5th ed. 1979).

(5) In the case of areas covered by G.S. 113A-113(b)(5), that the development will jeopardize the public rights or interests specified in said subdivision.

N.C.G.S. § 113A-120(a)(5) (1987). N.C.G.S. § 113A-113(b)(5) provides that the Commission can designate as areas of environmental concern "waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights . . ." N.C.G.S. § 113A-113 (1983). The Commission considered and denied plaintiff's application.

Without appealing the Commission's findings pursuant to N.C.G.S. § 113A-123(a), plaintiff filed a complaint in the Superior Court requesting the relief provided in § 113A-123(b), alleging that the Commission's actions were an unreasonable exercise of police power. N.C.G.S. § 113A-123 (1983).

In his complaint, plaintiff alleges:

7. At periods of high water the area of approximately 600 feet from the shoreline of the land of the Plaintiff is not navigable *except by shallow draft vessels.* [Emphasis added.]

8. That the Plaintiff advised the [Commission] that he wished to keep a small sailboat in front of his house, that is why he needed to get to at least 3½ feet of water.

. . . .

15. That the final order of the Coastal Resources Commission so restricts the use of Plaintiff's property, as to deprive him of the practical uses thereof.

16. That the actions of the Defendants are an unreasonable exercise of police power, and the order constitutes the equivalent of a taking without compensation.

N.C.G.S 113A-123(b) provides in pertinent part:

[T]he [superior] court shall determine whether [the Commission's final] order so restricts the use of [plaintiff's] property as to deprive him of the practical uses thereof, being not otherwise authorized by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation. . . The burden of proof shall be on petitioner as to ownership and the burden of proof shall be on the Commission to prove that the order

> is not an unreasonable exercise of the police power, as aforesaid. Either party shall be entitled to a jury trial on all issues of fact . . . The method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be exclusive and such issue shall not be determined in any other proceeding. . . .

The State answered plaintiff's complaint and moved for summary judgment on the grounds that plaintiff alleged no property interest in submerged tidal lands superior to the State's ownership of lands held in the public trust, plaintiff only owned a qualified right of access over tidal waters subject to public trust rights, CAMA dictated denial of the application because public trust rights were jeopardized by the proposed pier, plaintiff failed to obtain judicial review of the Commission's findings of fact in its denial of plaintiff's application and was bound by the findings, and the denial of plaintiff's application was neither an unreasonable exercise of police powers nor a deprivation of the practical uses of plaintiff's property. In support of its motion, the State offered the Commission's findings of fact in its order denying plaintiff's application. Those findings in pertinent part are as follows:

Findings of Fact

1. Description of Proposed Project:

d. The site of the proposed pier is located in the public trust, coastal wetlands, and estuarine waters areas of environmental concern, as designated by the Coastal Resources Commission pursuant N.C G.S. 113A-113. . . .

e. The proposed pier would have a footprint shadow of approximately 5,700 square feet (900′ long by 6′ wide with a T-head platform measuring 15′ by 20′). Approximately 120 feet of salt marsh cord grass and 5,700 square feet of black needle rush would be shaded by the proposed pier. The project would involve approximately 5,580 square feet of surface water and bottom land, as well as submerged aquatic vegetation. . . .

f. The petitioner [plaintiff] applied for a 900 foot long pier so that it would extend to the area in front of his property where the water depth first reached 3½ to 4 feet mean low water. He intends to use the pier to dock his 23 foot

sail boat which has a fixed keel requiring minimum water depth of 3½ feet. . . .

2. Inconsistency of Proposed Pier with CAMA Guidelines

a. The proposed pier would be several times longer than the majority of piers authorized under CAMA which are generally under 200 feet in length. The proposed pier would be significantly longer than any pier previously permitted by CAMA on this shoreline. Piers in the vicinity of the proposed project extend 150-250 feet into Bogue Sound. . . .

b. Coastal Resources Commission guideline 15 NCAC 7H.0208(b)(e) requires that piers not extend beyond the established pier length along the same shore line for similar uses.

c. Expert testimony from the Assistant Director for DCM [Division of Coastal Management] established that "similar use" within the meaning of 15 NCAC 7H.0208(b)(6)(e) properly refers to the type of use of the adjacent property, i.e. single family residential, commercial, etc. "Similar use" does not refer to the size of the boat owned by the applicant or type of recreational activity desired by the applicant. . . .

d. The "same shoreline" for purposes of 15 NCAC 7H.0208(b)(6)(e) is established by the DCM staff on a case by case basis; in doing so, DCM considers shoreline features, such as geography, land use factors, and public uses of the shoreline and waters. . . .

. . . .

h. The only two piers of a length similar to the length of the pier proposed by the petitioner, shown to have been permitted by DCM[,] are distinguishable. First, they are in entirely different areas of the State, and thus are not located on the same shoreline or body of water. Second, the two piers permitted, Rogers Bay and Edgewater, extend less than 200 feet and less than 50 feet[,] respectively[,] over open water. The two structures are located primarily over *irregularly* flooded marsh, which is not entirely submerged even when flooded by the tide. The piers were allowed for pedestrian use, rather than to dock boats, and will protect the marsh grass from the heavy foot traffic

which would otherwise occur. The proposed pier would cover open, navigable water for the entire span of the pier at high tide and would shade shellfish beds rather than thick marsh grass. . . . [Emphasis in original.]

. . . .

j. All evidence presented in the record indicates that the Division of Coastal Management has applied the guidelines adopted by the CRC [Commission] for public trust AECs [areas of environmental concern] and for piers and docks consistent with the geographic circumstances. No CAMA major development permit has ever been issued which allows a pier to extend as much as 900 feet over open water at mean high tide.

k. The only expert testimony presented at the hearing established that the pier *as proposed* is inconsistent with CRC guidelines and may not lawfully be permitted under CAMA. [Emphasis in original.]

3. Bogue Sound and Public Uses:

b. Bogue Sound as a navigable body of water is "navigable" to the high water mark at mean high tide. . . .

c. Bogue Sound is a wide, relatively shallow, body of water regularly and commonly used by the public between the high water mark and the federally maintained channel. . . .

. . . .

g. The 600 foot area of shallow water in front of the property is not regularly exposed at low tide. The presence of eel grass in the area is inconsistent with regular exposure of the area at low tide. This evidence refuted any showing by the petitioner that tended to show the area was regularly exposed at low tide and not navigable in that area. . . .

h. At high tide, Bogue Sound is navigable to the shore by small boats of 16 to 20 feet in length. Bogue Sound is commonly navigated by smaller vessels within 500 to 900 feet of the shore at low tide, and to the high water mark at high tide. . . .

i. Bogue Sound, in the immediate area of the proposed pier, is commonly and heavily used by members of the public,

including other riparian owners, for net fishing, scalloping and clamming. . . .

j. Bogue Sound in the immediate area of the proposed pier is heavily used by local families and campers at a church camp for various recreational activities including small sailboats, skiffs, waterskiing, and fishing. . . .

k. The predominant land use on the shoreline of this area of Bogue Sound is single family residential. . . .

l. Several adjacent riparian [sic] landowners and public users from the immediate area of Bogue Sound objected to the proposed permit because of concern over the length of the proposed pier and detrimental impacts the pier would have on their uses of the waters of Bogue Sound for navigation, fishing, and recreation. . . .

m. The proposed pier would obstruct navigable waters for a distance of 900 feet at high tide. The proposed pier would extend such a distance into open waters that it represents a high potential for substantial impairment of traditional public uses and rights in this area of Bogue Sound. During periods of rough weather and periods of heavy traffic times on the Intercoastal Waterway by large boats, the near shore area is used for navigation by shallow draft boats to avoid the hazards to navigation caused by either rough weather or waves from large boats. The area is also used at night for safe navigation. . . .

n. Petitioner would have access to navigable waters with a pier of 400 feet in length. . . .

. . . .

p. There is no evidence in the record tending to show that petitioner holds any easement or grant to the submerged lands on which the proposed pier would be built that would give petitioner any property interest in those submerged lands. Petitioner has shown only that he has a riparian [sic] property owner's qualified right of access to navigable waters. . . .

q. The DCM did carefully and properly consider the petitioner's qualified right of riparian [sic] access and balanced this right against the traditional public uses of the waters of Bogue

> Sound in making the decision to deny the permit application.
>
> . . .

Countering the State's evidence, plaintiff offered his affidavit, setting forth one contention:

> 5. That by Motion for Summary Judgment, Respondent [State] has stated that the Coastal Resources Commission has determined that Petitioner could obtain a CAMA major development permit for the construction of a pier of up to 400 feet in length. That said statement is erroneous in that the Commission simply denied Petitioner's request for a permit, thus preventing Petitioner from having any pier at all.

The issues presented are whether I) the Judicial Review statute, N.C.G.S. § 113A-123(b), provides that jury trial is the exclusive method of determining the 'takings' issue, (A) precluding the trial court from ruling on the State's summary judgment motion or (B) considering the Commission's prior findings of fact in ruling on a question of law; and II) the Commission's findings established that the State was entitled to summary judgment.

I

[1] Plaintiff first contends that jury trial is the only method available by statute to protect his "landowner rights" from being 'taken' without compensation, and that the trial court's grant of summary judgment renders the statutory provision for jury trial "meaningless." We disagree with plaintiff's contentions for the reasons listed below.

A

The judicial review statute provides that "[e]ither party shall be entitled to a jury trial on all issues of *fact*. . ." N.C.G.S. § 113A-123(b) (emphasis added). Summary judgment is appropriate if only questions of law are raised, which do not require jury trial. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). Thus, the device of summary judgment allows the court to "pierce the pleadings" to discern whether the parties' forecast of evidence reveals that more than questions of law are involved. *Id.* (citation omitted). Such a device is consistent with the statute and does not render the statute meaningless.

B

Plaintiff also contends that the jury trial provision became meaningless when the trial court allowed the State to introduce the Commission's factual determinations to support its motion for summary judgment. We disagree with plaintiff's contention for two reasons.

First, plaintiff's argument runs counter to established principles of law regarding administrative fact-finding. "The general rule is that an essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action." *Maines v. City of Greensboro,* 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980). The Commission made these findings after hearing expert testimony and any evidence plaintiff cared to present in support of his application. Plaintiff failed to object to or seek judicial review of the Commission's findings of fact pursuant to § 113A-123(a) and the findings are binding on plaintiff in this proceeding filed pursuant to § 113A-123(b). *Id.*

Second, plaintiff misperceives the issue at the heart of the judicial review statute. The statute provides that "[t]he method provided in this subsection [b] for the determination of the issue of whether [the Commission's] order constitutes a taking . . . shall be exclusive . . ." Plaintiff argues that if we give effect to the legal principle protecting administrative fact-finding, the Commission's previous final decision denying his application was an 'other proceeding' determinative of the 'taking' issue for which the statute provides the 'exclusive method.' As discussed above, the statute's 'method' contemplates both legal and factual determinations only of whether a 'taking' occurred. The Commission made its findings of fact solely in determination of whether to grant plaintiff's permit application. The Commission's findings certainly bear on the Commission's bases for denying the application, but they are not dispositive of the 'taking' issue. We note that the Commission also made Conclusions of Law in its order, including the conclusion that "[d]enial of petitioner's request for a 900 foot pier does not constitute a denial of opportunity for petitioner to exercise his common law right of riparian [sic] access, therefore, as a matter of law, there was no 'taking' of exercise of eminent domain by [the Commission]'s permit denial." The State admits, and the statute provides, that such conclusions of law by the Commission on the 'takings' issue have no weight.

Plaintiff has the right to use the statutory method for determining whether a 'taking' occurred, and within that method can seek jury trial on the 'takings' issue if he presents an *unresolved* issue of fact, but he is barred from relitigating the same issues of fact that the Commission resolved after hearing evidence concerning plaintiff's application. Plaintiff seeks to avoid the effects of his failure to request judicial review of the findings in the Commission's order as provided by section (a) of the statute, but the statute does not require the superior court to conduct pointless jury trials if no issue of fact supports plaintiff's claim.

II

[2] Plaintiff next contends that the trial court improperly entered summary judgment for the State because he raised a material issue of fact that the Commission's denial of his permit is "an unreasonable exercise of police power," constituting a 'taking' without compensation.

Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56; *Lowe*, at 369, 289 S.E.2d at 366. The movant has the burden of forecasting evidence showing that there are no material issues of fact and that it is entitled to judgment as a matter of law. *Id.* If the movant for summary judgment is not the party with the burden of proof of the claim, the movant's burden consists of (1) proving the lack of an essential element of the nonmovant's claim or (2) using discovery to show that the nonmovant cannot produce evidence to support an element of his claim. *Id.*, at 369-70, 289 S.E.2d at 366. If the movant fails to carry its burden, the nonmovant need not respond and summary judgment is improper, regardless of whether the nonmovant responds. *Id.* If, however, the movant carries its burden, the opposing party must respond with specific facts showing there is a genuine issue for trial or with an excuse for not doing so. Rule 56; *Id.*, at 370, 289 S.E.2d at 366. The opposing party cannot rely on the bare allegations of his complaint if the movant supports its motion by affidavit or otherwise. *Id.*

In the grant of summary judgment presented for our review, the State is movant and plaintiff is the opposing party. Therefore, the State has the burden of proving that plaintiff's claim lacks an essential element. To satisfy this burden, the State offered the Commission's Findings of Fact to support its motion. The record

shows no evidence plaintiff presented at the summary judgment hearing to dispute these findings, although he offered his affidavit, as shown above. Because plaintiff is not permitted to rely on his pleadings to rebut these facts and offered no excuse for not doing so, the only issue for our review is whether these undisputed facts entitle the State to judgment as a matter of law.

The law of the case is that damages resulting from a reasonable, or proper, exercise of police power are noncompensable. *Barnes v. Highway Comm.*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations omitted). The test for a reasonable exercise of a police power rule or regulation is known as the "ends-means" test. *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14, *reh. denied*, 325 N.C. 714, 388 S.E.2d 452 (1989). In evaluating the regulation's effect, one first looks to the 'ends,' or goals, of the legislation to determine whether it is within the scope of the police power, and second, to the 'means,' to determine whether the interference with the owner's right to use his property as he deems appropriate is reasonable. *Id.* A failure in either 'ends' or 'means' results in a taking. *Id.*

Within the second prong of the 'takings' analysis, the 'reasonable means' prong, a statute works a 'taking' of property if it (1) deprives the owner of all practical use of the property and (2) renders the property of no reasonable value. *Id.*, at 364, 384 S.E.2d at 15, citing *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 264, 302 S.E.2d 204 (1983). Mere restriction of 'practical uses' or diminishment of 'reasonable value' does not result in a 'taking.' *Id.*, at 364, 302 S.E.2d at 210, quoting *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979).

Plaintiff directs his contentions only to the first part of the two-part 'reasonable means' inquiry, whether the Commission's denial of his pier development permit deprived him of a 'all practical use' of the property. Specifically, he argues that because the tidal waters overlying the submerged land was not "usable" in navigation for mooring his boat, the Commission's denial was a 'taking' of the practical use of his property. We disagree.

As a littoral proprietor, plaintiff's rights derive from two distinct properties: 1) the principal estate of land extending to the shoreline of Bogue Sound, and 2) the appurtenant estate of submerged land in Bogue Sound benefiting the principal estate. *Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968); *see also* Black's Law

Dictionary at 94 ("A thing is deemed . . . *appurtenant* to land when it is by right used for its benefit, as in the case of a . . . water-course . . ." (emphasis in original)). However, the plaintiff's status as a littoral property owner does not guarantee him an absolute right to access over the tidal area of Bogue Sound because this right is "subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable waters." *Capune*, at 588, 160 S.E.2d at 886. Thus, plaintiff's right in the appurtenant submerged land is subordinate to public trust protections, such as those evinced in N.C.G.S. § 113A-120(a)(5) (permits may be denied upon a finding that the "development will jeopardize the public rights and interest" in the waterways and lands "under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights"). The Legislature's authority to protect public trust rights always is limited by plaintiff's right to retain some use or value of his property.

The issue is whether plaintiff is left with some practical use of his appurtenant interest. That the denial of the 900-foot pier permit restricts plaintiff's use of his interest in the submerged property to some degree and prohibits him from developing it as he may wish is immaterial. *See Finch*, at 371, 384 S.E.2d at 19. The Commission determined that the building of a 900-foot pier would "jeopardize the public rights and interest" and did not address, as it was not raised by the plaintiff, what length pier would be consistent with "public rights and interest." Not only does plaintiff have the right to petition the Commission for a pier of some length less than 900 feet, but the Commission's findings show that the shallow tidal water covering the submerged land has many recreational uses, including boating by "small boats of 16 and 20 feet in length, fishing, scalloping and clamming" and waterskiing. Furthermore, plaintiff has the current use of his principal estate of land and does not argue that there has been any taking of this property interest, apart from his appurtenant use in the submerged land. Accordingly, we determine that the State has met its burden of showing at the summary judgment hearing that plaintiff was not deprived of all practical uses of his property by the Commission's denial of his application to build a 900-foot pier.

Affirmed.

Judges BECTON and PHILLIPS concur.

LOIS E. KOUFMAN v. JAMES A. KOUFMAN

No. 8921DC105

(Filed 6 February 1990)

1. Appeal and Error §§ 24, 45 (NCI3d)— appellate rules—appeal heard in interest of justice

Plaintiff in a domestic action complied with Rule 10(c) of the North Carolina Rules of Appellate Procedure (effective for judgments entered prior to 1 July 1989), and, although plaintiff did not entirely comply with Rule 28, the Court of Appeals disposed of the appeal on its merits in the interest of preventing manifest injustice.

Am Jur 2d, Appeal and Error § 235.

2. Divorce and Alimony § 24.4 (NCI3d)— child support—motion for contempt—denied—no error

The trial court in a child support action did not err by holding that defendant was not in contempt where the court's findings supported its conclusion of law and the findings were supported by competent evidence in that plaintiff's contentions arising from the enrollment of their son in a private boarding school essentially pointed out the conflict between her testimony and defendant's testimony, and defendant testified and the court found that he had reduced his child support payments in reliance upon a memorandum of judgment executed by the parties.

Am Jur 2d, Divorce and Separation § 1071.

3. Divorce and Alimony § 24.9 (NCI3d)— child support—findings as to children's expenses—insufficient

The trial court erred in a child support action by making a finding as to the children's expenses where plaintiff had submitted only an affidavit of expenses dated August 1988 and there were no affidavits in the record for the earlier period from October of 1986 when the original support order was signed. Moreover, there was no basis for the conclusion that certain of plaintiff's home and automobile maintenance costs would decrease because one child was not present in

the home; fixed and indivisible costs of maintaining a home do not decrease proportionally when a child is not present.

Am Jur 2d, Divorce and Separation §§ 1082, 1083.

4. Judges § 5 (NCI3d)— child support—motion for recusal denied—motion for another judge to hear recusal denied

The trial judge in a child support action did not err by failing to recuse himself from further hearings in the action or by failing to have the recusal motion heard by another judge where plaintiff did not allege personal bias and the remarks in chambers which allegedly indicated prejudging of the case occurred after some evidence had been heard.

Am Jur 2d, Judges §§ 170, 217.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiff from order entered 1 September 1988 by *Judge R. Kason Keiger* in FORSYTH County District Court. Heard in the Court of Appeals 13 September 1989.

Plaintiff appeals in this civil action from the trial court's denial of her motion to hold defendant in contempt for his alleged failure to pay child support. She also appeals the trial court's granting of defendant's motion to reduce child support payments.

White and Crumpler, by G. Edgar Parker and Christopher L. Beal, for plaintiff-appellant.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Clifton R. Long, Jr., for defendant-appellee.

JOHNSON, Judge.

Plaintiff instituted this action on 6 February 1986 by the filing of a complaint in which she sought custody of her two minor children, child support, alimony, equitable distribution, divorce from bed and board, and attorney's fees. Defendant filed responsive pleadings, and on 24 October 1986, a consent order was signed and entered in district court. The order provided, *inter alia*, the following: (1) that the parties share custody of the minor children equally with plaintiff being considered primary custodian; and (2) that defendant pay $3,333.33 per month child support, for a total of $40,000 per year.

On 22 October 1987, plaintiff filed a motion for defendant to appear and show cause why he should not be held in contempt for violating the terms of the 1986 consent order. At the time the motion was filed, defendant was in arrears $288.17 on the October 1987 payment. A show cause order was signed, defendant responded and filed a countermotion to reduce child support payments based on a material change in circumstances.

After a hearing on both motions before the Honorable R. Kason Keiger on 8 February 1988, the parties executed a memorandum of judgment which provided, *inter alia*, that defendant's child support be reduced to $1,000 per month per child; that defendant pay all private school expenses of the children; and that defendant be given credit on child support payments for any private school expenses which exceed $18,000 per year. The document was not signed by Judge Keiger nor filed in the court file.

Upon plaintiff's refusal to sign the consent order drafted pursuant to the memorandum of judgment, defendant moved that the court conduct a hearing and issue an order making the memorandum of judgment an order of the court. Plaintiff responded that the memorandum was unenforceable, and that she had signed it under duress and coercion. She also moved that Judge Keiger recuse and disqualify himself in this matter based on his actions at the 8 February 1988 hearing. Judge Keiger denied this motion in an order entered 17 May 1988.

After a full hearing on 24 August 1988, Judge Keiger held that defendant was not in contempt of court and was in full compliance with all orders of the court. The court also reduced defendant's child support to $1,700 per month, ordered defendant to pay the private school expenses of both children, and ordered defendant to maintain medical and dental insurance on the children and to pay all reasonable medical expenses not covered by the insurance.

Plaintiff appealed to this Court in apt time.

[1] Before turning to the merits of plaintiff's appeal we address defendant's motion that plaintiff's appeal should be dismissed for her failure to state plainly, concisely and without argument the legal basis upon which error is assigned pursuant to Rule 10(c)(1) of the N.C. Rules of Appellate Procedure. (Rule 10(c)(1) is a new rule applicable only to appeals of judgments of the trial division entered on or after 1 July 1989. It is not applicable to this case.

We assume appellee intended to refer to Rule 10(c) which is effective for judgments entered prior to 1 July 1989.) We find that plaintiff has sufficiently complied with this rule and defendant's argument is without merit.

Defendant also urges that plaintiff's appeal be dismissed for failure to comply with Rule 28(b)(3) and (4) of the N.C. Rules of Appellate Procedure which requires a concise statement of procedural history and a complete, non-argumentative summary of the facts. Plaintiff failed to comply with this rule by combining the statement of procedural history with the factual summary. Plaintiff also almost entirely failed to make reference to pages in the record on appeal as required by Rule 28(b)(4). (In response to defendant's motion, plaintiff has supplied the Court with a statement of facts to which page references have been added.)

Although plaintiff has not entirely complied with Rule 28, in the interest of preventing manifest injustice, we deem it appropriate to dispose of this appeal on its merits, pursuant to Rule 2 of the N.C. Rules of Appellate Procedure. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985). Accordingly, defendant's motion to dismiss is denied.

[2] By her first two Assignments of Error, plaintiff contends that the trial court erred in holding that defendant was not in contempt of court and in making findings of fact and conclusions of law supporting that holding. We find no error.

Our review of contempt proceedings is confined to whether there is competent evidence to support the findings of fact and whether those findings support the judgment. *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971). The 24 October 1986 order provided that any amount over $10,000 per year paid by defendant for private school expenses was to be shared equally by the parties. It also stated that the parties contemplated that their children would continue to attend private schools. Defendant testified that plaintiff did not object to enrolling their son Joseph in Woodberry Forest private boarding school since his former private school did not go past ninth grade. Defendant testified that plaintiff personally mailed a deposit form to Woodberry Forest. Based on the amounts spent by defendant on Woodberry Forest, he deducted $288.17 from monthly child support pursuant to the parties' agreement.

Plaintiff contends that the decision to enroll Joseph in Woodberry Forest was unilateral and that she was against it. This, she states, was in violation of the 24 October 1986 order which required the parties to participate equally in making major decisions concerning the children.

Essentially, plaintiff is pointing out the conflict between her testimony and that of defendant. It was the province of the trial court to resolve this conflict. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Our review of the record shows that there was competent evidence to support the court's determination. Therefore, its findings that defendant's child support reduction prior to 8 February 1988 were in accord with the 24 October 1986 order and not in willful disregard of any court order will not be disturbed on appeal.

Defendant testified (and the court found as fact) that after 8 February 1988 he reduced his child support payments to $2,000 per month in reliance on the memorandum of judgment executed by the parties on that date. We need not determine the binding effect of the memorandum of 8 February in order to conclude that defendant was not in willful contempt of court in relying on its contents. We conclude that the court's findings of fact are supported by competent evidence, and these findings support the court's conclusion of law and order that defendant was not in contempt of court.

[3] Next, plaintiff argues that the trial court erred in denying her motion to dismiss made at the conclusion of the evidence with respect to defendant's countermotion to reduce his child support payments. She also contends that certain findings of fact supporting the reduction in child support were not supported by the evidence.

Plaintiff's motion in this nonjury trial should be treated as one for involuntary dismissal pursuant to Rule 41(b) of the N.C. Rules of Civil Procedure. *Holthusen v. Holthusen*, 79 N.C. App. 618, 339 S.E.2d 823 (1986). Pursuant to this rule, the judge may at the close of the defendant's evidence give judgment against him "not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he [the judge] may then determine them to be from the evidence then before him. *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218 (1983).

Defendant has the burden of proving a substantial change in circumstances affecting the welfare of the child to justify modifying a child support order. *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979). To order a modification, the court must determine the present reasonable needs of the children. Evidence of actual past expenditures is essential in determining the children's present reasonable needs. *Norton v. Norton*, 76 N.C. App. 213, 332 S.E.2d 724 (1985).

> Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. It is a question of fairness and justice to all concerned. . . . In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. . . .
>
> . . . .
>
> . . . Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 712-14, 268 S.E.2d 185, 189-90 (1980) (citations omitted).

It is clear from the record and reflected in the court's order that defendant is a man of considerable financial means and his wealth has increased substantially since the time of the October 1986 child support order. Because of his financial position compared to that of plaintiff's, the court order requires defendant to continue to provide the entire support of his two children.

Applying the principles applicable to modification of child support set forth above, we must conclude that the court had before it insufficient evidence of the two children's actual past expenditures to support a specific finding of fact. The court made a finding of fact that "the plaintiff's expenses in her home for the minor children were in excess of $3,000 per year." (We assume that the court intended to say "in excess of $3,000 per *month*" rather than "per *year*.") Defendant does not direct us to evidence in the record to support this figure, nor does our review of the record reveal any. Plaintiff submitted only an affidavit of expenses dated August 1988. There are no affidavits in the record on appeal for the earlier period from October 1986 when the original support order was signed. This lack of evidentiary support for a finding regarding expenditures constitutes one basis for reversing the trial court order.

We also find the trial court's method of calculating the present reasonable expenses (excluding tuition and medical insurance) for the child Joseph to be at least partly in error. The court based its calculations on plaintiff's August 1988 affidavit of expenses. It reduced a number of her estimates for the stated reason that Joseph presently spends only seventy-one days per year with plaintiff because he attends boarding school. Certain of these expenses, such as cable television, automobile insurance, and automobile repairs, appear to be fixed expenses necessary to maintaining a home.

In *Gilmore v. Gilmore, supra*, the defendant prayed for a one-third reduction in child support and maintenance in part because the oldest of his three children had attained majority and defendant was incurring the expense of sending him to an out-of-state college. In reversing the trial court decision to reduce child support by one-third, this Court stated that defendant had "made no showing that the expenses relating to [the children's] maintenance and support have decreased proportionately one-third. Absent proof of this fact, it is impermissible to presume that such child-oriented expenses are proportionally divisible. The presumption, if any is appropriate at all, would be to the contrary in light of the fixed and indivisible costs of providing a home, and the varying requirements of the children." 42 N.C. App. at 563, 257 S.E.2d at 118-19 (citations omitted).

In the instant case, although the trial judge as fact finder, had the right to believe or disbelieve testimony as he saw fit,

we find no basis for his conclusion that certain of plaintiff's home and automobile maintenance costs would decrease because one child was not present in the home. We find the logic of *Gilmore v. Gilmore* reasonable that such fixed and indivisible costs of maintaining a home do not decrease proportionally when a child is not present.

[4] Last, plaintiff asserts that Judge Keiger erred in failing to recuse himself from further hearings in this action and failing to have her recusal motion heard by another judge. In a hearing on the issue Judge Keiger ruled that he could be completely fair and impartial.

A trial judge should recuse himself or refer the recusal motion to another judge if there is "sufficient force in the allegations contained in defendant's motion to proceed to find facts." *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976). We do not find that the allegations in this case rise to that level. Plaintiff does not allege personal bias. We disagree with plaintiff's argument that Judge Keiger appeared to have "pre-judged" the case because of his statements in chambers to plaintiff's attorney as to what child support was appropriate. At that point the judge had already heard some evidence in the matter. In the present posture of this case, we find it unnecessary to address this issue further.

For the reasons stated above, we reverse the order of the trial court and remand for reinstatement of the child support order of 24 October 1986.

Affirmed in part; reversed in part and remanded.

Judge EAGLES concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I disagree with the conclusion of the majority I) that there was insufficient evidence of the actual past expenditures of the children and II) that the trial court erred in its method of calculating the reasonable expenses of Joseph.

I

The defendant introduced into evidence affidavits reflecting the financial standings of the parties. The affidavit of the plaintiff dated August 1988 included a detailed listing of the expenses for the two children totalling $2,148.37. The plaintiff testified she determined these figures by estimating the actual expenses of the children. Also in evidence was plaintiff's affidavit of financial standing submitted in support of the first order dated October 1986. That affidavit revealed plaintiff's expenses for the two children of $3,776 per month. The 1986 order, which was a consent order, set $3,333 per month as the defendant's child support obligation to the plaintiff. This is sufficient evidence of past expenditures to support the trial court's finding of plaintiff's monthly expenses ($1,663) for the children and its subsequent determination of the reasonable monthly needs ($1,700) of the children. *See Smith v. Smith*, 89 N.C. App 232, 236, 365 S.E.2d 688, 691 (1988).

II

Furthermore, I see no error in the trial court's calculation of the expenses for Joseph, the child who was a boarding school student in Virginia and was only in the plaintiff's home some 71 days each year. The trial court did determine that plaintiff's expenses for Joseph were less than the amount on plaintiff's affidavit and that one of the reasons for such reduction was the fact that Joseph was in plaintiff's home only 71 days a year. There is nothing in this record to support the conclusion of the majority that the trial court improperly allocated, by the use of some arbitrary formula, Joseph's share of the fixed expenses in the plaintiff's home. The order indicates the trial court accepted in full some of the plaintiff's asserted expenses, i.e., mortgage payments, homeowners insurance and taxes, and accepted in part other asserted expenses, i.e., electricity, water, cablevision, automobile gasoline and household supplies. I do not find this procedure inconsistent with *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979). *Gilmore* held only that a trial court may not assume that the costs of maintaining remaining children are less simply because a sibling has left the household. Furthermore, the trial court is not bound to accept all the evidence presented to the court as true, and I see no justification for rejecting the findings of the trial court. The trial court obviously did not agree with the plaintiff's allocation of certain expenses to Joseph.

III

Agreeing with the majority that the trial court correctly refused to find the defendant in contempt of court, I would affirm the trial court in every respect.

M. LEE HEATH, JR. v. CRAIGHILL, RENDLEMAN, INGLE & BLYTHE, P.A., JAMES B. CRAIGHILL, JOHN T. RENDLEMAN, JOHN R. INGLE AND ROBERT BLYTHE

No. 8926SC87

(Filed 6 February 1990)

1. **Attorneys at Law § 1 (NCI3d); Principal and Agent § 5.2 (NCI3d)— attorney's conversion of client's investment funds— liability of professional association—actual authority**

A law firm was not liable for a former firm member's conversion of funds sent to him by plaintiff for investment on the ground that the former member's dealings with plaintiff were within the scope of authority conferred on him by the firm because plaintiff had given the firm a power of attorney "to deal generally and in all respects, without restriction, in and with any property of any nature whatsoever in which [plaintiff] may have any interest" where the law firm, an accounting firm and a bank were designated jointly as attorneys in fact and none could act without the concurrence of the other two, and where the former firm member did not employ the power of attorney in his dealings with plaintiff, signed promissory notes to plaintiff in his personal capacity, and wrote checks to plaintiff drawn on his personal account.

Am Jur 2d, Attorneys at Law §§ 216, 217.

2. **Attorneys at Law § 1 (NCI3d); Principal and Agent § 5.2 (NCI3d)— attorney's conversion of client's investment funds— liability of professional association—apparent authority**

A law firm was not liable for a former firm member's conversion of funds sent to him by plaintiff for investment on the ground that the former member acted within his apparent authority in soliciting funds from plaintiff where the evidence showed that a letter to plaintiff on firm stationery

was written entirely in the former member's hand; another letter to plaintiff was written on the former member's personal stationery; plaintiff was never billed by the firm for any aspect of his investments with the former member; neither plaintiff's testimony nor that of the former member's secretary supported plaintiff's claim that the other lawyers at the firm knew or should have known about the former member's solicitation and acceptance of money from plaintiff; the charter of the law firm, a professional association, limited it to rendering legal services; the former member was not the principal stockholder in the professional association and was not principally in charge of its operation; and the former member gave plaintiff no assurances that money invested with him would be handled through the law firm.

Am Jur 2d, Attorneys at Law §§ 216, 217.

3. Attorneys at Law § 1 (NCI3d)— attorney's conversion of client's investment funds—liability of law firm—negligence and breach of fiduciary duty

A law firm was not liable in damages for a former firm member's conversion of investment funds solicited by him from plaintiff on theories of negligence or breach of fiduciary duty since members of the firm had no duty to detect and supervise actions of a firm member which were outside the practice of law, which the member had no authority to take, and of which the other firm members had no reason to know.

Am Jur 2d, Attorneys at Law §§ 216, 217.

4. Attorneys at Law § 1 (NCI3d); Trover and Conversion § 2 (NCI3d)— attorney's conversion of client's investment funds—Securities Act—no liability by professional association

Members of a law firm were not liable for a former member's conversion of investment funds sent to him by plaintiff based on a violation of provisions of the N. C. Securities Act relating to civil liability for offering and selling securities by means of false or misleading statements, N.C.G.S. § 78-56(a), (c), where plaintiff failed to show that defendants knew or should have known that the former firm member was selling securities while he was a member of the firm, and defendants

thus did not "directly or indirectly control" the former firm member's actions within the meaning of the statute.

Am Jur 2d, Attorneys at Law §§ 216, 217.

APPEAL by plaintiff from Orders of *Judge James U. Downs* entered 13 May 1988 and 15 June 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 12 September 1989.

Justice & Eve, P.A., by R. Michael Eve, Jr., for plaintiff appellant.

Smith Helms Mulliss & Moore, by E. Osborne Ayscue, Jr., and Benne C. Hutson, for defendant appellees.

COZORT, Judge.

Plaintiff brought this action to recover damages from a law firm based on allegations that a former member of the law firm wrongfully converted investment funds given by plaintiff to the former member of the firm. The trial court granted the law firm's motion for directed verdict as to three of plaintiff's four theories of liability and granted the law firm's motion for judgment notwithstanding the verdict on the fourth. We affirm.

This lawsuit has its origins in the relationship between plaintiff M. Lee Heath, Jr., and Francis O. Clarkson, Jr., formerly a lawyer and member of Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A. Clarkson had been a partner in the firm and became an officer, director, and employee when it incorporated as a professional association in July 1972. Beginning in 1977 Clarkson performed for Heath various legal services, including the preparation of a will, codicils, and a continuing power of attorney. Another member of the firm, Robert B. Blythe, handled real estate matters for Heath.

In September or October 1982, Clarkson telephoned to solicit Heath's investment "in some type of oil-related venture." When Heath returned the call, Clarkson told him that another investor had been found. In the winter and spring of 1983 Clarkson proposed two other investments to Heath. The first offer involved a client in need of operating funds who would pay Heath "five percent per month for thirty to ninety days" until a pending insurance settlement was approved. The second offer also involved a short-term loan, this time until funds were disbursed from an estate

in probate. Heath declined both offers because he did not have funds available.

In August 1983 Clarkson, promising a "two-to-one return," persuaded Heath to invest in an "Arab oil deal" with a "group of American investors" represented by Richard Seaman of Florida. Heath testified that when he asked about the risk, Clarkson replied: "I will minimize the risk by giving you my own promissory note." On 16 August 1983, in return for $25,000 Clarkson gave Heath a note for $50,000 payable on 30 September 1983. When the note came due, Clarkson promised an additional $12,500 in return for a two-week delay. Heath agreed to the new date and collected $62,500, representing a return on his money of one hundred and fifty percent in sixty days. In the meantime, in early October, by letter dated 30 September 1983, effective the same day, Clarkson resigned from his firm. The firm allowed him to remain in its offices for about two months until he negotiated a lease on an office condominium.

Heath's final investments with Clarkson were made in November 1983. Again Clarkson proposed investment in foreign oil exploration which would yield investors a one hundred percent return. On 4 November 1983, Heath gave Clarkson $50,000 and took a note for $100,000 payable 19 December 1983. At the same time Heath requested and received from Clarkson a letter which read: "This is to confirm that the funds to pay off my note of even date will come from a legitimate banking source and *not* from the sale of drugs, any criminal activity or a Communist Bloc Country." (Emphasis in original.) According to Heath, he wanted the letter because, "being a Federal Agent [employed by the United States Defense Investigative Service], it would not be wise for me not to have further documentation as to where I made money overseas."

Soon afterward Clarkson solicited a final $25,000 from Heath, who declined the invitation until promised a "three-to-one return on this last phase . . . ." On 19 November 1983 Heath exchanged $25,000 for Clarkson's note in the amount of $75,000 payable 19 December 1983 and a second letter from Clarkson stating "that the funds to pay off our loan of today will not come from any drug or criminal sources or any other illegal source."

Shortly after the notes came due, Clarkson wrote personal checks to pay them. His checks were dishonored. In February 1984, Clarkson paid Heath $50,000. Subsequently that payment was iden-

tified as a preference by Clarkson's trustee in bankruptcy, and $37,500 was reclaimed in the bankruptcy proceedings.

Plaintiff Heath initiated this action on 15 April 1986 with a complaint alleging that Clarkson converted plaintiff's funds and that defendants are liable for the conversion. Plaintiff made four claims, each of which set out a distinct theory for the recovery of damages: agency, breach of fiduciary duty, negligence, and violation of N.C. Gen. Stat. Chap. 78A (North Carolina Securities Act). Defendants denied liability, and the case came to trial before a jury.

On 13 May 1988, at the close of plaintiff's evidence, defendants moved for a directed verdict on all issues. The trial court granted that motion as to the second, third, and fourth claims and denied it as to the first (agency) claim. On the same day, at the close of all evidence, defendants renewed their motion for a directed verdict on the first claim. The court denied the motion, and the jury returned a verdict for the plaintiff in the amount of $25,000.

On 18 May 1988 defendants moved alternatively for judgment notwithstanding the verdict (JNOV) or for a new trial. On 15 June 1988 the trial court granted defendants' motion for JNOV and denied their alternative motion for a new trial. Plaintiff appealed from both the order of 13 May (directing a verdict for the defendants on the second, third, and fourth claims) and the order of 15 June (granting JNOV on the first claim). Defendants filed a cross-appeal from the court's denial of their motion for a new trial.

Plaintiff contends that the trial court erred in granting defendants' motion for JNOV on the first claim and in granting defendants' motion for a directed verdict on the second, third, and fourth claims. We disagree.

In ruling on a motion for JNOV or for a directed verdict, the same standard applies: "The judge must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant." *Williams v. Jones*, 322 N.C. 42, 48, 366 S.E.2d 433, 437 (1988); *see also Dickinson v. Pake*, 284 N.C. 576, 584-85, 201 S.E.2d 897, 902-03 (1974). When, as in the case below,

> a motion for a directed verdict made at the close of all the evidence is denied . . . the submission of the action to the jury *shall be deemed to be subject to a later determination*

> *of the legal questions raised by the motion* . . . a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his [earlier] motion for a directed verdict.

N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (1989) (emphasis added.) For reasons of judicial economy, among others, a trial court may deny a motion for a directed verdict and then grant a motion for JNOV. Unlike an erroneous JNOV, if a directed verdict is in error, judgment cannot be entered for the nonmovant; instead, upon determining that the issue should have gone to the jury, the appellate court must require a new trial.

A professional corporation like the firm in the case below is liable on the same basis and to the same extent as a partnership. *Zimmerman v. Hogg & Allen*, 22 N.C. App. 544, 546, 207 S.E.2d 267, 269, *rev'd on other grounds*, 286 N.C. 24, 209 S.E.2d 795 (1974). A partnership is liable for loss or injury caused "by any wrongful act or omission of any partner *acting in the ordinary course of business of the partnership or with the authority of his copartners* . . . to the same extent as the partner so acting or omitting to act." N.C. Gen. Stat. § 59-43 (1989) (emphasis added). Thus, the question presented upon the trial court's grant of JNOV turns on whether, as a matter of law, there was insufficient evidence to justify a verdict that Clarkson's dealings with Heath were within the scope of authority or apparent authority conferred on Clarkson by his firm.

[1] Authority, sometimes called actual authority, "is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." Restatement (Second) of Agency § 7 (1958). Plaintiff contends that Clarkson had authority from his firm to solicit money from Heath for investment. Plaintiff bases that contention on the power of attorney which empowered Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A. "to deal generally and in all respects, without restriction, in and with any property of any nature whatsoever in which [Heath] may have any interest."

Plaintiff's argument, however, ignores crucial facts. First, Clarkson's firm, Arthur Young & Co., and City National Bank were designated jointly as attorneys in fact. None could act without the concurrence of the other two. Secondly, when Clarkson took

money from Heath, he dealt face to face. Clarkson did not employ or attempt to employ the power of attorney in his transactions with Heath. The promissory notes Heath received were signed by Clarkson in his personal capacity, and the checks he wrote to Heath were drawn on Clarkson's personal account. Without more, the fact that Clarkson's firm was designated in a power of attorney did not confer on Clarkson the authority to deal as he did with Heath.

[2] Apparent authority "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Zimmerman v. Hogg & Allen*, 286 N.C. at 31, 209 S.E.2d at 799. Under the doctrine of apparent authority, a "principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Id.* Plaintiff contends that, even if Clarkson lacked authority for his dealings with Heath, he acted under the aegis of apparent authority.

Plaintiff submits that apparent authority to solicit money may be attributed to Clarkson from a variety of transactions and circumstances. Plaintiff alleges principally that Clarkson's letter of 4 November 1983 was written on firm stationery, and he asserts that "[o]n one occasion, James Craighill, a partner [*sic*] in the firm, was present with two staff members and overheard a discussion between Clarkson and Heath concerning the transactions."

Plaintiff fails to note that he was never billed by the firm for any aspect of his investments with Clarkson, including the letters of 4 November and 19 November 1988, which plaintiff characterizes as "legal opinions." The letter of 19 November was written on Clarkson's personal stationery. James Craighill testified that on or about 30 September 1983 the firm instructed its "secretaries [to] run a line through [Clarkson's] name to indicate that he was no longer with the firm . . . ." Clarkson's letter of 4 November 1983 on firm stationery was not typed by a secretary; it was written entirely in his hand.

Regarding the discussion between Clarkson and plaintiff, at which James Craighill, Janice Burton and Elizabeth Carr were present, plaintiff testified as follows:

> I made what you would call, I guess, a jestful comment, in the presence of all these people, and I said, "I'd better be

> careful. Frank will have me signing over all my assets to him so he can invest it with his Arab clients," to which Mr. Clarkson responded, "Yes. They're having cash flow problems in Jidda,["] to which I responded, "Yes. Those poor Arabs are only making millions instead of billions." . . . . Everybody heard it. Everybody laughed. Mr. Clarkson chuckled, and Mr. Craighill grinned, and the girls sort of grinned, too, knowing that basically my comment was a jestful comment.

Ms. Burton testified that secretaries "were allowed to do personal work for the attorneys whose legal work they did." She testified further that, to the extent she knew of Clarkson's meetings with Heath, she never discussed them with other lawyers in the firm. Neither plaintiff's testimony, nor that of Ms. Burton supports his claim that other lawyers at the firm knew or "*should have known* about Clarkson's soliciting and accepting the money." (Emphasis in original.)

Finally, plaintiff cites *Zimmerman v. Hogg & Allen* in support of his argument for reinstating the verdict below. In *Zimmerman* our Supreme Court refused to allow summary judgment against a plaintiff who sought to hold a professional association liable for the stock transactions of one of its agents (Glenn L. Greene, Jr.) with the plaintiff. In its holding, the Court relied on the following facts:

> [T]he powers granted to the Professional Association by its charter were very broad powers, the exercise of which was principally in the hands of Greene; that defendant Greene, while he was on business trips to attend to the legal business of Holly Farms, accepted funds for investment purposes from employees of the corporate client; that these corporate employees were assured that such moneys would be handled through the Professional Association; that such activities by Greene, the president and principal stockholder of the Professional Association, had occurred over a period of several years; and that [shareholder-]employees of the Professional Association had knowledge of such dealings.

Zimmerman v. Hogg & Allen, 286 N.C. at 39, 209 S.E.2d at 804.

In the case below, the charter of Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., limited it to rendering legal services. Clarkson was not the principal stockholder of the professional association,

nor principally in charge of its operation. He gave no assurances that money invested with him would be handled through his law firm, and plaintiff presented no credible evidence that other shareholder-employees knew or had reason to know of Clarkson's transactions with Heath. Given these facts, plaintiff's reliance on *Zimmerman* is misplaced.

[3] We turn now to plaintiff's contention that the trial court erred in directing a verdict for defendants on the claims of breach of fidiciary duty, negligence, and violation of the North Carolina Securities Act. These claims (the second, third, and fourth in the pleadings) are grounded on the same facts presented in the first claim, and those facts are inadequate to support elements essential for plaintiff's recovery of damages.

Breach of fiduciary duty is a species of negligence or professional malpractice. *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). For recovery in any type of negligence action there must exist a duty owed by the defendant to the plaintiff. In the case below, as in the parallel case of *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, plaintiff "would have to show that defendants owed a duty to detect and supervise Mr. Clarkson's activities which were outside the practice of law, which he had no authority to take, and of which defendants had no reason to know." *McGarity*, 83 N.C. App. 106, 111, 349 S.E.2d 311, 314 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 112 (1987). As a matter of law, no such duty exists. *Id.*

[4] Plaintiff bases his final theory of defendants' liability on N.C. Gen. Stat. § 78A-56(a) and (c). Subsection (a) defines the civil liability of a person offering and selling securities by means of false or misleading statements. Subsection (c) reads, in pertinent part,

> Every person who directly or indirectly controls a person liable under subsection (a) or (b), every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions, every employee of such a person who materially aids in the act or transaction, and every dealer or salesman who materially aids in the sale are also liable jointly and severally with and to the same extent as such person, unless the person who is so liable sustains the burden of proof that he did not know, and did not act in reckless

disregard, of the existence of the facts by reason of which the liability is alleged to exist.

Because plaintiff failed to show that the defendants knew or should have known that Clarkson was selling securities they cannot be held to have "directly or indirectly control[led]" his actions within the meaning of the statute.

We hold that the trial court ruled correctly on the defendants' motions for directed verdict and JNOV. Our holding renders moot the defendants' cross-appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(c).

The trial court's orders of 13 May 1988 and 15 June 1988 are

Affirmed.

Judges ARNOLD and BECTON concur.

KENNETH P. GUMMELS AND ALLAN McGINNIS D/B/A HUNTINGTON MANOR OF MURPHY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND EVANGELINE OF ANDREWS, INC., RESPONDENT/INTERVENOR

No. 8930SC173

(Filed 6 February 1990)

1. **Rules of Civil Procedure § 24 (NCI3d)— certificate of need— petition for preliminary injunction—intervention**

The trial court did not err by granting Evangeline's petition to intervene in an action in which petitioner (Huntington) sought a preliminary injunction to prevent the department from announcing or awarding a certificate of need for nursing home beds to Evangeline. Although petitioner contended that its petition was for review of the department's declaratory judgment decision not to review its application with the 1 February 1988 cycle and that Evangeline was not a party to and had no interest in that dispute, Evangeline's rights are affected in that the department was enjoined from issuing a certificate of need to Evangeline allocating thirty beds to

it during the pendency of the review process. Also, if the trial court had ordered the department to consider petitioner's application, petitioner might have been awarded all or part of the sixty beds under the department's control. N.C.G.S. 1A-1, Rule 24.

Am Jur 2d, Administrative Law § 743; Parties §§ 134-137.

2. **Rules of Civil Procedure § 6 (NCI3d)— hearing on motion to intervene and motion to dismiss—notice**

The trial court did not err by conducting a hearing and entering an order on Evangeline's motion to dismiss at the same hearing in which it granted Evangeline's petition to intervene. N.C.G.S. § 1A-1, Rule 6(d) requires that a written motion and notice of hearing be served not later than five days before the specified time for the hearing, and Rule 6(a) explains that when the period prescribed is less than seven days intermediate Saturdays, Sundays and holidays shall be excluded. Evangeline served petitioners by hand on Sunday, eight days before the matter was heard, giving three days more notice than was required. Moreover, petitioner admits receiving notice and chose not to prepare a defense because it thought that the motion to intervene would be denied.

Am Jur 2d, Parties § 167.

3. **Administrative Law § 5 (NCI3d)— certificate of need—preliminary injunction—jurisdiction**

The trial court correctly dismissed for lack of subject matter jurisdiction a petition for a preliminary injunction to delay announcement and issuance of a certificate of need for nursing home beds where there was no challenge to the issuance, denial, or withdrawal of a certificate of need, so that N.C.G.S. § 131E-188 does not apply, and the petition was not properly filed under N.C.G.S. § 150B-45 because the record is completely devoid of any evidence tending to show that petitioner is a resident of Cherokee County. The petition should have been filed in Wake County.

Am Jur 2d, Administrative Law §§ 731, 732.

APPEAL by petitioner, Kenneth P. Gummels, and by respondent/intervenor, Evangeline of Andrews, Inc., from *Briggs (Bruce B.), Judge*. Orders entered 25 October 1988 and 27 October 1988

in Superior Court, CHEROKEE County. Heard in the Court of Appeals 19 September 1989.

Harrell & Leake, by Larry Leake, for petitioner-appellant Huntington Manor of Murphy.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James A. Wellons, for respondent-appellee N. C. Department of Human Resources.

Bode, Call & Green, by Robert V. Bode and Diana E. Ricketts, for respondent-appellee Evangeline of Andrews, Inc.

ORR, Judge.

On 19 January 1988, petitioner, a partnership which does business as Huntington Manor of Murphy, filed applications for a Certificate of Need (CON) with the North Carolina Department of Human Resources, Division of Facility Services in the Certificate of Need Section (the Department). The deadline for filing such applications was 15 January 1988. Having missed that deadline, petitioner was informed that its applications would not be considered with those which were timely received for the 1 February 1988 review.

Thereafter, on 20 January 1988, petitioner wrote a letter to the Department requesting a declaratory ruling regarding "procedural inconsistency between the North Carolina Certificate of Need (CON) Program Administrative Rules and the 1988 N. C. State Medical Facilities Plan ('SMFP') affecting the 1990 nursing home bed need allocation." Petitioner urged the Department to issue a ruling admitting its applications into the 1 February 1988 review process.

By letter dated 9 March 1988, the Department informed petitioner of its declaratory ruling affirming its decision not to consider petitioner's applications. Then, on or about 13 May 1988, petitioners filed a petition with the Superior Court of Cherokee County seeking a temporary restraining order and a preliminary injunction to prevent the Department from announcing its intent to award the certificate of need and to postpone the actual awarding of the same. That petition was granted by order of Superior Court Judge Marlene Hyatt entered 15 June 1988. However, prior to the entry of that judgment, on 3 June 1988, the Department announced its intent

to issue the certificate of need to respondent Evangeline of Andrews, Inc. (Evangeline).

On 21 September 1988, Evangeline filed a motion for intervention as a respondent. On 17 October 1988, Evangeline served petitioners with a notice of hearing for that motion, and a notice of its motion to dismiss for lack of subject matter jurisdiction. Those motions were heard on 25 October 1988. Over petitioner's objections, Evangeline was allowed to intervene. The court thereafter granted its motion to dismiss. From that order, petitioner appeals.

I.

[1] The first issue raised by petitioner is whether the court erred in granting respondent Evangeline's petition to intervene in the action between it and respondent Department. Petitioner contends that its petition before the trial court was for review of the Department's declaratory judgment decision not to review its certificate of need with those considered in the 1 February 1988 cycle. Since respondent Evangeline was not a party to that dispute and, according to petitioner, has no interest in this matter, it should not have been permitted to intervene. Petitioner claims that just because Evangeline may have an interest in the ultimate resolution of the dispute between itself and the Department—the future allocation of the limited resources—it is not legally entitled to intervene as a matter of right. Furthermore, petitioner argues that Evangeline had no right to intervene as a competing applicant since the scope of review for the declaratory judgment related only to the Department's refusal to consider petitioner's application and not to whether petitioner filed a better application than Evangeline.

Respondent Evangeline argues that it was entitled to intervene because its rights were substantially affected by the agency's decision and by the court's injunction. Consequently, it claims that it was entitled to intervene as a "person aggrieved" under G.S. 150B-46. It also claims a right to intervene in the allocation of the beds which is the subject of the dispute between petitioners and the Department.

The court heard Evangeline's motion to intervene at which time it found that "it appearing to the Court that [Evangeline] has an absolute right to intervene pursuant to Rule 24(a)(1) of the North Carolina Rules of Civil Procedure on the grounds that

N.C.G.S. 150(b)-46 [sic] states that any person agrieved [sic] may petition to become a party to a petition seeking judicial review . . . ."

G.S. 1A-1, Rule 24 entitled "Intervention[,]" allows anyone to intervene as a matter of right when there is either statutory authority for the intervention, or "[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action . . . ." Furthermore, the applicant must be in jeopardy of having his rights impaired or impeded if the action is decided in his absence, and his rights are not adequately represented. *Id.*

The record before us demonstrates there was a total of 60 beds which could be allocated to applicants in Cherokee County. Petitioner is presently seeking to have all 60 of them allocated for its use. Evangeline has made application for 30 of the 60 beds. Evangeline's rights are affected by petitioner's request for review of the Department's refusal to consider its application in that the Department was enjoined from issuing a certificate of need to Evangeline allocating the 30 beds to it during the pendency of the review process which petitioner requested. Furthermore, had the trial court reversed the Department's declaratory judgment and ordered it to consider petitioner's application, petitioner might have been awarded all or part of the 60 beds which are under the Department's control. Evangeline was awarded the certificate of need, and it was at risk of having its interests substantially impaired.

Therefore, we find that the court did not err in granting Evangeline's petition to intervene under G.S. 1A-1, Rule 24. Due to this conclusion, we find it unnecessary to discuss Evangeline's right to intervene under G.S. 150B-46. This assignment of error is overruled.

II.

[2] The next issue before us is whether the court erred in conducting a hearing and entering an order on Evangeline's motion to dismiss at the same hearing in which it granted Evangeline's petition to intervene. Petitioner argues that Evangeline served its motion to dismiss at the same time that it served its notice of hearing on its motion to intervene. Petitioner contends that Evangeline should have waited until after its petition for intervention was granted. Then it could have served notice of its motion to dismiss pursuant to the time limits prescribed by G.S. 1A-1, Rule 6(d).

Respondent Evangeline argues that petitioner was not prejudiced by serving its motion to dismiss along with the notice of hearing because G.S. 1A-1, Rule 7 grants courts authority to hear motions made orally at the hearings in the causes to which the motions relate. Therefore, even if it had not served the motion to dismiss on petitioner in advance of the hearing, it could have orally motioned the court at the hearing and the result would have been the same. Respondent Department agrees with that argument and further argues that Evangeline's filing and serving a written motion to dismiss before the hearing on its motion to intervene does not "trigger" the notice requirements imposed by G.S. 1A-1, Rule 6(d).

Focusing our attention on G.S. 1A-1, Rule 6(d), we find the rule requires that "[a] written motion, . . . and notice of hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed . . . ." Part (a) of Rule 6 explains the method of computing time when the period prescribed is less than seven (7) days. In that case, "intermediate Saturdays, Sundays and holidays shall be excluded in the computation."

Here, Evangeline served petitioners with its motion and notice of hearing by hand delivering the same on Sunday, October 17, 1987. The matter was heard some eight days later. The notice that was given was three days more than what was required, because five days from Sunday, 17 October, was Friday, 22 October 1988. Consequently, Evangeline was in compliance with Rule 6. Furthermore, petitioner admits that it received notice of Evangeline's motion. It simply chose not to prepare a defense because it "belie[ved]" that the motion to intervene would be denied.

III.

[3] The final issue raised by petitioner is whether the court erred in dismissing petitioner's petition for review because it found that the Superior Court of Cherokee County did not have subject matter jurisdiction over this matter. Petitioner contends that its petition pertained to the Department's decision not to consider its application. Therefore, its right to a review is controlled by G.S. 150B-45 of the Administrative Procedure Act and not under G.S. 131E-188 which petitioner claims deals *exclusively* with the issuance, denial or withdrawal of a certificate of need. In order to obtain judicial review under G.S. 150B-45 (1987), "the person seeking review must

file a petition in the Superior Court of Wake County or in the Superior Court of the county where the person resides." Petitioner argues that this statute entitled it to bring an action in Cherokee County Superior Court because that county is most "substantially impacted" by the decision of the Department.

Respondents Evangeline and the Department argue that petitioner's right to a review is exclusively controlled by G.S. 131B-188 which specifically addresses the review process for matters relating to certificates of need. In the alternative, respondents contend that if G.S. 131E-188 does not control and G.S. 150B-45 does, petitioner incorrectly filed its petition for review in Cherokee County. Respondents argue the petitioner is a partnership comprised of out of state residents. G.S. 150B-45 allows a petitioner to initiate its request for review either in Wake County or the county in which the petitioner resides. Since petitioner does not meet the residency requirements of Cherokee County, Wake County Superior Court is the only possible forum for this action if G.S. 150B-45 is controlling.

In order to properly decide this issue, we must first determine whether this question is controlled by G.S. 150B or by G.S. 131E. We must then determine whether petitioner complied with the requirements of whichever of the two statutes applies.

Looking first at G.S. 131E, that chapter regulates health care facilities and services. Article 9 of that chapter relates specifically to certificates of need. Section 131E-188 contains the provisions for administrative and judicial review. According to that proviso, "*[a]fter a decision of the Department to issue, deny or withdraw a certificate of need . . .* " any affected person is entitled to have a contested case hearing. G.S. 131E-188(a) (1988) (emphasis added). By its own terms, that statute only applies to challenges relating to the *issuance, denial* or *withdrawal* of certificates of need. Because the problem before us does not concern such a challenge, we find that G.S. 131E is inapplicable.

Next, we must focus on G.S. 150B, the Administrative Procedure Act. Article 4 of that act sets out the rights and procedures concerning judicial review of administrative decisions. Under G.S. 150B-17, a person aggrieved may request an agency to issue a declaratory ruling as to the validity of a rule or as to the applicability of an agency rule to a particular set of facts. Such a declaratory ruling may be judicially reviewed "in the same manner as an order

in a *contested case*." G.S. 150B-17 (1987) (emphasis added). In accordance with Article 4, a person aggrieved by a final decision in a contested case is entitled to judicial review. G.S. 150B-43. "To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides." G.S. 150B-45 (1987).

In the case at bar, petitioner, a partnership, filed its petition for judicial review in Cherokee County. That petition was correctly filed if, and only if, the partnership "resides" in Cherokee County. *See* G.S. 150B-45. Article 1 of the Administrative Procedure Act defines "residence," or the place where one "resides" as the domicile or principal place of business. G.S. 150B-2(8) (1987).

The record before us is completely devoid of any evidence which would tend to show that petitioner is a resident of Cherokee County. The letters which were written by petitioner to the Department have an Atlanta, Georgia return address. All correspondence sent to petitioner was sent to a Georgia address. There is no evidence in the record that petitioner has filed a certificate of assumed name with Cherokee County. Mr. Gummels and Mr. McGinnis, the members of the partnership, have not demonstrated that they were residents of this State when their petition was filed. Most importantly, the trial court found that petitioner is not a resident of Cherokee County. In the absence of any evidence to show that such a finding was erroneous, we are bound thereby. G.S. 150B-51. Therefore, petitioner should have filed its petition for review in Wake County Superior Court.

For the reasons stated above, we find the court properly dismissed this petition for lack of subject matter jurisdiction. Petitioners' claim that respondent Department never before contested subject matter jurisdiction is without merit. Such a challenge can be made at any time because subject matter jurisdiction cannot arise by waiver. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978), *cert. denied*, 296 N.C. 538, 254 S.E.2d 32 (1979).

Because of the decisions reached herein, we decline to address any of respondent's cross-assignments of error. The judgment entered below is affirmed and the injunction entered below is hereby dissolved.

Affirmed.

Judges WELLS and JOHNSON concur.

IN THE MATTER OF: THE APPEAL OF ELE, INC., FROM THE DENIAL OF PRESENT USE VALUE TREATMENT FOR CERTAIN OF ITS REAL PROPERTY BY THE BERTIE COUNTY BOARD OF COMMISSIONERS FOR 1986

No. 8810PTC828

(Filed 6 February 1990)

1. **Taxation § 25.4 (NCI3d)— ad valorem taxes—farmland—corporate stock held briefly by another corporation—present use value assessment**

Ownership of a corporate taxpayer's stock by a family corporation for a brief period of time during a reorganization of the family corporation in 1984 which allowed two brothers to divide farmland without substantial federal income tax liabilities did not prohibit present use value assessment and taxation of the corporate taxpayer's farmland for 1984-1986. N.C.G.S. § 105-277.3(b).

Am Jur 2d, State and Local Taxation §§ 188, 203.

2. **Taxation § 25.7 (NCI3d)— ad valorem taxes—present use assessment—consideration of Internal Revenue Code**

It was not prejudicial error for the Property Tax Commission to consider Internal Revenue Code provisions under which a corporate reorganization was accomplished in determining whether the corporate taxpayer was entitled to present use value assessment of its farmland for certain years.

Am Jur 2d, State and Local Taxation §§ 188, 203.

Judge GREENE dissenting.

APPEAL by Bertie County from the Final Decision of the Property Tax Commission, sitting as the State Board of Equalization and Review, dated 10 March 1988 in WAKE County. Heard in the Court of Appeals 22 February 1989.

Smith and Daly, P.A., by Lloyd C. Smith, Jr., and Roswald B. Daly, Jr., for respondent appellant.

Baker, Jenkins & Jones, P.A., by Robert C. Jenkins and W. Hugh Jones, Jr., for taxpayer appellee.

COZORT, Judge.

[1] The question before the Court in this case is whether the taxpayer's property in Bertie County is subject to present use value assessment and taxation for the years 1984, 1985, and 1986. The Bertie County Board of Commissioners denied the taxpayer's application for present use value assessment and taxation. The Property Tax Commission reversed, holding that the property in question qualified for present use value assessment and taxation. We affirm.

The land which is the subject of this appeal was owned by E. R. Evans, Sr., until 1963. In that year, Evans incorporated his agriculture and farming business, which included substantial farmland in Bertie and Hertford Counties, under the name of E. R. Evans & Sons, Inc. E. R. Evans, Sr., died in 1974, leaving his surviving sons, E. R. Evans, Jr., and Ernest L. Evans, majority stockholders in the corporation. By 1982, E. R. Evans, Jr., and Ernest L. Evans had acquired the remainder of the stock of E. R. Evans & Sons, Inc., with each brother owning 50% of the stock. In 1983, E. R. Evans, Jr., and Ernest L. Evans decided to divide the business into two equal parts. About one-half of the farmland was located in Bertie County, and about one-half of the land was located in Hertford County. It was agreed that E. R. Evans, Jr., would operate the farm located in Hertford County, and Ernest L. Evans would operate the farm in Bertie County. A decision was made to reorganize the corporation in accordance with provisions of Internal Revenue Code and Treasury Regulations adopted thereunder so that the resulting division of the corporation would be nontaxable under federal law. As a part of that reorganization plan, a new corporation, titled ELE, Inc., was created. The stock of ELE, Inc., was titled to E. R. Evans & Sons, Inc. E. R. Evans & Sons, Inc., transferred the real property in Bertie County to ELE, Inc. Ernest L. Evans transferred his stock in E. R. Evans & Sons, Inc. to E. R. Evans & Sons, Inc. E. R. Evans & Sons, Inc., then transferred the ELE, Inc., stock to Ernest L. Evans. The parties intended a simultaneous transaction; however, E. R.

Evans, Jr., was not available to execute the documents when the transactions began. Thus, E. R. Evans & Sons, Inc., owned all of the outstanding stock of ELE, Inc., from 29 February 1984 until 2 March 1984, when the stock was transferred to Ernest L. Evans.

ELE, Inc., made timely application to the Bertie County Tax Supervisor for taxation of its real property on the basis of its present use value for the years 1984, 1985 and 1986. The Board of Commissioners of Bertie County met in regular session on 6 October 1986, and denied the present use value application submitted by ELE, Inc. ELE, Inc., applied for review of the County's decision before the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review. In a decision dated 10 March 1988, the Property Tax Commission reversed the decision of the Bertie County Board of Commissioners. The County appeals.

The issue before this Court is whether the Property Tax Commission's decision is an erroneous interpretation of certain provisions of Chapter 105 of the General Statutes of North Carolina. The specific statutes in question, N.C. Gen. Stat. §§ 105-277.2 to -277.7, permit "preferential assessment of agricultural, forest, and horticultural lands which reduces the property tax burden of the landowner." *W. R. Co. v. Property Tax Comm.*, 48 N.C. App. 245, 257, 269 S.E.2d 636, 643 (1980), *disc. review denied*, 301 N.C. 727, 276 S.E.2d 287 (1981). In the case below, for example, the county appraised the land in question at a market value of $2,889,641.00, while the taxpayer appraised the property at its present use value of $2,079,953.00.

Before the land can qualify for present use value assessment and taxation, it must be individually owned. N.C. Gen. Stat. § 105-277.3(a)(1) and (3) (1989). Individually owned is defined by statute to mean owned by a "natural person" or a corporation which has as its principal business certain specified activities and whose shareholders are all natural persons actively engaged in the business of the corporation or a relative of a shareholder who is actively engaged in the business of the corporation. N.C. Gen. Stat. § 105-277.2(4)(a) and (b) (1989). There is no dispute that ELE, Inc., has as its principal business one of the specified activities. An additional requirement, however, is that if the land in question is owned by the corporation, the property must have been owned by the corporation or by one or more of its principal shareholders

for the four years immediately preceding January 1 of the year for which present use value assessment and taxation is claimed. N.C. Gen. Stat. § 105-277.3(b) (1989). The County contends that ownership of the ELE, Inc., stock by E. R. Evans & Sons, Inc., for the brief period of time during the corporate reorganization in 1984, prohibits present use value assessment and taxation under the statutory scheme. We disagree.

The Property Tax Commission concluded that ELE, Inc., qualified for present use treatment for the years 1984, 1985 and 1986. The Commission concluded that, while

> the statute does not normally contemplate the ownership of one corporation by another, the facts in this case reveal that Ernest L. Evans, with his brother, owned the subject property *prior to* the reorganization through his 50% ownership of stock in E. R. Evans & Sons, Inc. *During* the reorganization, Ernest L. Evans, with his brother, owned the subject property through his 50% ownership of stock in E. R. Evans & Sons, Inc.; E. R. Evans & Sons, Inc., owned 100% of ELE, Inc. during this brief period. *After* the reorganization, Ernest L. Evans owned 100% of ELE, Inc. and through that corporation gained exclusive ownership and control over the subject property.
>
> To deny present use treatment to ELE, Inc. under the circumstances of this case would be contrary to the legislative intent expressed in *W. R. Co. v. Commission, supra,* to allow the use of family corporations as an estate planning device. The Commission, looking at the *substance* of these transactions rather than their form, finds no reason to deny present use treatment to the corporation owned by Ernest L. Evans where the statute clearly allows present use treatment for the corporation owned by E. R. Evans, Jr. [Emphasis in original.]

The standard of review of decisions of the Property Tax Commission is as follows: the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the Commission is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the Commission; made upon unlawful proceedings; affected by other errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; or arbitrary and capricious. The court shall review the whole record in making its determination of the Commission's decision. N.C.

Gen. Stat. § 105-345.2. *See generally In re McElwee*, 304 N.C. 68, 73-74, 283 S.E.2d 115, 119-20 (1981).

The County's principal argument is that the decision of the Property Tax Commission below is affected by other errors of law, in that the Commission did not correctly interpret the applicable statutes in arriving at the conclusion that ELE, Inc., was entitled to the present use treatment. We find no error in the Commission's interpretation of the applicable statutes.

Legislation permitting preferential assessment of agricultural and forest lands which reduces the property tax burden of the landowner was first enacted by the 1973 General Assembly. The General Assembly limited those owners who could seek preferential valuation of their property. As originally written, the present use valuation was available only for land owned by individuals, which was defined in the statute as being a natural person or persons and not a corporation. In 1975, the legislature expanded the definition of "individually owned" property to include property owned by a corporation having as its principal business one of the specified activities and whose shareholders are natural persons actively engaged in such activities or the relatives of such persons. Thus, "family corporations" involved in farming were permitted to qualify for present use valuation. The legislation authorizing these family corporations to qualify for preferential treatment was enacted at a time when farm families were advised to incorporate for estate planning purposes. *W. R. Company v. Property Tax Commission*, 48 N.C. App. at 257-59, 269 S.E.2d at 643-44.

We find the decision of the Property Tax Commission in this matter to be consistent with the legislative intent as set forth in *W. R. Company v. Property Tax Commission*. The first corporation, E. R. Evans & Sons, Inc., was a family corporation involved in a family farming business. The division of the farming operation between the two brothers continued the family farming operation. The brief ownership of the ELE, Inc., stock by E. R. Evans & Sons, Inc., was not ownership and control in derogation of the statutory scheme authorizing the present use treatment. Instead, it was merely a corporate reorganization device which allowed the two brothers to divide the farm assets without incurring substantial federal income tax liabilities. To hold to the contrary would be unfair to Ernest L. Evans, the sole shareholder of ELE, Inc., as the County has conceded. We hold that the Property Tax Com-

mission did not err in its decision concluding that ELE, Inc., was entitled to the present use treatment for the years in question.

[2] The County has also contended that the Commission erred by making findings of fact which were not supported by the evidence and by basing its decision, in part, on the provisions of the Internal Revenue Code and the Treasury Regulations under which the corporate reorganization was accomplished so that the property could be divided without incurring substantial federal income tax liabilities. The allegedly erroneous findings of fact identified by the County were not a substantial factor in the decision of the case, and any error would thus not be prejudicial. We also conclude that it was not prejudicial error for the Property Tax Commission to give consideration to the Internal Revenue Code provisions under which the corporate reorganization was accomplished. *See* N.C. Gen. Stat. § 105-345.2(c) (1989).

The decision of the Property Tax Commission is

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The issue is not as the majority suggests, whether "ownership of the ELE, Inc., stock by E. R. Evans & Sons, Inc., for the brief period of time during the corporate reorganization in 1982, prohibits present[-]use value assessment and taxation . . ." The issue is whether either ELE, Inc., or any of its majority stockholders have either separately or in combination owned the property in question for four years prior to January 1 of the year for which ELE, Inc., claims present-use treatment. I determine that they have not.

ELE, Inc., claims present-use treatment for the years 1984-86. Thus, we must look to the four years preceding 1984-86 to determine ownership, 1980-83. ELE, Inc., acquired the property on 29 February 1984 from E. R. Evans & Sons, Inc., who had owned the property since 1962. The sole stockholder of ELE, Inc., as of 29 February 1984, the date of its creation, was E. R. Evans & Sons, Inc., who transferred its stock to Ernest L. Evans on

2 March 1984. ELE, Inc., did not own the property a sufficient time to qualify for any of the years 1984, 1985 or 1986. Because E. R. Evans & Sons, Inc., is not a natural person, its ownership cannot be tacked onto ELE's ownership to calculate the four-year ownership period. N.C.G.S. § 105-277.2(4)(b) (corporate-shareholder does not qualify as natural person). Furthermore, Ernest L. Evans's ownership in E. R. Evans & Sons, Inc., is indirect and does not qualify for tacking his ownership onto his present ownership in ELE, Inc. The plain language of the statute requires *actual* ownership of the property by the corporate owner or by one of its principal shareholders. *Id.*

I believe that the statute is clear and unambiguous, and that the decision of the Property Tax Commission to grant the present-use valuation must be reversed because it was affected by an error of law. N.C.G.S. § 105-345.2(b)(4). To do otherwise would be to interpolate an exception, as the majority has done, into the clear language of the statute. Any exceptions should be left to the Legislature. *See* N.C.G.S. § 105-277.3(b) (exception to four-year requirement created for natural persons if property is the "owner's place of residence").

STATE OF NORTH CAROLINA v. JAMES LLOYD DAVIS, JR.

No. 8918SC90

(Filed 6 February 1990)

1. Criminal Law § 187 (NCI4th) — narcotics — motion to suppress — time for filing

The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress or by admitting marijuana obtained by a search of his person where N.C.G.S. § 15A-976(b) states that if the State gives notice not later than twenty working days before trial of its intention to use the evidence, then defendant may move to suppress only if the motion is made not more than ten working days following receipt of the notice from the State; the State provided defendant with notice on 31 May 1988; defendant moved to suppress on 9 June 1988; defendant's motion was dismissed on 1 July 1988 without prejudice and defendant was granted leave to

refile in a form meeting procedural requirements; and defendant's second motion to suppress was filed on 9 September 1988, three days before his scheduled trial. The order granting leave to refile required conformity with procedural requirements, among which is a ten-day time limit.

Am Jur 2d, Evidence § 426.

2. Criminal Law § 557 (NCI4th)— possession of narcotics—testimony regarding dealing—no mistrial

The trial court in a narcotics prosecution involving possession did not err by denying defendant's motion for a mistrial following a detective's testimony that officers had moved to a certain location because an informant had stated that the suspect was selling narcotics. Any prejudice was cured by the trial judge's instruction to disregard that information.

Am Jur 2d, Evidence § 748.

3. Criminal Law § 169.2 (NCI3d)— narcotics—charges relating to evidence dropped—admission harmless error

There was no prejudicial error in a narcotics prosecution from the admission of evidence of the contents of a van where the charge involving that evidence was dismissed.

Am Jur 2d, Evidence § 320.

4. Criminal Law § 42.1 (NCI3d)— narcotics—drugs found in wall—circumstantial connection to defendant—admissible

There was no error in a narcotics prosecution from the admission of testimony regarding a bag of cocaine found in a crack in a service station wall after defendant had fled from officers where an officer testified that the bag was clean, had no dirt, trash, or leaves on top of it, and did not appear to have been in the crack for long. While the testimony was arguably inadmissible expert testimony under N.C.G.S. § 8C-1, Rule 701, the jury was free to conclude that the bag had not been in the crack for long based on its condition.

Am Jur 2d, Evidence § 266.

5. Narcotics § 4 (NCI3d)— possession of cocaine—drugs found in wall—evidence sufficient

The trial court did not err by denying defendant's motion for nonsuit of a charge of felonious possession of cocaine where

a bag of cocaine was recovered from a crack in a wall; none of the detectives could testify as to how the cocaine got into the crack in the wall; and defendant was seen kneeling where the bag of cocaine was found.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from judgment entered 14 September 1988 by *Judge William H. Helms* in GUILFORD County Superior Court. Heard in the Court of Appeals 31 August 1989.

Defendant, James Lloyd Davis, Jr. ("Davis"), was convicted of felonious possession of cocaine and misdemeanor possession of marijuana. From a judgment imposing an active prison sentence, defendant appeals. We find no error.

On 16 November 1987 a narcotics detective, Julian Miller Landers, relying on information from a confidential informant, drove to the vicinity of the Tops Service Station on East Market Street in Greensboro. He was accompanied by Detectives Tim Parrish and Dave Lombardo. At the intersection of Charlotte Street and Raleigh Street, Detective Landers saw the white van described by the informant and placed it under surveillance. The informant had also described an individual and the clothes he would be wearing, but Landers did not see that individual.

Approximately twenty to thirty minutes after the detectives arrived at the location, they received another call informing them that the individual previously described was standing at the phone booths in front of the Tops Service Station and was selling narcotics. The detectives then proceeded to the Tops Service Station where they saw an individual fitting the description provided by the informant. At trial, Detective Landers identified that individual as Davis.

Detectives Parrish, Lombardo, Landers and two other police officers, Detective Seabolt and Sergeant Caviness, who were also in the area, approached Davis. As the officers approached, Davis ran. Sergeant Caviness identified himself as a police officer and commanded Davis to stop. Davis changed the direction of his flight but later stopped for about fifteen to thirty seconds and knelt at the corner of an abandoned service station across the street from the Tops Service Station. Sergeant Caviness pointed his

pistol at Davis, and again commanded Davis to freeze. Davis ran behind the abandoned service station, where he was apprehended by Detectives Seabolt and Parrish.

After placing Davis under arrest, the officers conducted a search and found marijuana in Davis' pocket. Upon searching the area, Sergeant Caviness discovered a small plastic bag in a crack in the wall of the abandoned service station at or near the point where Davis had stopped and knelt. The bag was tied with a twist tie. None of the detectives could state how the bag got into the crack in the wall. The substance in the bag was subsequently identified as cocaine. Detective Landers searched the white van and found baking soda, twist ties, a measuring spoon, a broken glass vial, and a beer can inside. The State did not present evidence as to who owned or was in possession of the van.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Henry T. Rosser, for the State.

Assistant Public Defender Robert O'Hale for defendant appellant.

ARNOLD, Judge.

[1] Defendant first assigns error to the denial of his motion to suppress evidence obtained from the search of his person. We find no merit to this assignment of error. N.C.G.S. § 15A-976(b) states, "If the State gives notice not later than 20 working days before trial of its intention to use evidence. . . , the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State." On 31 May 1988, the State provided the defendant with notice of its intent to introduce evidence obtained by search without a warrant of his person and vehicle. On 9 June 1988 defendant moved to suppress that evidence; however, his motion was dismissed on 1 July 1988 without prejudice and defendant was granted leave to refile it in a form meeting procedural requirements. Defendant's second motion to suppress the evidence was filed on 9 September 1988, three days before his scheduled 12 September 1988 trial.

Defendant contends that the order granting him leave to refile the motion to suppress did not include a time limitation and that the subsequently filed motion was properly before the court. That contention is unavailing. The order of 1 July 1988 specifically stated

that leave was granted to refile the motion "in a form which meets the procedural requirements of Article 53." Among those requirements is a ten-day time limit, and defendant should not be surprised to find that leave to refile the motion only extends his time another ten days and not until the eve of trial. N.C.G.S. § 15A-976. We therefore find no error in the dismissal of defendant's motion to suppress the evidence obtained from the search of his person.

Defendant also assigns error to the trial court's admission of the marijuana in evidence, contending that there was insufficient evidence for the court to determine if the officers had probable cause to arrest or search him. We find no error. The exclusive method of challenging the admissibility of evidence on the grounds specified in N.C.G.S. § 15A-974 is a motion to suppress which complies with the procedural requirements of Article 53. *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984); *State v. Conard*, 54 N.C. App. 243, 282 S.E.2d 501 (1981). The foregoing discussion addresses defendant's motion to suppress the evidence and will not be repeated herein except to note that twice his motion to suppress the evidence did not conform to the procedural requirements of Article 53, and he should not be heard to complain.

[2] Defendant next assigns error to the trial court's denial of his motion for a mistrial based upon Detective Landers' testimony that the reason the officers moved from the phone booth to the Tops Service Station was that the informant had stated that the "subject was selling narcotics." However, we agree with the State's contention that any prejudice to Davis was cured by the trial judge's instruction to the jury to disregard that information, and find no prejudicial error.

[3] Defendant also assigns error to the admission of evidence of the contents of the white van. Defendant contends that the contents of the van had no relevance to him and was so prejudicial in its effect as to deny him a fair trial.

Assuming, arguendo, that there was any prejudice in presenting evidence of the contents of the van, such prejudice was negated when the charge involving that evidence was dismissed.

[4] Defendant next assigns error to the admission of testimony by Detective Landers as to the length of time the bag had been

in the crack of the service station wall. This assignment of error is without merit.

At trial Detective Landers testified that the bag was clean; it had no dirt, trash or leaves on top of it; and it did not appear to have been in the crack for a long period of time. Defendant objected and moved to strike that testimony but was overruled. Arguably the testimony of Detective Landers is inadmissible expert testimony under N.C.G.S. § 8C-1, Rule 701. However, since the jury was free to conclude, based on the absence of dirt, trash or leaves, that the bag had not been in the crack an appreciable amount of time, we find that the error, if any, was harmless.

[5] Finally, defendant assigns error to the trial court's denial of his motion for nonsuit of the charge of felonious possession of cocaine. Defendant contends that there was insufficient evidence to support the charge. We disagree.

Upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State and the State given the benefit of every reasonable inference arising therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971); *State v. Vincent*, 278 N.C. 63, 178 S.E.2d 608 (1971).

In *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), the defendant was seen wearing a hat. He was later seen without the hat, and, upon his arrest, the hat was found in some tall grass. *Id.* Inside the hat were packets of marijuana. *Id.* Our Supreme Court held that the nonsuit motion should have been allowed and reversed the judgment of the trial court. *Id.* In the case at bar, although none of the detectives could testify as to how the cocaine got into the crack in the wall, Davis was seen kneeling where the bag of cocaine was found. This circumstantial evidence was sufficient to permit a jury to make whatever inferences and conclusions reasonable and to decide the guilt or innocence of the defendant. Therefore, nonsuit was properly denied.

Based on the foregoing analysis, we find no error in the trial below.

No error.

Judge COZORT concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON concurring in part and dissenting in part.

I concur in the majority's resolution of all issues in this case except the issue involving the trial judge's refusal to grant a mistrial when Detective Landers told the jury that an informant told him that the defendant was selling narcotics. Few activities deserve the uniform and national consternation that drug selling deserves. It naturally, and even rightfully, tugs at the heart strings of jurors. Indeed, some jurors may be swayed to convict by the mere suggestion that one deals in drugs. But the spectre of an alleged drug seller escaping punishment or being retried should not make courts waiver from their unflagging duty of ensuring every defendant a fair trial. In my view, testimony in this drug possession case that defendant was a drug seller was reversibly prejudicial and I dissent.

In *State v Aycoth* the defendant claimed prejudice on the grounds that a deputy sheriff testified that he knew that the defendant owned the automobile involved in the robbery case being tried because the defendant "at an earlier date said it was his car when [he was] arrested . . . on another charge . . . when he was indicted for murder." 270 N.C. 270, 272, 154 S.E.2d 59, 60 (1979). The trial judge in *Aycoth* gave a curative instruction, directing the jury to disregard the statements of the deputy sheriff. However, our Supreme Court found that ". . . the court's instruction did *not* remove from the minds of the jurors the prejudicial effect of the knowledge they had acquired from [the deputy sheriff's] testimony that Aycoth had been or was under indictment for murder." *Id.* at 273, 154 S.E.2d at 61.

"In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict." *State v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473 (1948). The statement in the case before us, like that in *Aycoth*, was of a nature such that the court's instruction did not remove from the minds of the jurors the "prejudicial effect of the knowledge they had acquired" from Landers' testimony that Davis was selling narcotics. Significantly, the jury knew that the informant's other statements had been proven to be true. Indeed, before uttering the challenged hearsay statement, Detective Landers

testified: "After I received the information, I responded to the area where the information was based on, [sic] and to verify that the information that I received was true and accurate information." The white van described by the informant was found where the informant said it would be. Baking soda, twist ties, a measuring spoon, and a broken glass vial, among other things, were found in the described van. The defendant, himself, fit the exact description given by the informant. Further, the defendant was found with another man exactly where the informant said they could be found. The knowledge that all the informant's previous statements were verified had its "probable influence upon the minds of the jury" and presented the "obvious difficulty [of] erasing it from [the] jury's mind." *Id.* Equally significant, the testimony of Detective Landers that he had been with the Greensboro Police Department for "almost seven years" and had been in the vice and narcotics division for "a little over two years" cast doubts on the possibility that the challenged statement—"the subject was selling narcotics"—was a "slip of the tongue" or the opinion of a recently-graduated officer. Indeed, the trial judge had just sustained objections to the two preceding questions, one of which solicited a hearsay response. Detective Landers had every reason to know that the hearsay testimony—that the defendant was selling narcotics—would be prejudicial in this narcotics possession case. I therefore believe the trial court erred by failing to grant Davis' motion for a mistrial.

JAMES WILKINS v. AMERICAN MOTORISTS INSURANCE COMPANY

No. 8929SC88

(Filed 6 February 1990)

1. Insurance § 149 (NCI3d)— insurer's duty to defend—determination by pleadings

An insurer's duty to defend an insured is determined by the facts alleged in the pleadings of the lawsuit against the insured. If the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, the insurer has a duty to defend; if, however,

the facts alleged in the pleadings are not even arguably covered by the policy, then no duty to defend exists.

Am Jur 2d, Insurance §§ 1405, 1409-1413.

2. Insurance § 143 (NCI3d)— homeowners insurance—aircraft exclusion—negligent failure to warn and to instruct

A provision in a homeowners insurance policy excluding liability for injuries arising out of the ownership, maintenance or use of an aircraft applied to exclude coverage for injuries to passengers in an airplane crash allegedly caused by defendant insured's negligent failure to warn the pilot and passengers of damage to the engine and negligent failure to properly instruct the pilot as to operation of the airplane since the aircraft exclusion applies when an injured party's use of the aircraft is a direct cause of the injury, and the alleged failure to warn and negligent instruction are causes which involve the use of the aircraft.

Am Jur 2d, Insurance § 727.

APPEAL by plaintiff from judgment entered 29 November 1988 by *Judge Robert D. Lewis* in HENDERSON County Superior Court. Heard in the Court of Appeals 22 August 1989.

Plaintiff instituted this action for declaratory judgment and damages for breach of an insurance contract. Plaintiff is the insured under a homeowners insurance policy issued by defendant. In his complaint, plaintiff requested that the court declare that defendant is obligated under the policy to provide liability coverage and legal defense for plaintiff in a lawsuit arising out of an airplane crash. Plaintiff also requested damages in the amount of the legal fees already incurred by plaintiff in defending the lawsuit. From the trial court's entry of summary judgment for defendant, plaintiff appeals.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr. and Sharon B. Ellis, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon, for defendant-appellee.

PARKER, Judge.

The sole issue presented by this appeal is whether, as a matter of law, plaintiff's homeowners policy provides coverage for any liability that may be imposed upon plaintiff as a result of the airplane crash.

The essential facts of the case are not in dispute and may be summarized as follows: The airplane involved in the accident was owned by a corporation known as Mountain Scenic Aero, Inc. At the time of the crash, plaintiff owned an interest in the corporation. The airplane crashed on 16 June 1985, while being piloted by Roger Ward. In addition to the pilot, there were three passengers in the airplane when it crashed. As a result of the crash, two of the passengers died and the pilot and the other passenger suffered personal injuries. On 18 April 1986, an action was instituted to recover damages for the wrongful deaths of two of the passengers and the injuries suffered by the third passenger. The complaint named plaintiff as a defendant, and alleged that he was liable in that he (i) negligently damaged the engine of the airplane; (ii) failed to warn the pilot or passengers of such damage; (iii) negligently failed to properly maintain the airplane; and (iv) negligently failed to properly instruct the pilot as to the operation of the airplane.

Plaintiff's policy provides in pertinent part:

> If a claim is made or a suit is brought against any insured for damages because of bodily injury or property damage to which this coverage applies, we will:
>
> a. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> b. provide a defense at our expense by counsel of our choice. . . .

The policy also provides, however, that liability coverage does not apply to bodily injury or property damage:

> e. arising out of the ownership, maintenance, use, loading or unloading of:
>
> (1) an aircraft;

Based upon the aircraft exclusion, defendant denied coverage for any liability and refused to provide plaintiff with a defense in the lawsuit resulting from the airplane crash.

[1] Summary judgment is appropriate when no genuine issue of material fact exists 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). Under the language of plaintiff's policy defendant has a duty to defend. Since an insurer's duty to defend the insured is broader than its duty to provide liability coverage, *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. at 691, 340 S.E.2d at 377, we need not decide whether plaintiff will ultimately be liable in the lawsuit against him or whether defendant will ultimately be required to provide coverage for such liability. The duty to defend is determined by the facts as alleged in the pleadings of the lawsuit against the insured; if the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend. *Id.* If, however, the facts alleged in the pleadings are not even arguably covered by the policy, then no duty to defend exists. *Id.* at 692, 340 S.E.2d at 378. Any doubt as to coverage must be resolved in favor of the insured. *Id.* at 693, 340 S.E.2d at 378.

[2] In the present case, it is undisputed that plaintiff's potential liability is for injuries caused by an airplane crash. The complaint in the underlying lawsuit alleges that plaintiff is liable for (i) negligently damaging the airplane; (ii) failing to warn the pilot and passengers of the damage; (iii) failing to properly maintain the airplane; and (iv) failing to properly instruct the pilot. The policy excludes coverage for liability "arising out of the ownership, maintenance, use, loading or unloading" of an aircraft. This language clearly excludes coverage for liability based upon negligent damage to and improper maintenance of the airplane. Plaintiff contends, however, that the policy does not clearly exclude coverage for liability based upon failure to warn and negligent instruction and, therefore, the trial court erred in entering summary judgment for defendant.

Plaintiff relies on our Supreme Court's decision in *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986). In that case, the Court considered whether a homeowners policy provided coverage for liability resulting from the accidental discharge of a rifle within the insured's truck. The policy in question contained a motor vehicle exclusion with language identical to the exclusion at issue in this case. *Id.* at 537, 350 S.E.2d at 68. (The exclusion in this case also applies to motor vehicles.) After review-

ing cases from other jurisdictions, the Court enunciated two principles governing the construction of homeowners policies:

> (1) [A]mbiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.

Id. at 546, 350 S.E.2d at 73. Finding the "arising out of" language in the exclusion to be ambiguous, the Court found that the policy provided coverage because the insured's liability could be predicated upon negligent mishandling of the rifle—a cause unrelated to the use of the truck. *Id.* at 547, 350 S.E.2d at 73-74.

Although our decision in this case is controlled by the principles our Supreme Court enunciated in *State Capital*, we hold that plaintiff's homeowners policy does not provide coverage for any liability that might result from the underlying lawsuit. We find it significant that the injury in *State Capital* was caused by an instrumentality other than the specific subject of the exclusion. In this case, however, the injuries were caused by the operation of the airplane itself. Although the allegations of failure to warn and improper instruction are theories of liability which do not depend upon plaintiff's direct involvement with the operation of the airplane, the exclusionary language requires only that the *injuries* arise out of the ownership, maintenance, or use of an aircraft. Therefore, the potential liability created by the underlying lawsuit falls within the policy's aircraft exclusion.

Other jurisdictions have reached the same conclusion under similar facts. In *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982), the insured sought to avoid the effect of an aircraft exclusion by contending that liability could be imposed for negligent training of a pilot. The court rejected the argument and reasoned as follows:

> Regardless of what may have been a contributing cause of the decedent's death, it is clear beyond question that the bodily injury resulting in his death was directly related to the opera-

> tion of an aircraft leased to [the insured]. Whatever else may have been a cause of the decedent's ultimate death, it is clear from the record here that if he had not been operating the aircraft at the time it crashed, he would not have been killed. That is specifically what the policy excluded.

Safeco Ins. Co. of America v. Husker Aviation, Inc., 211 Neb. at 24, 317 N.W.2d at 748. In *Hartford Fire Ins. Co. v. Superior Court*, 142 Cal. App. 3d 406, 191 Cal. Rptr. 37 (1983), the court held that allegations of negligent pre-flight planning and misrepresentations of the pilot's experience were not independent causes of the injury so as to create an exception to an aircraft exclusion. In *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042 (9th Cir. 1985), the court held that liability based upon negligent entrustment came within an aircraft exclusion, noting that there could be no recovery but for the ownership or use of the excluded aircraft. *Id.* at 1045. *See also Fox Hills Country Club, Inc. v. American Ins. Co.*, 264 Ark. 239, 243, 570 S.W.2d 275, 277-78 (1978) (negligent entrustment). Finally, in *John Deere Ins. Co. v. Penna*, 416 N.W.2d 820 (Minn. Ct. App. 1987), the court held that liability for a parachuting accident came within an aircraft exclusion because "the act of parachuting is so intimately associated with the use of the airplane as to be inseparable from it." *Id.* at 824.

Thus, other jurisdictions have held that liability for aircraft-related injuries is not excepted from an aircraft exclusion merely because there are allegations of negligent conduct other than the negligent use or maintenance of the aircraft. The above-cited cases establish the principle that coverage is excluded when the injured party's use of the aircraft is the direct cause of the injury. *Cf. Little v. Kalo Laboratories, Inc.*, 406 So. 2d 678 (La. Ct. App. 1981), *cert. denied*, 410 So. 2d 1133 (La. 1982) (exclusion did not apply to damages resulting from pesticides sprayed from airplane). We find this principle to be consistent with our Supreme Court's decision in *State Capital, supra.* Although the Court held that coverage would exist for injuries resulting from non-excluded, concurrent causes, it interpreted the exclusionary language "as excluding accidents for which the sole proximate cause involves the use of an automobile." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. at 547, 350 S.E.2d at 74. Coverage existed in *State Capital* because the negligent mishandling of the rifle was a "non-automobile proximate cause." *Id.* In the present case, the alleged failure to warn and negligent instruction are causes which

involve the use of the aircraft and, unlike the handling of the rifle in *State Capital*, they could cause no injury that was not directly connected to the use of the aircraft.

We are not unmindful of the principle that exclusions of liability in insurance contracts are not favored and any ambiguities in exclusionary provisions must be construed in favor of the insured. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. at 547, 350 S.E.2d at 73. This principle cannot be invoked, however, to impose liability that is clearly excluded by unambiguous contract terms. *See Chadwick v. Insurance Co.*, 9 N.C. App. 446, 176 S.E.2d 352 (1970). The injuries giving rise to plaintiff's potential liability in this case arose from the use of an aircraft and, therefore, coverage is clearly excluded under the terms of the policy.

For the foregoing reasons, the trial court's entry of summary judgment for defendant is affirmed.

Affirmed.

Judges WELLS and PHILLIPS concur.

NEIL J. NADEAU v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND THE MEASUREMENTS GROUP, INC.

No. 8910SC110

(Filed 6 February 1990)

1. **Master and Servant § 108.1 (NCI3d) — unemployment compensation — misconduct — unauthorized telephone calls**

The trial court did not err by upholding an Employment Security Commission determination that claimant was discharged for cause where claimant's rewiring of telephone lines so that he could make long-distance calls was discovered only after he was discharged, but plaintiff's employer had reached the point of knowing that claimant had made numerous personal long-distance calls on company time at company expense in violation of company policy when claimant was discharged. The later discovered modification of the telephone system was

not necessary to the finding of misconduct but was relevant to show claimant's state of mind.

Am Jur 2d, Unemployment Compensation § 52.

2. **Master and Servant § 108.1 (NCI3d) — unemployment compensation — misconduct — notice of reason for discharge**

A claimant for unemployment compensation who had been discharged for misconduct received sufficient notice of the reason for his termination where he was told that he was being discharged as the result of an ongoing investigation which showed that he was responsible for unknown telephone charges, claimant worked for a private employer and there was no allegation that he had a property interest in continued employment, and he was afforded the statutory safeguards applicable to him at each point in the proceedings.

Am Jur 2d, Unemployment Compensation § 52.

3. **Appeal and Error § 28 (NCI3d) — unemployment compensation — broadside exception to findings — not considered**

An unemployment compensation claimant's broadside exception to the findings did not comply with Rule 10(a) of the North Carolina Rules of Appellate Procedure and the Court of Appeals declined to address his contention that the findings were not supported by competent evidence.

Am Jur 2d, Unemployment Compensation §§ 93, 94.

APPEAL by petitioner from judgment entered 26 October 1988 by *Judge J. B. Allen, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 19 September 1989.

Petitioner Nadeau ("claimant"), a former employee of respondent Measurements Group, Inc. ("employer"), appeals from a decision of the Employment Security Commission ("ESC"), affirmed in Superior Court, that claimant is disqualified from receiving unemployment benefits pursuant to G.S. sec. 96-14(2) because he was discharged for misconduct connected with his work.

Anderson, Schiller, Rutherford & Geil, by Marvin Schiller and Richard W. Rutherford, for petitioner-appellant.

Chief Counsel T. S. Whitaker and Deputy Chief Counsel V. Henry Gransee, Jr. for respondent-appellee Employment Security Commission of North Carolina.

Johnson, Gamble, Hearn & Vinegar, by Samuel H. Johnson and Richard J. Vinegar, for respondent-appellee Measurements Group, Inc.

JOHNSON, Judge.

After being discharged by respondent employer, claimant filed for unemployment compensation benefits with the ESC effective 24 January 1988. Employer responded that claimant was disqualified because he was discharged for misconduct. An adjudicator of the ESC concluded on 12 February 1988 that claimant was not discharged because of misconduct or substantial fault connected with his work pursuant to G.S. sec. 96-14(2) or (2A). Employer appealed to the Appeals Referee, who, after a hearing, reversed the prior decision, and held that claimant was discharged for misconduct connected with his work. Claimant appealed this decision to the Deputy Commissioner. After a hearing, the Deputy Commissioner entered a decision affirming the Appeals Referee's denial of benefits on 8 June 1988. Claimant sought further review in superior court. Following a hearing in superior court, the Honorable J. B. Allen, Jr. entered an order affirming the ESC's decision in its entirety. Claimant gave notice of appeal in open court.

The Deputy Commissioner made the following pertinent findings of fact: Claimant worked for employer as a photographic laboratory technician from March 1980 until 19 January 1988. It was employer's policy that employees were allowed to make reasonable use of its telephones for personal local calls. Employees needed a supervisor's permission to make personal, long distance calls. The telephone in claimant's work area was wired for internal calls only. Certain other employees saw claimant gain access to an area above the ceiling in his work area where the telephone junction was located. Claimant modified the wiring to enable him to make local and long distance calls from his telephone. On one occasion, he was overheard calling his wife in North Dakota. At other times claimant also used the telephone of another employee. After complaints by this employee, claimant's supervisor spoke with him about his telephone usage.

On 19 January 1988, employer completed an investigation of claimant's telephone use and concluded that claimant had made a number of lengthy personal long distance calls, including calls to Germany, Massachusetts and New York. On that same date

claimant was discharged without being told the specific reason for his discharge. After terminating claimant, employer continued to investigate the manner in which calls were made and discovered the modification of the telephone wiring in the ceiling area above claimant's work area.

[1] By his first Assignment of Error, claimant contends that the trial court erred in upholding the ESC's determination that he was discharged for misconduct because, claimant asserts, his misconduct was discovered only after his discharge. We disagree.

We note at the outset that a decision of the ESC is final, subject to review in superior court pursuant to G.S. sec. 96-15(h) and (i). In such review, "findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." G.S. sec. 96-15(i); *In re Enoch*, 36 N.C. App. 255, 243 S.E.2d 388 (1978). Concerning disqualification for benefits because of discharge for misconduct, G.S. sec. 96-14(2) states that a claimant is disqualified for benefits

> [f]or the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Claimant argues that his only action which would qualify as misconduct was the rewiring of the telephone lines above the ceiling in his office so that he could make long distance calls, and that this misconduct was only discovered after he was discharged. The findings of fact, however, disclose that employer had already reached the point in its investigation of knowing that claimant had made numerous personal long distance calls on company time and at

company expense, in disregard of company policy, when he was discharged. These calls evidenced "intentional and substantial disregard of the employer's interests" and of claimant's "duties and obligations to his employer," G.S. sec. 96-14(2), and rose to the level of "misconduct" under the statute. *Id.* The later discovered modification of the phone system was not necessary to the finding of misconduct. The tampering, however, is relevant to show claimant's state of mind concerning use of employer's phone system.

Violation of a company rule or policy will not constitute misconduct if the employee's action was reasonable and taken with good cause and does not demonstrate an unwillingness to work. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982). In the instant case, the evidence tended to show that claimant spent long periods of time making personal telephone calls. The record does not reflect that there was any reasonable cause for the repeated calls, and one result of them was to cause claimant to neglect his work. There is ample evidence of misconduct that was discovered prior to claimant's termination. We therefore overrule claimant's first argument.

[2] Next, claimant contends that he could not be discharged for misconduct since he was not given a specific reason at the time of discharge. Claimant relies on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494 (1985), and *Leiphart v. N. C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914 (1986). We find claimant's reliance on both of these cases to be misplaced. The respondents in *Loudermill* were public employees who could only be discharged for cause. They were held to have a property right in continued employment and accordingly had a due process right to a pretermination opportunity to respond to the charges against them. *Loudermill, supra.* The *Leiphart* claimant was a permanent State employee whose discharge notice was governed by G.S. sec. 126-35. This statute is not applicable to the instant case.

In the case at bar, the claimant worked for a private employer and there is no allegation that he had a property interest in continued employment. Claimant has been afforded the statutory safeguards applicable to him at each point in the proceedings. We also note that although the Deputy Commissioner found that claimant was not told the specific reason for discharge on 19 January 1988, the transcript reveals that he was told that he was being discharged as the result of an ongoing investigation, and that the

investigation showed that claimant was responsible for the unknown telephone charges. This reason was sufficient to put claimant on notice of the reason for his termination. This argument is overruled.

[3] By his third Assignment of Error, claimant contends that numerous findings of fact by the ESC are not supported by competent evidence. This argument is not properly before this Court since claimant, in making a broadside exception to the findings, has failed to comply with Rule 10(a) of the N. C. Rules of Appellate Procedure. *Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E.2d 536 (1976). We therefore decline to address this argument.

We find claimant's last Assignment of Error to be wholly without merit, and we do not address it.

For all the foregoing reasons, the judgment of the superior court is

Affirmed.

Judges WELLS and ORR concur.

IN THE MATTER OF ISSAC CLARK ROBERSON AND JORDAN EDWARD ROBERSON

No. 8918DC391

(Filed 6 February 1990)

1. Parent and Child § 1.6 (NCI3d)— termination of parental rights—nonpayment of child support—evidence sufficient

The trial court correctly found and concluded that respondent failed to provide child support for more than one year preceding the filing of the termination of parental rights proceeding where respondent acknowledges that he paid no support to petitioner for a period of more than one year before the petition was filed but contends that payments to his son's child psychologist constituted child support. Respondent's support obligation was $250 a month, to be paid to petitioner, not to pay the child psychologist for his son's counseling.

Am Jur 2d, Parent and Child §§ 34, 35.

2. Parent and Child § 1.6 (NCI3d)— termination of parental rights—nonpayment of support—finding of willfulness

The trial court did not err by finding and concluding that respondent's failure to pay child support during the relevant period was willful despite the failure of the order to contain a finding of fact on respondent's ability to make support payments because petitioner in a termination action must prove the existence of an enforceable support order and a proper child support decree will be based on the supporting parent's ability to pay as well as the child's needs. Moreover, there was evidence of defendant's employment and earnings in the record which defendant did not rebut.

Am Jur 2d, Parent and Child §§ 34, 35.

3. Parent and Child § 1.6 (NCI3d)— termination of parental rights—failure to pay child support—willful

The trial court did not err in a proceeding to terminate parental rights for failure to pay child support by finding and concluding that respondent's failure to pay was willful, despite evidence of an emotional breakdown, where respondent did not present evidence of the seriousness or extent of his emotional difficulties sufficient to rebut petitioner's showing of willfulness.

Am Jur 2d, Parent and Child §§ 34, 35.

4. Parent and Child § 1.5 (NCI3d)— termination of parental rights—dispositional stage—no evidentiary burden of proof

The trial court did not abuse its discretion by terminating respondent's parental rights following findings and conclusions that respondent had not provided support for one year. Although respondent argued that petitioner had failed to prove by clear, cogent, and convincing evidence that termination was in the children's best interest, the court in the dispositional stage makes a discretionary determination of whether termination of parental rights is in the children's best interest and petitioner does not carry an evidentiary burden at that stage.

Am Jur 2d, Parent and Child §§ 34, 35.

APPEAL by respondent from judgment entered on 10 November 1988 by *Judge Robert E. Bencini* in GUILFORD County District Court. Heard in the Court of Appeals 11 December 1989.

In July 1988, petitioner, mother of Isaac Clark Roberson and Jordan Edward Roberson, filed a petition for termination of the parental rights of respondent, father of the two children. Following a hearing, the court ordered respondent's parental rights to Isaac and Jordan terminated. From this order, respondent appeals. Additional pertinent facts are set out in the opinion.

Hatfield & Hatfield, by Kathryn K. Hatfield, for petitioner appellee.

Anne R. Littlejohn, Attorney Advocate, for appellee.

Neill A. Jennings, Jr. for respondent appellant.

ARNOLD, Judge.

This is a case in which respondent's parental rights were terminated pursuant to N.C. Gen. Stat. § 7A-289.32(5), which permits termination of parental rights upon a finding that:

> One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support and education of the child, as required by said decree or custody agreement.

In the adjudication stage, petitioner must prove clearly, cogently, and convincingly the existence of at least one ground for termination. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984).

[1] Respondent first assigns error to the trial court's finding of fact #8 and conclusion of law #14, both of which state:

> The Court finds that between February, 1987 and the filing of this Petition, Thomas Edward Roberson did willfully and without legal justification fail to provide for the care, support and education of his minor children for more than one year preceding the filing of this Petition in violation of a court order for support.

We must review the evidence to determine whether the finding of fact is supported by clear, cogent and convincing evidence and the conclusion of law is supported by the findings of fact. *Montgomery* at 111, 316 S.E.2d at 253. In reviewing the order, the findings

of fact to which respondent did not except are deemed to be supported by sufficient evidence and are conclusive on appeal. *In re Wilkerson*, 57 N.C. App. 63, 65, 291 S.E.2d 182, 183 (1982).

The conclusive findings of fact showed the following: On 19 September 1986, respondent was ordered to pay to petitioner $250 a month for the support of their two sons. Between 19 September 1986, when the support order was entered, and July 1988, when the termination petition was filed, respondent made two full support payments in September and October 1986 and a partial support payment in February 1987. Respondent made a second partial support payment on 5 August 1988, after the petition had been filed. On 7 June, 11 July, 8 August and 21 September 1988, respondent made payments to his son's child psychologist of between thirty and fifty dollars each.

Respondent acknowledges that he paid no support to petitioner between February 1987 and August 1988, a period of more than one year before the petition was filed. However, he argues that the payments during the relevant statutory time period to his son's child psychologist for his son's counseling constitute child support. We disagree. According to the copy of the child support order included in the record, respondent's support obligation was $250 a month to be paid to petitioner, not to pay the child psychologist for his son's counseling. We note that the payments to the child psychologist before the petition was filed totalled $75. Respondent offered no evidence that he was obligated by a custody decree or agreement to pay the child psychologist for his son's treatment. The trial court therefore correctly found and concluded that respondent failed to provide child support for more than one year preceding the filing of the termination petition in violation of a court order for support.

[2] Respondent makes several arguments that the finding and conclusion of willful failure to pay was erroneous. In proceedings under N.C. Gen. Stat. § 5A-21 to hold a supporting parent in contempt for willful failure to pay support, the following definitions of the word "willful" were cited with approval: "disobedience which imports knowledge and a stubborn resistance," "doing the act . . . without authority—careless whether he has the right or not—in violation of law." *Jones v. Jones*, 52 N.C. App. 104, 110, 278 S.E.2d 260, 264 (1981). (Citations omitted.) In proceedings conducted under former N.C. Gen. Stat. § 48-5, the predecessor of N.C. Gen. Stat.

§ 7A-289.32(8), which allows termination based upon a finding of "willful abandonment," the word "willful" implied doing an act purposely and deliberately. *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 513-14 (1986). "Willful intent . . . is a question of fact to be determined from the evidence." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

Respondent first argues that the trial judge erred in finding and concluding that respondent's admitted failure to pay support during the relevant time period was willful because the order does not contain a finding of fact on respondent's ability to make support payments. In a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed. *See* N.C. Gen. Stat. § 7A-289.32(5). Because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, N.C. Gen. Stat. § 50-13.4; *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985), there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period. Moreover, there was evidence in the record that respondent was continuously employed and earning between $1,300 and $1,700 a month during the relevant statutory time period, except for a period of several weeks when he moved from Texas to North Carolina. Respondent could have rebutted petitioner's evidence of his ability to pay by presenting evidence that he was in fact unable to pay support, but he did not do so.

[3] Respondent next argues that the finding and conclusion of "willfulness" was erroneous because petitioner did not exclude respondent's psychological and emotional difficulties as the cause for respondent's failure to pay. Petitioner's evidence showed that respondent had been ordered to pay for his children's support and that he was fully aware of his obligation, yet he failed to pay for the relevant time period. Respondent testified that he had had a very serious emotional breakdown in November 1986 and that he had received counseling before and during the year preceding the filing of the petition. The trial judge determined from all the evidence that petitioner had shown by clear, cogent, and convincing evidence that respondent's failure to pay was willful. We agree that the evidence was sufficient for a finding of willful failure to pay. On different facts, a respondent-parent's psycho-

logical or emotional illness might rebut what a petitioner's evidence had shown to be willful behavior. Here, however, respondent did not present evidence as to the seriousness or extent of his emotional difficulties sufficient to rebut petitioner's showing of willfulness.

[4] Respondent next assigns error to the trial court's finding and conclusion that it was in the children's best interest to terminate respondent's parental rights. Respondent argues that petitioner failed to prove by clear, cogent, and convincing evidence that termination was in the children's best interest. At the adjudication stage, petitioner carries the burden of proving the existence of grounds for termination by clear, cogent and convincing evidence. N.C. Gen. Stat. § 7A-289.30(e); *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *cert. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). Once the judge determines grounds for termination exist, the case enters the dispositional stage. At this stage, the court makes a discretionary determination whether termination of parental rights is in the children's best interest. N.C. Gen. Stat. § 7A-289.31(a); *White* at 85, 344 S.E.2d at 38. Petitioner does not carry an evidentiary burden at the dispositional stage. *See White* at 85, 344 S.E.2d at 38. In this case, the trial judge first determined that one of the grounds for termination did exist. He then declined to exercise his discretion not to terminate respondent's parental rights. This assignment of error has no merit.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

JANICE BARE v. TINA LOUISE BARRINGTON AND VERNON LESLIE TYNDALL

No. 8920SC656

(Filed 6 February 1990)

1. Automobiles and Other Vehicles § 94.7 (NCI3d) — automobile accident — contributory negligence — intoxicated driver

The trial court erred in a negligence action arising from an automobile accident by refusing to submit the issue of con-

tributory negligence to the jury where there was evidence tending to show that plaintiff and defendants had been socializing together at two different bars for approximately three hours prior to the accident; the defendant driver consumed eight or nine beers during that period according to her own testimony; and the investigating officer found empty beer containers inside the car and detected an odor of alcohol about the defendant driver immediately following the accident. Plaintiff's evidence that she did not see defendant driver having anything to drink that evening was for the jury to consider and weigh along with all of the other evidence presented.

Am Jur 2d, Automobiles and Highway Traffic §§ 422-424.

2. Evidence § 51 (NCI3d)— automobile accident—blood test for alcohol not admissible

The trial court in a negligence action arising from an automobile accident did not err by refusing to admit hospital records with respect to the blood test tending to show the amount of alcohol in the driver's blood immediately after the accident where defendants did not follow the guidelines set out in *Robinson v. Insurance Co.*, 255 N.C. 669.

Am Jur 2d, Automobiles and Highway Traffic §§ 305, 306.

APPEAL by defendants from *Mills, Judge*. Judgment entered 23 March 1989 in Superior Court, RICHMOND County. Heard in the Court of Appeals 8 January 1990.

This is a civil action wherein plaintiff seeks to recover damages for personal injury allegedly resulting from the negligence of defendants in the operation of a motor vehicle on 14 July 1985.

The evidence at trial tends to show the following: On the night of 14 July 1985, plaintiff went with some friends to a bar called Our Place in Hamlet, North Carolina. They arrived at the bar at approximately 8:30 p.m. Shortly thereafter, defendants, Vernon Tyndall and Tina Barrington entered the bar accompanied by another man, James Hayden. Mr. Tyndall and Mr. Hayden sat down at a table directly behind plaintiff and her friends while Ms. Barrington went to play pool. Then, Mr. Hayden bought some beer and went out to the car, and defendant Tyndall began talking to plaintiff. Defendants, plaintiff and Hayden stayed at Our Place for approximately one hour and a half. During that period of time,

plaintiff saw defendant Tyndall consume three beers. Defendant Barrington also consumed three beers at Our Place, although plaintiff did not see her have anything to drink. Plaintiff and defendants then decided to go to the Lakeview Lounge which was approximately two to three miles from Our Place. Tyndall asked plaintiff to ride with him, Ms. Barrington and Mr. Hayden. They left Our Place in Tyndall's 1984 Oldsmobile automobile with Ms. Barrington driving and arrived at the Lakeview Lounge at approximately 10:30 p.m. Plaintiff and defendants stayed at the Lakeview Lounge for approximately one hour and twenty minutes. During that time, defendant Tyndall drank two beers, and defendant Barrington drank three beers. Plaintiff again did not see Ms. Barrington have anything to drink. The group decided to go to a "pig pickin'" in Ellerbe, North Carolina; and at approximately 11:40 p.m., plaintiff, defendants, and Hayden left the Lakeview Lounge in Tyndall's 1984 Oldsmobile automobile with Ms. Barrington at the wheel. Plaintiff was seated in the front seat between Ms. Barrington, the driver, and Mr. Tyndall, who was in the passenger's seat. Mr. Hayden had passed out and was lying down in the back seat. From the Lakeveiw Lounge, the group proceeded along rural paved road 1450 towards Ellerbe. Ms. Barrington was unfamiliar with the road which was curvy and wet that night. As the car rounded a sharp curve in the road, both plaintiff and Mr. Tyndall asked Ms. Barrington to slow the car down. Approximately one-half mile further down the road and as the car approached a fork in the road, Ms. Barrington lost control of the car going around another sharp curve and ran the car off the road causing it to crash into a tree situated in the fork between the roads, resulting in serious personal injury to plaintiff. Immediately after the collision, Trooper Joe Stanley of the North Carolina State Highway Patrol investigated the accident scene and found beer bottles and cans inside the car and detected an odor of alcohol about all of the occupants of the vehicle.

The following issues were submitted to and answered by the jury as indicated:

> 1. Was the plaintiff injured and damaged as a result of the negligence of the defendant Tina Louise Barrington?
>
> ANSWER: YES.
>
> 2. If so, what amount, if any, is the plaintiff entitled to recover of the defendants?

ANSWER: 136,000.00.

From a judgment on the verdict, defendants appealed.

Charles W. Collini and Henry T. Drake for plaintiff, appellee.

George C. Bower, Jr., and H. P. Taylor, Jr. for defendant, appellant Tina Louise Barrington.

Griffin, Caldwell, and Helder, P. A., by C. Frank Griffin, for defendant, appellant Vernon Leslie Tyndall.

HEDRICK, Chief Judge.

[1] Defendant contends in his second assignment of error argued on appeal that "[t]he trial court erred in refusing to submit the issue of contributory negligence to the jury when there was evidence that the plaintiff knew or should have known that defendant Barrington was intoxicated." Defendants assert that "a sufficient amount of evidence was presented to enable a reasonable person to find by a preponderance of the evidence that the plaintiff knew or should have known that the defendant Barrington was driving under the influence of an intoxicant." We agree.

"It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987). "This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties. . . ." *Harrison v. McLear*, 49 N.C. App. 121, 123, 270 S.E.2d 577, 578 (1980). "The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial." *Scher v. Antonucci*, 77 N.C. App. 810, 811, 336 S.E.2d 434, 435 (1985). Furthermore, in addressing specifically the issue of a passenger's contributory negligence, our Supreme Court has stated:

> Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision, is for the jury to decide in the light of all the surrounding facts and circumstances.

Dinkins v. Carlton, 255 N.C. 137, 141, 120 S.E.2d 543, 545 (1961), *quoting, Samuel v. Bowers*, 232 N.C. 149, 153, 59 S.E.2d 787, 789 (1950).

The evidence presented in the instant case tending to show that: (1) plaintiff and defendants had been socializing together at two different bars for approximately three hours prior to the accident; (2) the defendant/driver consumed eight or nine beers during that period according to her own testimony; and (3) the investigating officer found empty beer containers inside the car and detected an odor of alcohol about the defendant/driver immediately following the accident was clearly sufficient to raise an inference from which the jury could find that plaintiff knew or should have known that defendant/driver, Tina Barrington, had been drinking, and her ability to operate a motor vehicle was appreciably impaired from having consumed alcohol immediately prior to plaintiff's getting into the automobile when they left the Lakeview Lounge to go to the "pig pickin.' " Plaintiff's evidence to the contrary that she did not see Ms. Barrington have anything to drink that evening was for the jury to consider and weigh along with all the other evidence presented. "Discrepancies and contradictions in the evidence . . . are to be resolved by the jury, not by the court." *Dinkins v. Carlton*, *supra*, 255 N.C. 137, 141, 120 S.E.2d 543, 545 (1961).

We find the issue of plaintiff's contributory negligence to have been clearly raised by the evidence presented at trial, and the trial judge's failure to submit that issue to the jury entitles defendants to a new trial.

[2] Defendants also assign error to the refusal of the trial court to allow the introduction into evidence of the hospital records with respect to the blood tests tending to show the amount of alcohol in defendant Barrington's blood immediately after the accident giving rise to plaintiff's claim. Whether defendant Barrington was driving while impaired from the consumption of alcohol at the time of the accident is clearly relevant in this case, but our Supreme Court has established rules for the admission of evidence regarding tests tending to show the amount of alcohol in a party's blood. In *Robinson v. Insurance Co.*, the Supreme Court said:

> . . . [W]hether or not a blood test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field.

Robinson v. Insurance Co., 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961).

The Court did not err in refusing to admit the hospital records, as defendants contend, as business records. Defendants did not follow the guidelines set out in *Robinson*. This assignment of error has no merit.

For the error in not submitting an issue of contributory negligence to the jury, the case is remanded to the Superior Court for a new trial.

New trial.

Judges ARNOLD and WELLS concur.

DARRYL E. UNRUH AND WIFE, GRACE E. UNRUH, PLAINTIFFS v. CITY OF ASHEVILLE, DEFENDANT, AND CAROLINA L. BRIDGETT, RAYMOND G. GEPHARDT, MARION E. GEPHARDT, JOAN S. GRIMES, S. JANSON GRIMES, LISA G. HOLT, LAWRENCE B. HOLT, LEMAC N. HOPKINS, MARJORIE HOPKINS, VALERIE J. KLEMMER, ROBERT E. DUNGAN, DANIEL O'HANNON, SHEENA O'HANNON, THOMAS L. PAINTER, HERBERT H. PATRICK, WALLACE H. PATTERSON, MARY S. PATTERSON, TIMOTHY L. WARNER, JEANNE T. WARNER, AND BEATRICE P. HENDRIX, INTERVENOR-DEFENDANTS

No. 8828SC1339

(Filed 6 February 1990)

1. **Municipal Corporations § 30.20 (NCI3d)— historic district— amendment of zoning ordinance—statutory procedure not followed**

The trial court correctly declared invalid an ordinance establishing an historic district where N.C.G.S. § 160A-385 requires that an amendment to a zoning regulation shall not become effective except by favorable vote of three-fourths of all members of the City Council when there is a protest signed by owners of twenty percent or more either of the area of the lots included or those immediately adjacent thereto; the area was rezoned an historic district by a four-to-three vote; and the percentage of the rezoned or adjacent area owned by protesting property owners was not addressed in the record. In undertaking to enact an ordinance over the protests of affected property owners, the city had an affirmative duty

to determine the sufficiency, timeliness, and percentage of the protest and to call for the vote that the law required. Its failure to determine those essential facts rendered the ordinance invalid on its face.

Am Jur 2d, Zoning and Planning §§ 40, 57, 58.

2. Municipal Corporations § 31 (NCI3d)— historic district—declaratory judgment action to declare ordinance invalid—administrative remedies not exhausted—declaratory judgment action proper

Plaintiffs could properly challenge an historic zoning district ordinance by a declaratory judgment action before their administrative remedies were exhausted because they had the necessary personal and legal interest in that they were owners of property in the rezoned area on which the City would not permit them to build.

Am Jur 2d, Zoning and Planning §§ 40, 57, 58.

APPEAL by defendant and intervenor-defendants from order entered 15 July 1988 by *Lewis, Robert D., Judge*, in BUNCOMBE County Superior Court. Heard in the Court of Appeals 7 June 1989.

Van Winkle, Buck, Wall, Starnes and Davis, by Albert L. Sneed, Jr., for plaintiff appellees.

William F. Slawter and Sarah Patterson Brison for defendant appellant.

Robert E. Dungan, pro se, and Michael E. Smith for intervenor-defendant appellants.

PHILLIPS, Judge.

[1] By this declaratory judgment action plaintiffs, who own property in the district and were denied a certificate or permit to build on it, seek to have the City of Asheville ordinance establishing the Chestnut-Liberty Historic District declared invalid. The individual defendants intervened to join the City in defending the ordinance, which the court, following a hearing at which all parties offered evidence, declared invalid on the ground that the statutory procedures for establishing historic districts were not followed.

City ordinances creating historic districts, as other ordinances which limit the use of property, are zoning ordinances. The validity of such ordinances depends upon following the procedures laid down by the legislature for their adoption, because cities are creatures of the legislature and have only those powers that the legislature has granted them. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968); *Schloss v. Jamison*, 262 N.C. 108, 136 S.E.2d 691 (1964). The only authority that the legislature has granted towns and cities to regulate the use of property is contained in Article 19, Planning and Regulation of Development, of Chapter 160A of the General Statutes. The statutes in Part 2 of that Article contain their authority to regulate subdivisions; the statutes in Part 3 contain their zoning authority; and the statutes in Part 3A contain their authority to create historic districts. In Part 3A, G.S. 160A-395 provides that cities—

> may, *as part of a zoning ordinance* . . . designate and from time to time amend one or more historic districts within the area subject to the ordinance. Such ordinance may treat historic districts either as a separate-use district classification or as districts which overlay other zoning districts. (Emphasis added.)

Despite the plain wording of this statute defendants incongruously and vainly contend that our zoning statutes do not apply to the ordinance in question, which undertook to amend Asheville's zoning regulation by *rezoning* the Chestnut-Liberty Street area as a local historic district. The City Council enacted the rezoning ordinance over the opposition of plaintiffs and other protesting property owners by a 4 to 3 vote. The sufficiency of that vote is a crucial issue in the case. For G.S. 160A-385 states that an amendment to a municipal zoning regulation "shall not become effective except by a favorable vote of three-fourths of all the members of the city council" when a protest occurs "signed by the owners of twenty percent (20%) or more either of the area of the lots included in a proposed change, or of those immediately adjacent thereto." Since the ordinance was opposed by protesting property owners, its validity necessarily depends upon what percent of the rezoned area the properties of the protesting property owners amounted to. If their properties aggregated 20 percent or more of the rezoned or adjacent lots the 4 to 3 vote was insufficient and the ordinance is invalid; if their properties aggregated a less percent of the specific lots the vote was sufficient and the ordinance is valid.

But it has not been determined and we cannot ascertain what percentage of the rezoned or adjacent area was owned by the protesting property owners because that crucial issue is not addressed in the record. What the record does show pertinent thereto, as the trial court found, is that: The City had not prescribed a form for protest petitions though G.S. 160A-386 authorized it to do so; and though G.S. 160A-386 provides that a protest must be received in sufficient time to allow the City at least two working days "to determine the sufficiency and accuracy of the petition" and the City received numerous writings from purported property owners opposing the proposed ordinance no determination was made either as to the accuracy or sufficiency of the protests or as to the percentage of rezoned or adjacent land owned by the protestors. These established facts on this vital aspect of the controversy led the court to conclude as a matter of law that: In undertaking to enact the ordinance over the protests of affected property owners the City had an affirmative duty to determine the sufficiency, timeliness, and percentage of the protests and to call for the vote that the law required; and its failure to determine those essential facts rendered the ordinance invalid on its face, since the 4 to 3 vote was insufficient to overcome a protest by property owners that complied with the provisions of G.S. 160A-385. These conclusions are correct: For only the City knew what protest documents were received and from whom; only it could initially determine the timeliness, accuracy and sufficiency of the protests; and since the City made no effort to determine those statutory conditions for a valid ordinance it cannot be presumed that it complied with them. A contrary holding would render nugatory a statute that the City was obliged to follow in enacting an ordinance which affects the rights of property owners.

[2] The appellants' other contention, that the action should have been dismissed because plaintiffs did not exhaust their administrative remedies before filing it, is also without merit. Though the denial of their certificate for new construction could have been followed by an appeal to the Board of Adjustment and a petition to the Superior Court for *certiorari*, as G.S. 160A-397 authorizes, and though ordinarily administrative remedies authorized by the legislature must be exhausted before resorting to the courts, *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979), under the circumstances recorded plaintiffs were not limited to following that course. For under our law—

> [T]he validity of a municipal zoning ordinance, when directly and necessarily involved, may be determined in a properly constituted action under our Declaratory Judgment Act. However, this may be done only when challenged by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby. (Citations omitted.)

Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976). This is such an action. As owners of property in the rezoned area that the City will not permit them to build on, plaintiffs have the necessary personal and legal interest to challenge the ordinance.

Affirmed.

Judges BECTON and LEWIS concur.

BOBBY H. HAWKINS AND WIFE, ANGELA L. HAWKINS v. RICHARD C. HOLLAND, D/B/A RICHARD C. HOLLAND CONTRACTOR

RICKY W. HOLLIFIELD AND WIFE, MELISA L. HOLLIFIELD v. RICHARD C. HOLLAND, D/B/A RICHARD C. HOLLAND CONTRACTOR

Nos. 8927SC150
8927SC151

(Filed 6 February 1990)

1. Contracts § 6.1 (NCI3d) — unlicensed contractor — counterclaim for unpaid balance of contract — summary judgment proper

The trial court did not err by granting summary judgment for plaintiffs on defendant's counterclaim for the unpaid balance on a construction contract where defendant individually contracted with plaintiffs to build the houses involved; the contract price exceeded $30,000; and defendant was not licensed under N.C.G.S. § 87-1 *et seq.* Even if defendant was in partnership with one Jim Hopper, who had a general contractor's license, the counterclaims were still unenforceable because plaintiffs' contracts were with defendant, not a partnership, and

because the partnership did not have a general contractor's license.

Am Jur 2d, Building and Construction Contracts § 130.

2. Contracts § 6.1 (NCI3d)— unlicensed contractor—attempt to recover sums paid

Plaintiffs were not entitled to recover sums they had paid to an unlicensed contractor on a building contract because our legislature did not intend to authorize the recovery of amounts paid unlicensed contractors under the circumstances of this case.

Am Jur 2d, Building and Construction Contracts § 130.

APPEAL by defendant from orders entered 18 October 1988 by *Sitton, Judge,* in CLEVELAND County Superior Court. Heard in the Court of Appeals 14 September 1989.

These consolidated appeals are based on essentially the same circumstances and raise the same legal questions. In the Fall of 1986 defendant building contractor built a house for each set of plaintiffs, the contract price of which exceeded $30,000; after each house was completed and defendant had been paid part of the contract price each set of plaintiffs sued defendant to recover what had been paid and to prevent him from collecting anything further. Each action was based upon the allegation that the construction contract was for more than $30,000 and defendant did not have a general contractor's license as then required by G.S. 87-1. The Hawkins' contract was for $74,700 upon which they had paid $36,600; the Hollifields' contract was for $57,700 upon which they had paid $39,200. In each case defendant admitted the contract amount and the payments made, but alleged in defense that he was in partnership with one Jim Hopper, who had a general contractor's license, and that the contract was obtained for and performed by the partnership. In each case defendant also counterclaimed for the contract balance, including the cost of extra construction done at plaintiffs' request, and moved to join Hopper as a defendant under his partnership allegation. In each case Hopper resisted the joinder motions, alleging that no partnership existed between them and that he only permitted defendant to use his contractor's license in obtaining the building permit and worked on the houses as defendant's paid employee. Both joinder motions were denied. In each case plaintiffs' motion for judgment on the pleadings under Rule

12, N.C. Rules of Civil Procedure, was converted to a motion for summary judgment under Rule 56, and defendant moved for summary judgment as to plaintiffs' suit to recover the amounts paid. In each case, following a hearing on the motions, defendant's motion for summary judgment was denied, defendant's counterclaim was dismissed, and summary judgment was entered for the plaintiffs in the amount of the payments made.

O. Max Gardner III for plaintiff appellees.

Lackey & Lackey, by N. Dixon Lackey, Jr., for defendant appellant.

PHILLIPS, Judge.

In each appeal defendant poses four identical questions, two of which are encompassed by the other two—Did the court err in (1) dismissing defendant's counterclaim for the unpaid balance of the construction contract, and in (2) holding defendant liable for the payments received on the construction contracts?

[1] As to the first question, we hold that dismissing defendant's counterclaim by summary judgment was not error. For the written contracts, affidavits, and other materials presented to the court establish without contradiction that defendant, individually, contracted with the plaintiffs to build the houses involved; that the contract price in each instance exceeded $30,000; and that defendant was not licensed as a general contractor under the provisions of Article I of Chapter 87 of the North Carolina General Statutes. These uncontradicted and therefore established facts required the entry of summary judgment dismissing the counterclaims as a matter of law. For G.S. 87-1, *et seq.*, then required a general contractor's license for all persons, firms or corporations who "for a fixed price, commission, fee or wage" undertook to bid upon or construct any building, the cost of which exceeded $30,000; defendant violated the law by contracting to build houses costing $74,700 and $57,700; and our courts will not enforce a contract that the law forbids. *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983); *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968); *Tillman v. Talbert*, 244 N.C. 270, 93 S.E.2d 101 (1956); *Courtney v. Parker*, 173 N.C. 479, 92 S.E. 324 (1917). Though the contradictory affidavits of defendant and Hopper do raise an issue of fact as to whether they were partners in building the houses involved, it does not follow, as defendant argues, that the dismissal of the

claim was error, because whether Hopper and defendant were partners is immaterial to the enforceability of the counterclaims for two reasons. First, the recorded materials conclusively indicate that plaintiffs' contracts were not with a partnership, but with defendant. Second, even if defendant and Hopper were partners and had contracted as a partnership to build the houses the contracts would still be illegal and unenforceable because the partnership did not have a general contractor's license either, and the law is that the construction bidder or contracting party must be licensed and that an employee, officer, or firm member of the contracting party had a license does not meet the law's requirement. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

[2] As to the other question presented, our opinion is that plaintiffs are not entitled to recover the sums they paid defendant under the illegal construction contracts. Though numerous cases involving the efforts of unlicensed building contractors to collect on their contracts have been decided by our Courts, so far as we can ascertain whether one can recover payments made on a construction contract to an unlicensed contractor has not been considered before in this jurisdiction. Other courts have considered the question, however, and held that such payments are not recoverable. Annotation, Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract, 74 A.L.R.3d 637 (1976). The bases of the holdings are that the statutes requiring the license do not specifically authorize the recovery of money paid, *Comet Theatre Enterprises, Inc. v. Cartwright*, 195 F.2d 80 (9th Cir. 1952); that such laws are penal in nature and must be strictly construed, *Main v. Taggares*, 8 Wash. App. 6, 504 P.2d 309 (1972); that the specification of particular penalties precludes the addition of others by judicial construction, *Fosdick v. Investors' Syndicate*, 266 N.Y. 130, 194 N.E. 58 (1934); that allowing the recovery of such payments is not necessary to effectuate the policy of licensing statutes, *Food Management, Inc. v. Blue Ribbon Beef Pack, Inc.*, 413 F.2d 716 (8th Cir. 1969); and that equity and the principles of restitution do not require that such contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost, *Homeland Insurance Co. v. Crescent Realty Co.*, 277 Ala. 213, 168 So.2d 243 (1964). All these reasons persuade us that in enacting G.S. 87-1, *et seq.*, our legislature did not intend to

authorize the recovery of amounts paid unlicensed contractors under the circumstances involved here.

Thus, the judgments against defendant for the payments received under the contracts are reversed; the orders denying defendant's motions for summary judgment as to plaintiffs' suits to recover the payments are reversed; the judgments dismissing defendant's counterclaims are affirmed; and the matter remanded to the Superior Court for the entry of judgments in accord with this opinion.

Affirmed in part; reversed in part; and remanded.

Judges WELLS and PARKER concur.

CHEROKEE INSURANCE COMPANY, BY AND THROUGH DAVID S. WEED, SPECIAL DEPUTY COMMISSIONER OF COMMERCE AND INSURANCE FOR THE REHABILITATION OF CHEROKEE INSURANCE COMPANY v. R/I, INC., AKA REINSURANCE INTERMEDIARIES

No. 8915SC377

(Filed 6 February 1990)

Limitation of Actions § 12.1 (NCI3d)— voluntary dismissal—action refiled within one year—different parties

The trial court properly granted defendant's motion for summary judgment based upon the statute of limitation where the parties agreed that the statute of limitation on a contract dispute began to run on 31 December 1984; plaintiff filed a complaint on 2 December 1987 naming Reinsurance Intermediaries, Inc. as the defendant; the summons was issued to Richard Edens as president and/or chairman of the board of directors of Reinsurance Intermediaries; the summons was accepted by Robert E. Hykes; plaintiff's contractual dispute was with R/I, Inc.; Reinsurance Intermediaries, Inc. was a separate, independent but inactive corporation; Robert Edens and Robert Hykes were officers of both corporations and both corporations used the same address; R/I, Inc. had in the past used the name Reinsurance Intermediaries; plaintiff was at that time litigating the same dispute with R/I, Inc. in Tennessee; plaintiff voluntarily dismissed the North Carolina ac-

tion against Reinsurance Intermediaries, Inc. on 16 December 1987 and filed an action in North Carolina on 22 June 1988 naming R/I aka Reinsurance Intermediaries as defendant; and the summons was issued to R/I, Inc. aka Reinsurance Intermediaries at the same address. The allegations in both complaints were substantially the same; however, the defendants were distinct and separate corporate entities, and the fact that they shared an address, directors and officers is immaterial. N.C.G.S. § 1A-1, Rule 41(a)(1).

Am Jur 2d, Limitation of Actions § 313.

APPEAL by plaintiff from judgment entered 14 November 1988 by *Judge Donald W. Stephens* in ALAMANCE County Superior Court. Heard in the Court of Appeals 13 October 1989.

Littleton, Weed & Hubbard, by William B. Hubbard and Brenner B. Lackey, and Alan E. Ferguson, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie L. Hutchins, for defendant-appellee.

GREENE, Judge.

In this civil action the trial court granted defendant's motion for summary judgment based on the statute of limitation and other issues. Plaintiff appeals.

The evidence tends to show that the Cherokee Insurance Company and R/I, Inc. entered into a contractual relationship in 1980. The parties agree that the statute of limitation on a dispute arising therefrom began to run on 31 December 1984.

On 2 December 1987 the plaintiff filed a complaint naming Reinsurance Intermediaries, Inc. as the defendant. The summons was issued to Richard Edens as president and/or chairman of the board of directors of Reinsurance Intermediaries, Inc. at 2855 South Church in Burlington, North Carolina. The summons was accepted at that location by Robert E. Hykes. The plaintiff's contractual dispute was with R/I, Inc., and Reinsurance Intermediaries, Inc. was a separate, independent but inactive corporation. Richard Edens and Robert Hykes were officers of both corporations, and both corporations used the same address. Furthermore, R/I, Inc. had in the past used the name Reinsurance Intermediaries. Also, at

the time of this filing, the plaintiff was litigating the same dispute with R/I, Inc. in Tennessee.

The plaintiff voluntarily dismissed the North Carolina action against Reinsurance Intermediaries, Inc. on 16 December 1987. On 22 June 1988 the plaintiff filed an action in North Carolina naming "R/I aka Reinsurance Intermediaries" as defendant. The summons was issued to R/I, Inc., aka Reinsurance Intermediaries at 2855 South Church Street in Burlington. The trial court found that this second filing occurred after the statute of limitation had tolled, and thus it granted defendant's motion for summary judgment.

The issue presented is whether the voluntary dismissal of an action against Reinsurance Intermediaries, Inc. extended the statute of limitation for filing an action against R/I, Inc.

There is no disagreement that this dispute arises out of a contract, and thus a three-year limitation commenced on 31 December 1984. N.C.G.S. § 1-52 (1983). The plaintiff argues that its complaint against R/I, Inc. on 22 June 1988 was timely because its earlier voluntary dismissal of an action against Reinsurance Intermediaries, Inc. provided a right to sue R/I, Inc. within one year from 16 December 1987, the date of the voluntary dismissal. Although R/I, Inc. and Reinsurance Intermediaries, Inc. are separate and distinct entities, the plaintiff argues that the initial filing against Reinsurance Intermediaries, and the surrounding circumstances, provided actual notice to R/I, Inc. and thus the plaintiff should receive the benefit of the Rule 41(a) extension. We disagree.

N.C.G.S. § 1A-1, Rule 41(a)(1) (1983) reads in pertinent part:

> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, *a new action based on the same claim* may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall satisfy a shorter time. [Emphasis added.]

To benefit from the one-year extension of the statute of limitation, the second action must be "substantially the same, involving the same parties, the same cause of action, and the same right. . . ." McIntosh, *North Carolina Practice and Procedure* § 312, at 187 (1956) (construing N.C.G.S. § 1-25, a predecessor of Rule 41(a)(1)). *See Holley v. Hercules, Inc.*, 86 N.C. App. 624, 628, 359 S.E.2d

47, 50 (1987); *see also Goodson v. Lehmon*, 225 N.C. 514, 35 S.E.2d 623 (1945); *Davis v. Norfolk-Southern R.R. Co.*, 200 N.C. 345, 157 S.E. 11 (1931); *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960); *Hall v. Carroll*, 253 N.C. 220, 116 S.E.2d 459 (1960); *see generally* Annot. "Limitations-Savings Statute-Parties," 13 A.L.R. 3d 848 (1967).

Although we have found no North Carolina cases involving facts closely similar to the case at hand, cases decided in other states applying savings statutes similar to our own have found the parties were not the same. For example, in *Vari v. Food Fair Stores, New Castle, Inc.*, 205 A.2d 529 (Del. 1964), the plaintiff was injured in a store operated by Food Fair Stores, New Castle, Inc. The plaintiff initially sued Food Fair Stores Corporation, a corporation separate and distinct from the defendant on appeal. After losing its initial suit on defendant's motion for summary judgment, the plaintiff instituted a second suit against Food Fair Stores, New Castle, Inc. The Delaware Supreme Court affirmed the trial court's grant of summary judgment for the defendant on the grounds that the statute of limitation had run since that state's saving clause had not been activated for the second defendant. The court found that the difference in the parties was more than nominal, even though the two corporations had the same resident agent and had at least two officers in common.

Another situation similar to the case at hand was presented in *McCoy Enterprises v. Vaughn*, 268 S.E.2d 764 (Ga. App. 1980) where the initial suit named Mr. James R. McCoy and Mrs. Irene W. McCoy, d/b/a Irene McCoy's Beauty Shop as defendants. "Subsequent discovery revealed that the correct owner of the beauty shop in question was McCoy Enterprises, a Georgia corporation, but that Mr. and Mrs. McCoy were the sole officers, directors and agents of said corporation." 268 S.E.2d at 765. The initial suit was voluntarily dismissed at mid-trial due to the unavailability of a key witness. A few weeks later the plaintiff "refiled" his complaint, naming McCoy Enterprises as the sole defendant. Noting that the plaintiff had never amended his original suit to name McCoy Enterprises, the court there held that the plaintiff "cannot maintain a 'renewal' action against it in light of the intervening statute of limitation." *Id.*

Another instructive case is *Cornwell v. Williams Brothers Lumber Co., et al.*, 229 S.E.2d 551 (1976), where the plaintiff collided

with a truck driven by an employee of Williams Brothers Concrete Company, but sued Williams Brothers Lumber Company. In discovery the plaintiff learned that the concrete and lumber companies were separate entities and that the truck was owned by the concrete company. However, both the companies shared an address and they had substantially the same officers and directors. The plaintiff voluntarily dismissed his action against Williams Brothers Lumber Company and later refiled against both companies after the statute of limitation had run. The court there held that the voluntary dismissal did not extend the statute of limitation for suit against the concrete company. *Id.; see also Henthorn v. Collins*, 118 S.E.2d 358 (W.Va. 1961).

Here the allegations and the plaintiff in both complaints are substantially the same. However, the defendants are distinct and separate corporate entities, and the fact that they share an address and directors and officers is immaterial. Therefore, we affirm the summary judgment for R/I, Inc. on the statute of limitation grounds.

Affirmed.

Judges EAGLES and PARKER concur.

JOHN SELLERS AND WILBER LEE SELLERS, PLAINTIFFS v. HIGH POINT MEMORIAL HOSPITAL, INC., HIGH POINT REGIONAL HOSPITAL, AND YVONNE HILL, DEFENDANTS

No. 8918SC406

(Filed 6 February 1990)

1. **Rules of Civil Procedure § 6 (NCI3d) — service of process — six-month delay — suit dismissed**

The trial court did not err by dismissing an action after a six-month delay in service of process where plaintiffs filed a complaint alleging medical negligence and loss of consortium on 20 November 1985; plaintiffs took a voluntary dismissal without prejudice on 4 May 1987; plaintiffs reinstituted the action on 2 May 1988; summonses were issued but never delivered to the sheriff; alias and pluries summonses were issued for both defendants on 3 June, 21 July, 6 September,

and 27 October 1988; defendant hospital received its first notice of the action when it received a copy of the calendar setting the case for the week of 14 November 1988; defendant hospital filed a motion to dismiss on 10 November 1988; the 27 October 1988 alias and pluries summons issued to the hospital was served on 14 November 1988; plaintiffs maintained at the hearing on the motion to dismiss that they had wanted to serve the individual defendant before serving the hospital for tactical reasons and had been unable to locate the individual defendant; and the trial court dismissed plaintiff's complaint against the hospital with prejudice. The hospital was prejudiced by the delay because it had no notice of this action until its name appeared on the court calendar and plaintiffs failed to explain why their intentional delay for tactical reasons should not be considered bad faith or an attempt to gain unfair advantage in the case.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 51.

2. **Rules of Civil Procedure § 4 (NCI3d)— service of process— service delayed—alias and pluries summonses—dismissal of process**

The trial court did not abuse its discretion in dismissing plaintiff's action with prejudice following a six-month delay in service of process even though alias and pluries summonses had been issued because *Smith v. Starnes*, 317 N.C. 613, which held that a duly-issued summons not served or delivered to the sheriff within thirty days could serve as the basis for an alias or pluries summons and would toll the statute of limitations, specifically stated that it was not addressing the issue of whether the complaint and summons were issued in bad faith or subject to involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b). Furthermore, the trial court concluded that plaintiffs had failed to prosecute their action and dismissed the action in its discretion.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 51.

3. **Rules of Civil Procedure § 4 (NCI3d)— service of process— delay—dismissal with prejudice—no abuse of discretion**

The trial court did not abuse its discretion by dismissing a complaint with prejudice based on a six-month delay in serv-

ice of process where the trial court found that no lesser sanction would better serve the interests of justice.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 51.

Judge WELLS concurring in the result.

APPEAL by plaintiffs from *Albright (W. Douglas, Jr.), Judge.* Order rendered in open court on 17 November 1988 and signed out of session on 22 November 1988. Heard in the Court of Appeals 18 October 1989.

Plaintiffs filed a complaint against defendants alleging medical negligence and loss of consortium on 20 November 1985. Plaintiffs took a voluntary dismissal without prejudice of this action on 4 May 1987 pursuant to Rule 41(a) of the N. C. Rules of Civil Procedure.

Plaintiffs reinstituted this action on 2 May 1988. Summons were issued contemporaneously but were never delivered to the sheriff for service. Alias and pluries summons were issued for both defendants on 3 June, 21 July, 6 September, and 27 October 1988.

Defendant, High Point Regional Hospital (formerly known as High Point Memorial Hospital; hereinafter the hospital), received its first notice of the action when it received a copy of the Non-Jury Administrative Calendar, and the case had been set for the week of 14 November 1988. Defendant hospital filed a motion to dismiss on 10 November 1988 under Rule 12(b)(2), (4) and (5) of the N. C. Rules of Civil Procedure and requested the action to be dismissed with prejudice pursuant to G.S. 1A-1, Rule 41(b).

On 14 November 1988, after plaintiffs received notice of the motion to dismiss, the 27 October 1988 alias and pluries summons issued to the hospital was served.

Defendant's motion to dismiss was heard on 17 November 1988. At the hearing, plaintiffs maintained that they wanted to serve defendant Hill before serving the hospital for tactical reasons, and plaintiffs were unable to locate defendant Hill. The trial court dismissed plaintiff's complaint against the hospital with prejudice in open court on 17 November 1988. From this order, plaintiffs appeal.

Metcalf and Osborne, by W. Eugene Metcalf, for plaintiffs-appellants.

Tuggle Duggins Meschan & Elrod, P.A., by J. Reed Johnston, Jr. and Sally A. Lawing, for High Point Memorial Hospital, Inc. and High Point Regional Hospital, defendants-appellees.

ORR, Judge.

[1] Plaintiffs argue that the trial court erred in dismissing its suit based upon a six-month delay in service of process. Under G.S. 1A-1, Rule 4(a), when a plaintiff files a complaint, a summons must be issued within five days and delivered to the sheriff of the county "where service is to be made" or another person "authorized by law to serve summons." Service must be made within 30 days under Rule 4(c) unless otherwise excepted. *Id.* A summons may be extended by obtaining an alias and pluries summons pursuant to Rule 4(d). *Id.*

In the case *sub judice*, plaintiffs maintain that their failure to serve the summons on the hospital was not done in bad faith, nor an attempt to delay or gain unfair advantage and therefore the hospital was not prejudiced by the delay. We disagree.

First, the hospital was prejudiced by the delay. It had no notice of *this* action until its name appeared on the court calendar for the week of 14 November 1988. Moreover, the hospital was not served until after it filed a motion to dismiss on 10 November 1988. We can only speculate what plaintiffs intended to argue before the trial court during the week the case was scheduled if defendants had not been notified by that time.

We do not accept plaintiffs' argument that because the hospital had notice and engaged in extensive discovery of the original action, then it was not prejudiced by the delay in notice in *this* action. The purpose of Rule 3 and Rule 4 of the N. C. Rules of Civil Procedure is to ensure that a defendant will have notice of an action against him. *Estrada v. Burnham*, 316 N.C. 318, 326, 341 S.E.2d 538, 544 (1986). What the hospital had notice of was the *original* action, not *this* action.

Second, the record establishes that plaintiffs intentionally delayed service on the hospital. The trial court found that plaintiffs' delay was for tactical reasons, and plaintiffs did not except. Plaintiffs maintain that they wanted to serve defendant Hill first because

she would be more difficult to locate. Plaintiffs failed to explain, however, why this "tactical reason" should not be considered in bad faith or an attempt to gain unfair advantage in the case. We can assume from the record that plaintiffs did not want the hospital (a named defendant) to even know of the lawsuit until the other defendant was served. We believe this to be in bad faith and an attempt to gain unfair advantage over the hospital.

[2] Plaintiffs next argue that they did not violate the statute of limitations on service of process because they properly obtained alias and pluries summonses.

Plaintiffs rely on *Smith v. Starnes*, 317 N.C. 613, 346 S.E.2d 424 (1986), which held that a duly issued summons not served or delivered to the sheriff within 30 days could serve as the basis for an alias or pluries summons and would toll the statute of limitations. The *Smith* court specifically stated that it was not addressing the issue of whether the complaint and summons were issued in bad faith or subject to involuntary dismissal under G.S. 1A-1, Rule 41(b). *Id.* at 615, 346 S.E.2d at 426. Therefore, we hold that *Smith* does not apply to the facts of this case. Further, the trial court concluded "that the plaintiffs have failed to prosecute their action" and in its discretion the plaintiff's action against the defendant hospital was dismissed with prejudice.

[3] Plaintiffs maintain that an involuntary dismissal of their complaint was inappropriately harsh and severe. The trial court in its discretion found "that no other lesser sanction would better serve the interests of justice in this case." We find no basis for concluding that the trial court abused its discretion. *See Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989) (plaintiff's action properly dismissed under Rule 41(b) based upon violation of Rule 4(a) for the purposes of delay and in order to gain an unfair advantage over defendant).

The evidence in the case at bar clearly supports the trial court's findings of fact and its conclusions of law. Such findings are conclusive on appeal when supported by competent evidence, even if there is evidence to the contrary. *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983).

For the reasons set forth above, we affirm the trial court's decision.

Affirmed.

Judge JOHNSON concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring in the result.

In his order dismissing plaintiffs' action, the trial court found that plaintiffs' delay in serving defendant Hospital was intentional, and then made additional findings (actually conclusions) that the delay served to undercut the statute of limitations and defeat defendant Hospital's expectation that it would no longer have to defend plaintiffs' action.

Following the spirit, if not the letter, of our Supreme Court's opinion in *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989), I concur that the trial court properly exercised its discretion in dismissing plaintiffs' action, based upon the conclusions expressed in its order.

KENNETH LOONEY, JAMES A. TRIPP, AND W. C. LOFTIS, TRUSTEES FOR THE CHURCH OF GOD, AND THE CHURCH OF GOD v. W. E. WILSON, INDIVIDUALLY, AND THE COMMUNITY BIBLE HOLINESS CHURCH

No. 897SC668

(Filed 6 February 1990)

1. Appeal and Error § 6.2 (NCI3d)— preliminary injunction— possession of church property—appeal not premature

An appeal from a preliminary injunction granting possession of church property to plaintiffs and ordering the pastor to vacate the property was not premature and not dismissed. N.C.G.S. § 1-277(a), N.C.G.S. § 7A-27(d)(1).

Am Jur 2d, Injunctions §§ 345-347; Religious Societies §§ 50, 51.

2. Injunctions § 7 (NCI3d) — action for possession of church property — no demonstration of likelihood of success — no demonstration of irreparable harm

Plaintiffs' motion for a preliminary injunction was erroneously granted in an action in which plaintiffs sought possession of church property where title to the realty was sufficiently clouded that it could not be concluded that plaintiffs had met their threshold burden of demonstrating a likelihood of success on the merits of their case. Moreover, the evidence tends to show that defendants are continuing in conditions of occupancy and use which existed over a substantial period of time and that greater harm would inure to defendants rather than to plaintiffs as a result of the issuance of the preliminary injunction, so that plaintiffs have failed to demonstrate the requisite irreparable harm.

Am Jur 2d, Injunctions §§ 345-347; Religious Societies §§ 50, 51.

APPEAL by defendants from *Brown, Frank R., Judge.* Order entered 20 March 1989 in WILSON County Superior Court. Heard in the Court of Appeals 8 January 1990.

Plaintiffs brought this action seeking to have themselves declared the owners of certain church property located in Wilson County. In their complaint, plaintiffs alleged in pertinent part:

. . .

4. That for the past several years, the congregation of the Community Church of God [now defendant Community Bible Holiness Church] has recognized the hierarchical structure and authority of the Plaintiff Church of God[.]

5. That the [defendants] have refused to comply with the teachings, authorities, and financial commitments of the Plaintiff Church of God, and . . . have seized the said Church property and converted it to their own personal use[.]

6. That . . . certain real property was conveyed by deed to certain trustees . . . acting on behalf of the "Community Church of God[.]"

. . .

8. That on or about the 26th day of August, 1988, [the] State Overseer for the Church of God . . . declared all offices of the Local Board of Trustees of the Church of God at Community to be vacant, and . . . appointed Plaintiff Trustees Kenneth Looney, James A. Tripp, and W.C. Loftis as a special Board of Successor Trustees for the purpose, among others, of conveying any and all real estate theretofore owned by the Local Board of Trustees.

9. That pursuant to said appointment, the said special Board of Successor Trustees executed deeds conveying the real property [in issue] to themselves as Trustees for the Community Church of God[.]

10. That despite said conveyance and demand upon Defendants to quit the said premises and cease the unlawful use and possession of the said premises, the Defendants refuse to vacate the premises, and are, therefore, trespassing upon the said premises.

11. That . . . Defendant W.E. Wilson was removed as pastor of the Community Church of God [but] . . . continues to reside in certain church property . . . and continues to use the said church property unlawfully and to the exclusion of the Plaintiff Church of God.

Plaintiffs sought relief, in part, in the form of a preliminary injunction restraining defendants from continuing to occupy the property.

Defendants answered, denying that plaintiffs owned the property in question, and alleged that plaintiffs' purported conveyance of the property to themselves was null and void in that plaintiffs lacked the power or authority to make such a conveyance. By their affidavit opposing plaintiffs' motion for preliminary injunction, defendants further alleged that the property in issue was acquired in 1950, prior to affiliation with plaintiff Church of God, when defendant church was named Batts Chapel Free Will Baptist Holiness Church. Upon affiliation with plaintiff Church of God in 1955, the property was conveyed by the trustees for Batts Chapel Free Will Baptist Holiness Church to the trustees for the Community Church of God. Defendants also alleged that throughout the church's history, numerous improvements, including construction of the church building, were made by the local congregation and that plaintiff Church of God in no way contributed assistance, financial or other-

wise. On 10 August 1988, pursuant to a duly called business meeting, the congregation voted to withdraw from the Church of God denomination, and all realty owned by the Community Church of God was thereafter conveyed to defendant Community Bible Holiness Church.

Judge Brown granted plaintiffs' motion, and an order for preliminary injunction was issued 20 March 1989, in which the trial court granted possession of the church property (church, church grounds, and parsonage) to plaintiffs and ordered defendant Wilson, the pastor of the church, to vacate the church property. Defendants' motion for stay pending appeal was denied. By order of 20 April 1989, this Court granted defendants' petition for writ of supersedeas and temporarily stayed Judge Brown's order pending further orders of this Court.

From the order granting plaintiffs' motion for preliminary injunction, defendants appeal.

Leon A. Lucas for plaintiffs-appellees.

Abrams & Clark, by Bobby G. Abrams, for defendants-appellants.

WELLS, Judge.

[1] We first address, *ex mero motu*, whether this appeal must be dismissed as premature. A preliminary injunction is an interlocutory order. *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449, *affirmed*, 324 N.C. 327, 377 S.E.2d 750 (1989) (*citing Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975)). No appeal lies from an interlocutory order unless such order affects a substantial right of the appellant, N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1), the enforcement of which will be "lost, prejudiced or . . . less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987) (and cases cited therein). Applying this test to the record before us, we conclude that this appeal is properly taken, and accordingly we proceed to an examination of the merits of the case advanced by defendants.

[2] A preliminary injunction may issue only where the moving party shows (1) a likelihood of success on the merits of his case and (2) that he is likely to sustain irreparable loss absent issuance

or, in the opinion of the court, issuance is necessary to protect the movant's rights during the course of the litigation. *Myers v. H. McBride Realty, Inc.*, 93 N.C. App. 689, 379 S.E.2d 70 (1989) (and cases cited therein). In reviewing the trial court's ruling on a motion for a preliminary injunction, the appellate court is not bound by the findings of the court below, but may weigh the evidence and find the facts for itself. *Id.*

Our review of the record convinces us that plaintiffs' motion for preliminary injunction was improvidently granted in this case. Title to the realty at issue is sufficiently clouded that we cannot conclude plaintiffs have met their threshold burden of demonstrating a likelihood of success on the merits of their case.

Additionally, our review of the evidence indicates that defendants, or their predecessors, have possessed and used the church property for many years, during a significant portion of which time defendant Wilson served the church as its pastor and occupied the parsonage. This evidence does not indicate that defendants have seized the church property or converted it to their own use as alleged in the complaint. Rather, the evidence tends to show that defendants are continuing in conditions of occupancy and use which have existed over a substantial period of time and that greater harm shall inure to defendants rather than to plaintiffs as a result of the issuance of the preliminary injunction. Consequently, plaintiffs have also failed to demonstrate the requisite irreparable harm.

The order granting plaintiffs' motion for preliminary injunction therefore must be and is

Reversed.

The order granting defendants' petition for writ of supersedeas is

Dissolved.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DEAN DARWIN FOLAND AND MATTHEW ERWIN PURDY

No. 896SC298

(Filed 6 February 1990)

Criminal Law § 211 (NCI4th)— Speedy Trial Act—continuances—no judicial determination of necessary factors—violation

Indictments against both defendants for trafficking in marijuana were remanded for dismissal where the Speedy Trial Act was in effect when defendants were indicted and convicted; their trial was 345 days after indictment; twelve continuances were entered which defendants claimed were without their knowledge; and an assistant clerk testified that the practice then in effect in Halifax County was for the sitting judge in each session to sign blank continuance order forms; following the conclusion of each session and the departure of the judge, an assistant or deputy clerk xeroxed the signed orders, filled in the names and file numbers of defendants scheduled for trial but not tried, and placed the orders in the files of the affected defendants; the defendants and their lawyers were not informed about the orders; and the judges were not informed what names would be and had been inserted in the orders or whether the defendants affected were in jail or on bond or whether the cases the district attorney tried were older or newer than the cases that were continued. N.C.G.S. § 15A-701(b)(7) plainly provided that a valid continuance order under the Speedy Trial Act required a judicial determination of certain factors; signing blank continuance orders that are later filled in by a clerk without being specifically so instructed by the judge is not such a determination even if grounds may have existed for entering some or even all of them.

Am Jur 2d, Criminal Law §§ 850-858, 863, 868, 869.

Judge GREENE concurring.

APPEAL by defendants from *Crawley, Judge*. Judgments entered 8 September 1988 in Superior Court, HALIFAX County. Heard in the Court of Appeals 15 November 1989.

Attorney General Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender David W. Dorey, for defendant appellant Foland.

Robin E. Hudson for defendant appellant Purdy.

PHILLIPS, Judge.

In pleading guilty to the charge of trafficking in marijuana in violation of G.S. 90-95(h), each defendant reserved his right to appeal the denial of his motions to dismiss the charge on the grounds that his right to a speedy trial was violated and that the contraband received into evidence was the fruit of an unlawful search and seizure. The appeal of the unlawful search and seizure ruling has no merit and is overruled without discussion, as similar investigatory detentions have been upheld by the United States Supreme Court and our Supreme Court in many cases. *See Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983); *United States v. Cortez*, 449 U.S. 411, 66 L.Ed.2d 621, 101 S.Ct. 690 (1981); *Adams v. Williams*, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

But the appeal of the speedy trial denial is well taken. Though the Speedy Trial Act, G.S. 15A-701, *et seq.*, was repealed by Chapter 688, 1989 Session Laws, it was in effect when defendants were indicted and convicted and they were entitled to its protection. In substance, the Act required that except for times justifiably excluded from consideration they be tried within 120 days after indictment. Their trial was some 345 days after indictment, as both defendants were indicted on 30 September 1987 and kept in jail because of their inability to make bail until their cases were disposed of on 8 September 1988. During the interval between indictment and trial, apart from continuances requested or agreed to because of discovery and other necessary reasons, twelve continuance orders were entered that the defendants claimed were entered without their knowledge. The validity of these orders, all of which according to the record were entered under somewhat the same circumstances, determines the appeals; if they are valid the times excluded by them for speedy trial purposes were proper and the trial was within the net 120 day period allowed, but if they are invalid the times excluded by them were not authorized, and defendants are entitled to have the charges dismissed.

In the hearing on defendants' motions the record shows that the following occurred: Defendants' counsel asserted that neither they nor the defendants had notice of the twelve orders and no showing to the contrary was made by the State. The district attorney and defense counsel expressed contradictory recollections as to the identity and age of cases tried during the different trial sessions during the interval involved; the district attorney, defense counsel and the court, assisted by Rose Lucas, Assistant Clerk of Superior Court, reviewed the files of the various cases that were tried ahead of the defendants' and some of the files showed that grounds existed for trying those cases first, but none of the files indicated how the continuance orders came to be entered or that notice was given defendants. Since Ms. Lucas had filed the orders Judge Crawley asked her to testify concerning them. Her testimony was that all the orders resulted from the following practice then in effect in the Halifax County Superior Court: In each session of criminal court the sitting judge signed blank continuance order forms which contained stock, boiler plate findings but did not contain the name of any defendant or the number of any case; the signed orders were left with the Clerk of Court and following the conclusion of each session and the departure of the judge an assistant or deputy clerk xeroxed the signed orders, filled in the names and file numbers of defendants scheduled for trial but not tried, and placed the orders in the files of the affected defendants; the practice was that the defendants and their lawyers were not informed about the orders; and the judges were not informed what names would be or had been inserted in the orders, or whether the defendants affected were in jail or on bond, or whether the cases the district attorney tried were older or newer than the cases that were continued.

The continuance orders entered as above described did not comply with the Speedy Trial Act and are invalid. The exclusion of times for continuances, the only exclusion pertinent to this appeal, was governed by the following provisions of G.S. 15A-701(b)(7):

> Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing

and he has made written findings as provided in this subdivision.

As the statute plainly provided a valid continuance order under the Act required a judicial determination of the factors stated therein and according to the record no such determination was made. A judicial determination requires, *inter alia*, an inquiry by the judge into the factual or legal issues raised, *In the Matter of Crutchfield*, 289 N.C. 597, 223 S.E.2d 822 (1975), signing blank continuance orders that are later filled in by a clerk without being specifically so instructed by the judge is not such a determination. Nor are the orders valid because grounds may have existed for entering some or even all of them; for according to the record grounds for the continuances were not found by a judge after inquiry into the issues involved, as the Act required. Under the circumstances we are obliged to vacate the judgments of conviction and remand the cases to the Superior Court for the entry of orders dismissing the indictments against both defendants.

Vacated and remanded.

Judges BECTON and GREENE concur.

Judge GREENE concurring.

While I do not agree that the defendants' claim of wrongful search and seizure has no merit, I fully concur with the majority as to the speedy trial issue.

IN THE MATTER OF THE ESTATE OF SANDRA BOVENDER COX, DECEASED

No. 8918SC143

(Filed 6 February 1990)

Death § 11 (NCI3d)— common law doctrine that one may not profit from his own wrong—action under slayer statute—not res judicata

A declaratory judgment action which determined that the husband of deceased was not a slayer under N.C.G.S. Chapter 31A was not res judicata and did not prevent the adminis-

tratrix from attempting to prevent him from sharing in the proceeds of a wrongful death action under the common law doctrine that one may not profit from his own wrong. The declaratory judgment action under the slayer statute neither raised nor adjudicated the issue of the husband's simple negligence, nor did it attempt to bar his right to benefit from her estate for any reason other than that he was a slayer under N.C.G.S. § 31A-1, *et seq.* A declaratory judgment is not res judicata as to matters not at issue and not passed upon.

Am Jur 2d, Declaratory Judgments §§ 238-240; Descent and Distribution §§ 101, 105.

APPEAL by respondent caveator from order entered 23 August 1988 by *Freeman, Judge,* in GUILFORD County Superior Court. Heard in the Court of Appeals 14 September 1989.

Jeffrey L. Mabe for petitioner appellee.

C. Richard Tate, Jr. and Cahoon & Swisher, by Robert S. Cahoon, for respondent caveator appellant.

PHILLIPS, Judge.

This appeal by William Frank Cox, III is from an order holding that he may not share in the proceeds recovered in an action against him for his wife's wrongful death because our law does not permit one to profit from his own wrong. The events leading to that adjudication follow:

On 1 September 1985 Sandra Bovender Cox was shot and killed by a rifle her husband, William Frank Cox, III, was handling in their living room in Colfax, North Carolina. She died intestate and her husband and parents are her only heirs. The administratrix's action against him for her wrongful death was settled by his liability insurance company paying her estate $50,000 and agreeing to pay $40,800 more in installments over a ten-year period. In the settlement agreement the administratrix reserved the right to pursue a suit she had filed under our "slayer statute," Chapter 31A of the North Carolina General Statutes, to bar him from sharing in his wife's estate, and Cox reserved his right to claim an interest in the estate and to defend any attempt to bar him from sharing therein. When the declaratory judgment action against him was tried the jury found that, contrary to the administratrix's allega-

tions, he "did not willfully and unlawfully, or by his culpable negligence, proximately cause" her death, and the judgment that he was "not a slayer of his deceased wife" and was entitled to "receive proceeds and benefits otherwise payable to him which are payable by reason of the death of Sandra Bovender Cox" was affirmed by this Court in an unpublished opinion. The administratrix then petitioned the Clerk of Guilford County Superior Court for Advice and Instruction as to the disposition of the wrongful death proceeds; in doing so she alleged that Cox was not entitled to share in the proceeds because they were received in settlement of his alleged negligence in causing her death. In responding to the petition Cox asserted that all questions concerning his right to inherit from his wife's estate had already been resolved by the prior action. Following a hearing on the petition the Clerk ordered that Cox not receive any of the wrongful death proceeds because our law does not allow one to profit from his own wrong and in making that adjudication he found and concluded *inter alia* that: The declaratory judgment "makes no reference to the disposition of the proceeds received from the wrongful death action and does not state that William Frank Cox, III, is entitled to" share in those proceeds; that in the wrongful death action it was alleged that the decedent's death resulted from his negligent acts and omissions in handling the gun and that the proceeds involved were paid to the estate in settlement of that claim; that "[t]he proceeds received from the wrongful death action are not proceeds or benefits otherwise payable to William Frank Cox, III, by reason of the death of Sandra Bovender Cox." The Clerk's order was affirmed by the Superior Court.

The appellant does not question the continued viability in this state of the ancient common law doctrine that one may not profit from his own wrong. The only question he presents for determination is whether the prior judgment in the action to declare him a slayer of his wife, under the principles of *res judicata,* bars the administratrix from attempting to prevent him from sharing in the proceeds of the wrongful death action. Our answer is that the doctrine of *res judicata* has no application and the prior judgment is no bar to the order entered pursuant to the administratrix's petition.

The declaratory judgment action that the administratrix brought against the appellant under the "slayer statute" neither raised nor adjudicated the issue of his simple negligence; nor did it at-

tempt to bar his right to benefit from her estate for any reason other than that he was a slayer under G.S. 31A-1, *et seq.* His argument that *res judicata* applies to "all matters properly within the scope of the pleadings which could have and should have been brought forward," though generally correct, is unavailing here because the law treats declaratory judgment actions differently:

> Suits for declaratory judgments have been held not to fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby, but, in addition, of all matters which could have been presented for adjudication. A declaratory judgment is not res judicata as to matters not at issue and not passed upon. It is only a bar to matters which were actually litigated, not to those that might have been litigated.

22A Am. Jur. 2d *Declaratory Judgments* Sec. 240 (1988). Thus, the adjudication in the prior action that he did not "willfully and unlawfully, or by his culpable negligence" cause his wife's death established only that fact; it did not also establish that he is entitled to share in the proceeds of the wrongful death action. For the "slayer statute," G.S. 31A-3, *et seq.*, applies only to felonious killings; it does not prevent the common law doctrine that no person will be allowed to profit from his own wrong from being applied in actions not under its provisions. *Quick v. United Benefit Life Insurance Co.*, 287 N.C. 47, 54, 213 S.E.2d 563, 569 (1975); *In re Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958). And this case is an appropriate one in which to apply the doctrine, since the wrongful death proceeds that the appellant seeks to obtain were paid into the estate upon his behalf and because of his own alleged negligence.

Affirmed.

Judges WELLS and PARKER concur.

PAUL J. STRANG v. GENE HOLLOWELL D/B/A HOLLOWELL AUTO SALES AND STEVE JONES AND SOLAR CENTER, INC.

No. 8910DC690

(Filed 6 February 1990)

1. **Bailment § 3 (NCI3d)— consignment sale of automobile—damages to auto—individual liability of bailee**

The trial court correctly ruled that, by failing to exercise due care in allowing an automobile to be damaged while in his custody, defendant committed a tort for which he can be held individually liable where defendants Hollowell and Jones met with plaintiff to negotiate a consignment agreement for the sale of plaintiff's automobile; a written consignment contract was executed between plaintiff and Hollowell Auto Sales, with defendant Jones signing the contract on behalf of Hollowell Auto Sales; defendants transported the automobile to the Hollowell Auto Sales lot in Morehead City; defendants were unable to sell the car and it was returned to plaintiff; plaintiff then discovered that the automobile had been damaged; and plaintiff, who had been under the impression that Hollowell Auto Sales was a sole proprietorship operated by defendant Hollowell, learned upon suing defendants that Hollowell Auto Sales was a trade name for Solar Center, Inc. Defendant was a bailee of plaintiff's automobile while it was in his custody in Morehead City and a bailee is obligated to exercise due care to protect the subject of the bailment from negligent loss, damage or destruction; while this obligation arises from the relationship created by the contract of bailment, breach of this contractual duty results in a tort and it is well settled that one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as an agent for another or as an officer for a corporation.

Am Jur 2d, Bailment §§ 45, 217-219.

2. **Principal and Agent § 7 (NCI3d)— bailment—use of trade name—disclosure not sufficient**

Although a bailment case involving an automobile was decided on other grounds, it was noted that the existence

of means by which the fact of agency might be discovered was insufficient to disclose agency.

Am Jur 2d, Agency §§ 325, 327.

APPEAL by defendant Gene Hollowell d/b/a Hollowell Auto Sales from *Payne, L. W., Judge*. Judgment entered 19 January 1989 in WAKE County District Court. Heard in the Court of Appeals 10 January 1990.

On 2 January 1987 plaintiff met with defendants Hollowell and Jones in Cary, North Carolina to negotiate a consignment agreement for the sale of plaintiff's 1974 Pantera automobile which had an estimated value of $23,000 to $25,000. A written consignment contract was executed between plaintiff and Hollowell Auto Sales. Defendant Jones, then employed by Hollowell Auto Sales, signed the contract on behalf of Hollowell Auto Sales. Plaintiff gave defendants the keys to his automobile and they transported it by flatbed trailer to the Hollowell Auto Sales lot in Morehead City. Defendants Jones and Hollowell were unable to sell the Pantera and it was returned to plaintiff in August 1987. At that time plaintiff discovered that the automobile had been damaged to an extent which reduced its value to between $10,000 and $12,000.

On 23 December 1987 plaintiff sued defendants Jones and Hollowell for negligence in their bailment of his automobile. Plaintiff was unaware that Hollowell Auto Sales was a trade name for Solar Center, Inc., whose principal place of business is in Carteret County. Plaintiff was under the impression that Hollowell Auto Sales was a sole proprietorship operated by defendant Hollowell. On motion of defendant Hollowell in open court, defendant Solar Center, Inc. was added as an additional party prior to trial.

Defendant Jones did not file an answer to plaintiff's complaint and default judgment was subsequently entered against him. At a non-jury trial, judgment in the amount of $11,000 was entered against defendants Jones and Hollowell, jointly and severally. Defendant Gene Hollowell appeals.

William A. Smith, Jr. for plaintiff-appellee.

Manning, Fulton & Skinner, by Robert S. Shields, Jr., for defendant-appellant Hollowell.

WELLS, Judge.

[1] The only issue presented in this appeal is whether defendant Hollowell can be held individually liable for plaintiff's damages. Defendant contends that he was acting as an agent of Hollowell Auto Sales and therefore cannot be held personally liable. Defendant further asserts that, regardless of the fact that plaintiff was unaware that Hollowell Auto Sales was a trade name for Solar Center, Inc., defendant is nevertheless shielded from individual liability because Solar Center, Inc. fulfilled its legal obligation to disclose its relationship with Hollowell Auto Sales by filing an assumed name certificate in Carteret County pursuant to N.C. Gen. Stat. §§ 66-68 (1985 & Supp. 1989). For the following reasons, we disagree.

When plaintiff gave possession of his automobile to defendant under the consignment contract a bailment for the mutual benefit of bailor and bailee was created. This bailment continued until the automobile was returned to plaintiff in August 1987. Defendant was therefore a bailee of plaintiff's automobile while it was in his custody in Morehead City. *See, e.g., U.S. Helicopters, Inc. v. Black*, 318 N.C. 268, 347 S.E.2d 431 (1986), and cases cited therein. A bailee is obligated to exercise due care to protect the subject of the bailment from negligent loss, damage, or destruction. His liability depends on the presence or absence of ordinary negligence. *Millers Mut. Ins. Ass'n of Ill. v. Atkinson Motors*, 240 N.C. 183, 81 S.E.2d 416 (1954); *Terrell v. H & N Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971). While this obligation arises from the relationship created by the contract of bailment, breach of this contractual duty results in a tort. *Millers Mut. v. Atkinson, supra; see also Miller's Mut. Fire Ins. Ass'n of Alton, Ill. v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951). It is well settled that one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation. *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 52 S.E.2d 915 (1949); *see also Esteel Co. v. Goodman*, 82 N.C. App. 692, 348 S.E.2d 153 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987) (An officer of a corporation who commits a tort is individually liable for that tort, even though acting on behalf of the corporation in committing the act.). Furthermore, the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as

to which party to hold liable for the tort. *Palomino Mills*, *supra* at 292, 52 S.E.2d at 919.

Here there is no dispute that plaintiff's automobile was returned to him in a damaged condition. Defendant does not except to the trial court's findings and conclusions that a bailment was created between plaintiff and defendant and that "defendants were negligent in their care and control of the vehicle while it was in their possession." We therefore hold that the trial court correctly ruled that by failing to exercise due care and allowing the automobile to be damaged while in his custody, defendant committed a tort for which he can be held individually liable.

[2] Because the resolution of this case is in tort for negligence, rather than in contract for breach, we need not reach the issue of whether defendant had sufficiently disclosed his agency with Hollowell Auto Sales or with Solar Center, Inc. However, we note that our Supreme Court has said that use of a trade name is not sufficient as a matter of law to disclose the identity of the principal and the fact of agency. *Howell v. Smith*, 261 N.C. 256, 134 S.E.2d 381 (1964); *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E.2d 271 (1983). Likewise, the existence of means by which the fact of agency *might* be discovered is also insufficient to disclose agency. *Id.* (Emphasis added.)

The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

MARY A. ROBERTS v. THOMAS F. ROBERTS

No. 8929DC49

(Filed 6 February 1990)

Appeal and Error § 39.1 (NCI3d) — alimony — record filed more than 150 days from notice of appeal — appeal dismissed

An appeal from an order modifying alimony was dismissed where defendant's motion to modify alimony was heard on 6 August 1986; the trial court rendered judgment reducing

alimony by making several findings in open court and then directing the attorneys to prepare an order; plaintiff immediately gave oral notice of appeal and the court allowed plaintiff 75 days to serve the proposed record on appeal; the trial court did not file the order until 10 December 1987, sixteen months later; and it was not clear from the record who was responsible for the delay. Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days after giving notice of appeal to file the appeal record, unless an extension of time was granted by the appropriate appellate court. N. C. Rules of Appellate Procedure, Rule 12(a) and Rule 27(c).

Am Jur 2d, Appeal and Error §§ 292, 293, 316.

APPEAL by plaintiff from *Greenlee (Loto J.), Judge.* Orders entered 6 August 1986, signed and filed 10 December 1987, and 4 October 1988, signed and filed 1 December 1988. Heard in the Court of Appeals 30 August 1989.

This suit arises out of defendant's motion filed on 25 November 1985 to terminate or modify alimony payments set out in the separation agreement between the parties. Defendant's motion was heard on 6 August 1986. Evidence before the court included the testimony of plaintiff and defendant concerning their respective incomes and expenditures. At the close of the evidence, the court made oral findings that the separation agreement was incorporated into the divorce decree and was subject to modification by the court; that the income of both plaintiff and defendant had increased since the separation agreement and divorce; and that the alimony provisions would be reduced to $300.00 per month.

Plaintiff gave oral notice of appeal in open court and the court allowed plaintiff 75 days to serve the proposed record on appeal. The court also directed both parties to "collaborate on your order." There is no evidence before us as to whether the clerk made any notations of appeal entries in his minutes.

On 2 December 1987, almost 16 months after the oral notice of appeal, defendant filed a motion for entry of order, pursuant to the trial court's ruling on 6 August 1986, and requested that the order apply *nunc pro tunc* as of 6 August 1986. The order was subsequently signed and filed 10 December 1987.

From this order and the order denying its motion for a new trial on 4 October 1988, plaintiff appeals.

Hudson and Peterson, by V. Scott Peterson, for plaintiff-appellant.

George T. Perkins, III, for defendant-appellee.

ORR, Judge.

Although plaintiff argues three issues on appeal regarding the trial court's reduction in alimony payments, the dispositive question is whether plaintiff timely filed its record of appeal after giving notice of appeal in open court on 6 August 1986. Under Rule 12 of the N. C. Rules of Appellate Procedure,

> (a) . . . . Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, *but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.*

(Emphasis added.)

In the case before us, the trial court rendered judgment in open court on 6 August 1986 by making several findings and then stating, "That will be the extent of the judgment at this time. Gentlemen, you can collaborate on your order." Plaintiff immediately gave oral notice of appeal, the court allowed plaintiff 75 days to serve the proposed record on appeal, and set the appeal bond at two hundred dollars ($200.00).

The trial court did not file the order until 10 December 1987, 16 months after its judgment. It is not clear from the record who was responsible for this unconscionable delay. What is clear is that both parties were present with their attorneys at the 6 August 1986 proceeding, the trial court announced its findings in open court and directed the attorneys to prepare an order, and the attorneys believed judgment had been rendered. Most importantly, plaintiff's attorney gave oral notice of appeal, and knew he had a limited time to serve the proposed record on appeal.

Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days after giving notice of appeal to file the appeal record with this Court. App.R. 12(a). The 150-day time limit may be extended only by an appropriate *appellate* court. App.R. 27(c); *State v. Ward*, 61 N.C. App. 747, 301 S.E.2d 507,

disc. rev. denied, 309 N.C. 825, 310 S.E.2d 357 (1983). Because no extension of time within which to file the record on appeal was granted by this Court within 150 days of plaintiff's oral notice of appeal on 6 August 1986, the appeal will be dismissed. *See Construction Co. v. Roofing Co.*, 46 N.C. App. 634, 265 S.E.2d 506 (1980).

For the reasons set forth above, we dismiss the appeal.

Appeal dismissed.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. BILLY McDONALD

No. 8920SC534

(Filed 6 February 1990)

Criminal Law § 566 (NCI4th)— driving while impaired—request for lower of two breathalyzer readings—mistrial denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a prosecution for driving while impaired where the prosecutor asked a witness to state the lower of the two breathalyzer readings. Assuming that the question was improper, the trial court promptly took appropriate corrective measures by sustaining defendant's objection to the form of the question and instructing the jury to disregard it. N.C.G.S. § 20-139.1(b3).

Am Jur 2d, Automobiles and Highway Traffic § 307; Criminal Law §§ 291, 294.

APPEAL by defendant from *Freeman, William H., Judge*. Judgment entered 16 March 1989 in RICHMOND County Superior Court. Heard in the Court of Appeals 16 January 1990.

Defendant was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. Following conviction in the district court, defendant appealed to the superior court. At trial, the State sought to introduce evidence of a breathalyzer test administered

to defendant by Trooper D. S. Newton. The record reveals the following pertinent exchange between the prosecutor and Trooper Newton:

> Q: After you finished preparing the [breathalyzer] instrument did the defendant furnish breath samples to be tested?
>
> A: Yes[.]
>
> Q: How many samples did the defendant furnish?
>
> A: Two.
>
> . . .
>
> Q: [D]id you analyze each to determine the alcohol concentration of the defendant's body?
>
> A: Yes[.]
>
> Q: And would you state what the lower of the two readings showed the defendant's alcohol concentration to be?

Defendant then objected and, out of the jury's presence, moved for a mistrial. The court sustained defendant's objection as to the form of the question, but denied defendant's motion for mistrial. When the jury returned, Judge Freeman instructed them to disregard the question regarding the lower of the two breathalyzer readings. The prosecutor then rephrased the question as follows:

> Q: Trooper Newton, what was the result of the breathalyzer test?
>
> A: Point ten.

The jury returned a verdict of guilty and the court sentenced defendant to sixty days' imprisonment, suspended, and imposed a fine of $100.00. Defendant appeals.

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

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendant-appellant.

WELLS, Judge.

Defendant brings forward a single assignment of error challenging the trial court's denial of his motion for mistrial. Defendant argues that the State's question regarding the lower result of the two breathalyzer tests improperly suggested to the jury that there

was a test result higher than the result introduced into evidence. We find no error.

N.C. Gen. Stat. § 20-139.1(b3) governs the admissibility of breathalyzer test results. It provides in pertinent part that duplicate sequential breath samples be taken and:

> (2) That the test results may only be used to prove a person's particular alcohol concentration if:
>
> a. The pair of readings employed are from consecutively administered tests; and
>
> b. The readings do not differ from each other by an alcohol concentration greater than 0.02.
>
> (3) That when a pair of analyses meets the requirements of subdivision (2), only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in any court . . . proceeding.

A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061. It is well established, however, that the decision as to whether such prejudice has occurred within the meaning of the statute is addressed to the sound discretion of the trial judge. *State v. Green*, 95 N.C. App. 558, 383 S.E.2d 419 (1989) (and cases cited therein). Consequently, a trial court's ruling on a motion for mistrial may not be disturbed on appeal absent an abuse of discretion. *Id.*

Applying these standards to the present case, we conclude that defendant has failed to demonstrate error. Assuming *arguendo* that the prosecutor's question regarding the lower of the two breathalyzer test results was improper, the trial court promptly took appropriate corrective measures by sustaining defendant's objection as to the form of the question and instructing the jury to disregard it. Such measures were sufficient to cure any possible prejudice resulting from the prosecutor's question. *See State v. Pruitt*, 301 N.C. 683, 273 S.E.2d 264 (1981). We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

IN RE BARNES, A MINOR CHILD

No. 896DC389

(Filed 6 February 1990)

1. Appeal and Error § 24 (NCI3d)— termination of parental rights—failure to make certain exceptions—appeal not dismissed

Even though respondent in a termination of parental rights proceeding violated the North Carolina Rules of Appellate Procedure by not entering an exception in the record relating to the failure of the trial court to appoint a guardian ad litem for the minor child and not making an objection or exception at trial to the court's failure to appoint a guardian ad litem, the Court of Appeals was unwilling to dismiss the appeal. The termination statute requires that termination proceed only in the best interests of the child, the child was aged twenty-two months, was not represented, and obviously could not enter the required objections at trial or in the appellate record.

Am Jur 2d, Appeal and Error §§ 545, 550.

2. Parent and Child § 1.5 (NCI3d)— termination of parental rights—requirement of guardian ad litem for child

A proceeding terminating parental rights was remanded where the court did not appoint a guardian ad litem for the child. N.C.G.S. § 7A-289.39(b) provides that the court shall appoint a guardian ad litem to represent the best interests of the child if the answer denies any material allegation of the petition; furthermore, N.C.G.S. § 1A-1, Rule 17(c) mandates that a guardian ad litem must always be appointed for a minor child in a termination proceeding regardless of whether a respondent filed an answer denying material allegations of the petition.

Am Jur 2d, Infants § 30; Parent and Child § 34.

APPEAL by respondent from order entered 10 March 1989, *nunc pro tunc* 28 December 1988 by *Judge Robert E. Williford* in BERTIE County District Court. Heard in the Court of Appeals 17 October 1989.

Donnie R. Taylor for petitioner-appellee.

Leahy and Moore, by Kevin M. Leahy, for respondent-appellant.

GREENE, Judge.

This action arose as a petition for termination of parental rights under N.C.G.S. § 7A-289.22 et seq. (1989). The trial court terminated both parents' parental rights, and only the father appeals.

Subsequent to the filing of the petition to terminate the parental rights, the respondent filed an answer denying the material allegations of the petition. The trial court did not appoint a guardian ad litem for the minor child, and it proceeded to conduct an adjudicatory hearing on termination, N.C.G.S. § 7A-289.30, and a subsequent disposition, N.C.G.S. § 7A-289.31. The respondent employed counsel for his representation during the proceedings.

The respondent failed to comply with our Rules of Appellate Procedure in at least two respects: (1) there was no exception entered in the record relating to failure of the trial court to appoint a guardian ad litem for the minor child, and (2) there was no objection or exception made at trial to the court's failure to appoint a guardian ad litem. North Carolina Rule of Appellate Procedure Rule 10(b)(1).

The issues presented are I) whether the respondent's failure to comply with the Rules of Appellate Procedure requires dismissal when the substantial rights of a minor, who had no guardian ad litem, were violated; and II) whether the trial court's failure to appoint a guardian ad litem for a child in a termination proceeding is error requiring a new hearing.

I

[1] We are unwilling to dismiss this appeal for the respondent's noncompliance with our rules when the termination statute requires that termination proceed only in the best interests of the child, N.C.G.S. § 7A-289.22(3), and the child aged twenty-two months, a party to the proceeding, was not represented and obviously could not enter the required objections at trial or in the appellate record.

Therefore, we supersede the rules and accept this appeal. North Carolina Rule of Appellate Procedure 2.

II

[2] N.C.G.S. § 7A-289.29(b) (1989) provides in pertinent part:

> If an answer denies any material allegation of the petition, the court *shall* appoint a guardian ad litem for the child to represent the best interests of the child. . . . [Emphasis added.]

Since the respondent filed an answer denying material allegations of the petition and the court did not appoint a guardian ad litem for the child, the court failed to carry out its statutory mandate. In addition, where the respondent, as here, was represented by counsel, "fundamental fairness requires that the minor child be represented by counsel." *In re Clark*, 303 N.C. 592, 600-01, 281 S.E.2d 47, 53 (1981).

Furthermore, N.C.G.S. § 1A-1, Rule 17(c) mandates that a guardian ad litem must always be appointed for a minor child in a termination proceeding regardless of whether a respondent filed an answer denying material allegations of the petition. *In re Clark*, 303 N.C. at 598, 281 S.E.2d at 52. We must remand for appointment of a guardian ad litem for the child following which the trial court must conduct, de novo, the appropriate proceedings under N.C.G.S. § 7A-289.22 et seq.

Vacated and remanded.

Judges EAGLES and PARKER concur.

MRS. JOHN J. SHORT, AND HARRY G. BRYANT, PLAINTIFFS v. GEORGE A. BRYANT, JR. AS EXECUTOR OF THE ESTATE OF GEORGE A. BRYANT, SR., ET AL., DEFENDANTS

No. 8921SC549

(Filed 6 February 1990)

1. Execution § 15.1 (NCI3d)— sheriff's sale—motion to set aside—evidence insufficient

Inadequacy of price alone is not sufficient to declare a deed issued pursuant to an execution sale void; to void such

a deed a showing of some trick, oppression, artifice or undue advantage is required, and defendant made no such showing.

Am Jur 2d, Executions §§ 728, 733, 734.

2. Attorneys at Law § 7.5 (NCI3d) — motion to set aside sheriff's deed — frivolous — attorney fees as costs

Defendant was not exempt from the sanctions of N.C.G.S. § 6-21.5, under which plaintiff was awarded attorney fees incurred in defense of defendant's motion to set aside a sheriff's deed, where N.C.G.S. § 6-21.5 became effective on 1 October 1984; the underlying action was brought on 16 September 1983; defendant signed a consent judgment which was filed on 17 September 1985; and defendant's motion to cancel the sheriff's deed was filed on 13 January 1988. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban; the consent judgment effectively brought the original case to a close and the motion to cancel the sheriff's deed raised new issues for which he is accountable.

Am Jur 2d, Costs § 79.

APPEAL by defendant from order entered 1 February 1989 by *Martin, Lester P., Jr., Judge*, in FORSYTH County Superior Court. Heard in the Court of Appeals 23 October 1989.

This appeal is from the denial of defendant's motion to cancel a Sheriff's Deed issued pursuant to the execution sale of defendant's real property. The underlying action was brought by plaintiffs on 16 September 1983. Defendant signed a consent judgment which was filed on 17 September 1985. Pursuant to the execution of the judgment the Forsyth County Sheriff caused defendant's property to be sold at public auction on 22 December 1986, the order of confirmation of the sale was entered by the Clerk of Superior Court of Forsyth County on 8 January 1987, and the Sheriff's Deed was issued on 14 January 1987. Defendant's motion to cancel the Sheriff's Deed was filed 13 January 1988 and denied by the trial court on 1 February 1989. In addition, the court found that defendant's motion lacked any justiciable issues of law or fact and pursuant to G.S. 6-21.5 awarded plaintiffs attorney's fees incurred in the defense of defendant's motion. From the denial of his motion and the award of attorney's fees defendant appeals.

Joseph T. Carruthers for plaintiff appellee.

George A. Bryant, Jr., defendant appellant, pro se.

PHILLIPS, Judge.

[1] Defendant's first assignment of error concerns the court's denial of his motion to cancel the Sheriff's Deed conveying defendant's property to the purchasers of it at auction. He contends that the price received was inadequate and that "other circumstances," when combined with the inadequate price, warrant cancellation of the deed. While theoretically correct, defendant has failed to show any other circumstances to justify his contention. Inadequacy of price alone is insufficient to declare a deed issued pursuant to an execution sale void. *Weir v. Weir*, 196 N.C. 268, 145 S.E. 281 (1928). To void such a deed a showing of some trick, oppression, artifice, fraud or undue advantage is required, *Weir v. Weir, supra*, and defendant has made no such showing.

[2] His next assignment of error concerns the awarding of attorney's fees to plaintiffs under G.S. 6-21.5, which became effective on 1 October 1984, and contends that as the underlying action arose in 1983, he is exempt from the sanctions imposed by the statute. We disagree. G.S. 6-21.5 states in part that upon motion by the prevailing party the court may award attorney's fees if it finds there was a "complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The legislative purpose of this statute is to discourage frivolous legal action and that purpose may not be circumvented by limiting the statute's application to the initial pleadings. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban. The consent judgment, which defendant entered into, effectively brought the original case to a close; his motion to cancel the Sheriff's Deed raised new issues for which he is accountable, and the attorney fees assessed against him are only those incurred in combating those issues.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

PATRICIA McNULTY TROGDON v. CALVIN LANCASTER TROGDON

No. 8921DC95

(Filed 6 February 1990)

Divorce and Alimony § 21.9 (NCI3d)— equitable distribution—defendant deceased before claim adjudicated—administrator of estate not allowed to substitute

The trial court correctly denied the petition of the administrator of defendant's estate to be allowed to substitute for defendant in an equitable distribution action where defendant died after filing a counterclaim for equitable distribution but before the counterclaim or plaintiff's claim for divorce could be adjudicated. The marriage was dissolved by death and the parties can never be divorced as required by N.C.G.S. § 50-21(a).

Am Jur 2d, Divorce and Separation §§ 176, 177, 639.

APPEAL by petitioner administrator from order entered 26 October 1988 by *Reingold, Judge*, in FORSYTH County District Court. Heard in the Court of Appeals 12 September 1989.

Bailey and Thomas, by David W. Bailey, Jr. and John R. Fonda, for plaintiff appellee.

Morrow, Alexander, Tash, Long & Black, by Clifton R. Long, Jr., for defendant appellant.

PHILLIPS, Judge.

Plaintiff sued for an absolute divorce; defendant counterclaimed for an order of equitable distribution but died before either claim could be adjudicated. The appeal is from the denial of the petition of the administrator of defendant's estate to be allowed to substitute for the defendant in the action.

The appeal has no merit. Permitting the administrator of defendant's estate to enter the case would avail nothing. The order of equitable distribution that defendant counterclaimed for cannot be obtained because he and plaintiff were not divorced as G.S. 50-21(a) requires, *McKenzie v. McKenzie*, 75 N.C. App. 188, 330 S.E.2d 270 (1985); and they can never be divorced since the marriage was dissolved by death. *Caldwell v. Caldwell*, 93 N.C. App.

740, 379 S.E.2d 271, *disc. rev. denied*, 325 N.C. 270, 384 S.E.2d 513 (1989).

Affirmed.

Judges WELLS and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 FEBRUARY 1990

BOUTWELL v. BOUTWELL No. 891DC222	Chowan (88CVD75)	Affirmed
BRIARCLIFF MANOR APARTMENTS v. ODHAM No. 893DC438	Pitt (88CVD2014)	Affirmed
BUNN v. RAISON No. 897SC104	Wilson (87CVS1103)	Affirmed
BURNETTE v. BURNETTE No. 8928DC91	Buncombe (87CVD2224)	Affirmed
CANIPE v. CANIPE No. 8927DC449	Lincoln (86CVD321)	Affirmed
COLBERT v. LONGWORTH No. 8923DC232	Wilkes (88CVD519)	No Error
GENE TAYLOR CHEVROLET-GMC v. WILEY No. 898DC271	Wayne (87CVD1301)	Reversed
GILLESPIE v. NCNB CORP. No. 8910IC709	Ind. Comm. (650242)	Affirmed
GILLIKIN v. PIERCE No. 893SC122	Carteret (87CVS928)	Appeal Dismissed
HACKNEY v. N.C. DEPT. OF HUMAN RESOURCES No. 8914SC323	Durham (88CVS35)	Affirmed
IN RE HAYES No. 8919DC519	Randolph (82J54)	Affirmed
IN RE McDOWELL No. 8913DC507	Brunswick (87J83)	Vacated & Remanded
INMAN v. LEISURE No. 8913SC559	Brunswick (87CVS873)	Affirmed
JOHNSON v. JOHNSON No. 8922DC744	Davidson (88CVD770)	Affirmed
JOHNSON v. PERRY No. 8923SC157	WILKES (87CVS395)	No Error
MURPHY v. VANDERPOOL No. 8810IC1030	Ind. Comm. (539510)	Vacated & Remanded

PEARCE v. BEAUSOLEIL No. 8818SC1424	Guilford (87CVS5099)	Affirmed
PRITCHARD v. CUMBERLAND COUNTY HOSPITAL SYSTEM No. 8810IC1216	Ind. Comm. (957716)	Affirmed
ROBERTS v. JANE DOE No. 896SC712	Halifax (89CVS171)	Appeal Dismissed
SKATE STATION OF GREENSBORO v. SKATE STATION I No. 8918SC611	Guilford (88CVS5139)	Affirmed
STATE v. ADAMS No. 8927SC869	Gaston (88CRS19477)	No Error
STATE v. BRADSHAW No. 8926SC358	Mecklenburg (87CRS65103)	No Error
STATE v. BROWN No. 8926SC473	Mecklenburg (88CRS14765)	No Error
STATE v. CRITE No. 8918SC763	Guilford (88CRS65224)	No Error
STATE v. DUNLAP No. 8921SC400	Forsyth (88CRS11784)	No Error
STATE v. FARRAR No. 8915SC691	Alamance (88CRS23823)	No Error
STATE v. FRICK No. 8929SC742	McDowell (88CRS466)	No Error
STATE v. GANT No. 8927SC754	Gaston (88CRS3766)	Affirmed
STATE v. HAGAN No. 897SC469	Nash (88CRS1678)	No Error
STATE v. HEMBY No. 894SC620	Onslow (88CRS9503) (88CRS9504) (88CRS9505) (88CRS9506) (88CRS9507) (88CRS9508) (88CRS9509) (88CRS9510) (88CRS9511) (88CRS9512) (88CRS9513) (88CRS9514)	Affirmed in part; vacated and remanded in part

STATE v. HORTON No. 8810SC1394	Wake (87CRS44412) (87CRS44413) (87CRS44414)	No Error
STATE v. McMILLIAN No. 8919SC522	Cabarrus (87CRS8599)	No Error
STATE v. MAYE No. 898SC508	Lenoir (88CRS5386) (88CRS5387)	No Error
STATE v. MICHAELS No. 8912SC530	Cumberland (88CRS16218)	No Error
STATE v. MYERS No. 8922SC783	Davie (88CRS1471)	New Trial
STATE v. PETTIFORD No. 8915SC505	Orange (88CRS7657) (88CRS7658)	No Error
STATE v. PITTMAN No. 8915SC764	Bladen (87CRS2476)	No Error
STATE v. STACEY No. 8926SC375	Mecklenburg (88CRS34689)	No Error
STATE v. TESSENAIR No. 8929SC796	Rutherford (87CRS3881)	Affirmed
STATE v. WAYNE No. 893SC801	Carteret (89CRS1590)	No Error
STATE v. WILSON No. 8925SC786	Burke (87CRS4842)	Affirmed
TETTERTON v. SERMONS No. 892SC686	Beaufort (87CVS278)	Summary judgment for defendant Sermons and defendant Cooperative Savings & Loan is affirmed.

MELVIN G. JOHNSON AND WIFE, AUDREY VIRGINIA JOHNSON v. BEVERLY-HANKS & ASSOCIATES, INC., HILL-GATEWOOD REALTY, INC., JAMES H. GORDON, JOHN R. KEFGEN AND WIFE, DOROTHY E. KEFGEN, ORKIN EXTERMINATING COMPANY, INC., THOMAS W. SUMNER, DONALD O. THOMPSON, AND WYNELLE M. THOMPSON

No. 8929SC162

(Filed 20 February 1990)

1. **Rules of Civil Procedure § 15.1 (NCI3d)— motion to amend pleadings—denied—no abuse of discretion**

The trial court did not abuse its discretion by denying plaintiffs' motion to amend the pleadings where the complaint was filed on 1 September 1987, the motion to amend was made on 18 April 1988, and there was nothing in the record to indicate why plaintiffs were delayed in making the motion or that the trial court abused its discretion.

Am Jur 2d, Pleading § 310.

2. **Fraud § 12.1 (NCI3d)— sale of house—false representations of material facts—evidence not sufficient**

The trial court properly granted summary judgment for defendants Wynelle Thompson (the selling realtor) and Beverly-Hanks (Thompson's agency) in an action for fraud arising from the sale of a house where plaintiffs did not produce evidence of false representations as to a material past or existing fact.

Am Jur 2d, Brokers § 108.

3. **Unfair Competition § 1 (NCI3d)— sale of house—unfair or deceptive trade practice—evidence insufficient**

The trial court properly granted summary judgment for defendants Thompson and Beverly-Hanks in an action for unfair or deceptive trade practices under N.C.G.S. § 75-1.1 arising from the sale of a house where the forecast of evidence does not reveal any oppressive, unscrupulous, or deceptive conduct on the part of Wynelle Thompson or any representative of Beverly-Hanks.

Am Jur 2d, Brokers § 108.

4. **Conspiracy § 2.1 (NCI3d)— sale of house—evidence insufficient**

The trial court properly granted summary judgment for defendants Thompson and Beverly-Hanks on a civil conspiracy

claim arising from the sale of a house where plaintiffs presented no evidence of any agreement between Ms. Thompson and any other defendant.

Am Jur 2d, Brokers § 108.

5. **Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d); Conspiracy § 2.1 (NCI3d)— sale of house—structural damage—summary judgment for defendants—no error**

The trial court did not err in an action arising from the sale of a house by granting summary judgment for defendants Hill-Gatewood (the listing real estate agency) and Sumner (the listing agent) on claims for fraud, unfair or deceptive trade practices, or civil conspiracy where very few representations were made by Sumner or any representative of Hill-Gatewood to plaintiffs; the few representations which they made were not relied upon by plaintiffs; and the forecast of evidence did not reveal any agreement by Sumner or any representative of Hill-Gatewood to do anything unlawful with regard to plaintiffs.

Am Jur 2d, Brokers § 108.

6. **Unfair Competition § 1 (NCI3d); Fraud § 12.1 (NCI3d); Conspiracy § 2.1 (NCI3d)— sale of house—structural damage—summary judgment for seller—no error**

The trial court did not err by granting summary judgment for defendant Kefgen in an action for fraud, unfair or deceptive trade practices, and civil conspiracy arising from the sale of Kefgen's house where plaintiffs did not bring forth any fact which tends to show that the Kefgens knowingly made false representations; there was no evidence of any agreement between the Kefgens and any other defendant to participate in an illegal act; and Mrs. Kefgen was merely a homeowner who listed her house for sale and cannot be liable for any acts which might generally be considered unfair or deceptive trade practices.

Am Jur 2d, Fraud and Deceit §§ 9, 41, 105, 106, 108; Vendor and Purchaser §§ 488, 495.

7. Conspiracy § 2.1 (NCI3d); Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d)— sale of house—termite inspector—dismissal proper

The trial court did not err by granting defendant Orkin's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action for fraud, unfair or deceptive trade practices, or civil conspiracy arising from the sale of a house where plaintiffs failed to put forth any evidence to support those claims in that Orkin's inspection reports were mere opinions.

Am Jur 2d, Negligence § 127; Vendor and Purchaser § 64.

8. Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d); Conspiracy § 2.1 (NCI3d)— sale of house—structural damage—summary judgment for home inspector—no error

The trial court properly granted summary judgment for defendant Gordon (home inspector) on claims of fraud, unfair or deceptive trade practices and civil conspiracy arising from the sale of a house where defendant Gordon's only representations were those placed in his inspection report; plaintiffs neither proved that those claims were false nor alleged a claim for negligent misrepresentation, so that a prima facie case of fraud was not established; the evidence was insufficient to support an allegation of unfair or deceptive trade practices; and the evidence did not reveal that defendant Gordon knew of a potential conspiracy, joined in through agreement, acted in a manner to further the conspiracy, or committed an unlawful act.

Am Jur 2d, Negligence § 127; Vendor and Purchaser § 64.

9. Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d); Conspiracy § 2.1 (NCI3d)— sale of house—structural damage—builder—summary judgment appropriate

The trial court did not err by granting summary judgment for defendant Donald Thompson (builder) in an action for fraud, unfair or deceptive trade practices or conspiracy arising from the sale of a house where the evidence showed that Thompson built the residence and submitted a letter attesting to the settling of the house and to its general soundness, but no facts were presented to show wrongful conduct, unfair or deceptive trade practices, or an agreement to engage in an unlawful act.

Am Jur 2d, Fraud and Deceit §§ 9, 41, 105, 106, 108.

Judge GREENE dissenting in part and concurring in part.

APPEAL by plaintiffs from judgments entered 12 July 1988, 14 September 1988, 15 September 1988 and 25 September 1988 by *Judge Robert D. Lewis* in HENDERSON County Superior Court. Heard in the Court of Appeals on 14 September 1989.

This is a civil action in which plaintiffs sought compensatory and punitive damages for defendants' alleged fraud, unfair or deceptive acts or practices in or affecting commerce and civil conspiracy.

James C. Coleman for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., for defendant-appellees Beverly-Hanks & Associates, Inc. and Wynelle M. Thompson.

Robert G. McClure, Jr. and Frank J. Contrivo for defendant-appellees Thomas W. Sumner and Hill-Gatewood Realty, Inc.

Waymon L. Morris for defendant-appellee James H. Gordon.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr. and Sharon B. Ellis, for defendant-appellee Dorothy E. Kefgen.

Prince, Youngblood, Massagee & Jackson, by Kenneth Youngblood and Sharon B. Ellis, for defendant-appellee Donald O. Thompson.

Long, Parker, Hunt, Payne & Warren, P.A., by Jeffrey P. Hunt, for defendant-appellee Orkin Exterminating Company, Inc.

JOHNSON, Judge.

The pertinent facts of this case are as follows: John and Dorothy Kefgen signed a listing contract to list their home in Henderson, North Carolina and to place the listing in the Hendersonville Multiple Listing Service. The listing firm was Hill-Gatewood Realty, Inc. and the listing agent was Thomas A. Sumner. Plaintiffs, Melvin and Audrey Johnson, were shown the house by Wynelle M. Thompson, a real estate broker at Beverly-Hanks and Associates, Inc., and signed an offer to purchase on 18 April 1986.

On 20 April 1986, plaintiffs returned to the Kefgen house for a closer inspection. While touring the house, plaintiffs noticed peeling paint, moisture coming through the wall, bad cracks and a

bulge in the rear wall of the house. Wynelle Thompson was subsequently informed of the defects and indicated that she would have the builder inspect the home.

Following the inspection by Donald Thompson, Wynelle Thompson informed plaintiffs that: (1) there were no structural defects; (2) the bulge in the wall was the result of settling; (3) a termite inspection would be conducted prior to closing; and (4) a door to the crawl space under the house had been installed as well as three vents.

A termite inspection of the house was conducted by Orkin Exterminating Company on 16 July 1986 and 26 July 1986. The report from the second inspection stated that there was "not structural damage" with the house, although there had been some problems with termites. The report further stated that the house was structurally sound.

In spite of the defects discovered by plaintiffs, they went to the real estate closing on 5 August 1986. At the closing, they were given the following signed statements:

(1) A statement signed by Orkin indicating that there was no structural damage in the house caused by termites.

(2) A statement by Wynelle Thompson indicating there were no structural defects and that the house was sound.

(3) A letter from James H. Gordon who signed as Jim Gordon of the Carolina Home Inspection Service indicating that there was no structural damage to the house.

(4) A memorandum signed by Donald O. Thompson, builder of the house, indicating that the concrete slab in the basement was sound. Donald O. Thompson further indicated that the concrete slab in the basement had settled somewhat, that after six years it had done all the settling it was going to do and that the house was soundly built.

(5) A letter from James E. Creekman, Attorney At Law, who indicated he represented Mr. and Mrs. Kefgen. He presented with his letter another statement from Donald O. Thompson stating that the structural integrity of the house was good and that the wooden forms under the concrete slab in the basement had nothing to do with the structural integrity.

Plaintiffs purchased the house on 5 August 1986 and shortly thereafter moved in.

After moving into the house, plaintiffs consulted and retained the services of the engineering firm of Sutton-Kennerly and Associates. Mr. Bernard M. Feinberg, P.E., inspected the premises and concluded that the house was not safe for occupancy due to the following reasons:

(1) Portions of the basement foundation walls were unstable and could collapse with little or no warning.

(2) A concrete masonry wall beneath the left rear garage door was found to be bearing on earth instead of a concrete foundation.

(3) The basement slab was found to be spanning distances greater than those recommended for a four inch thick concrete slab based on deflection criteria.

(4) Cracking and deflected surface conditions noted in the asphalt paving indicate settlement of the lowgrade adjacent to the home.

(5) Steel (jack post) type columns which support the upper level of the residence were found not to be secured to the basement floor.

(6) Upper level wood floor joists were found to be bearing unsecured atop the concrete masonry unit walls and no wood plate or anchor bolts were found.

(7) The basement slab is spanning a much greater distance than that allowed under the North Carolina Uniform Residential Code. Since the center steel columns support a portion of the upper floor and possibly fifty percent (50%) of the roof, partial structural failure of this floor could result in a collapse of the home.

(8) It appears as if the residence may have slid partially off its foundation while it was being constructed and was pulled back into place.

(9) The basement crawl space is not adequately ventilated to prevent moisture problems.

Upon receiving an estimate that it would cost approximately $69,427.00 to repair the structural damages, plaintiffs contacted

all parties involved in this matter to see if each would contribute to the repairs. None of the parties responded and plaintiffs filed this complaint.

Plaintiffs have essentially brought forth two Assignments of Error with respect to each defendant. The questions for review by this Court relate to whether the trial court abused its discretion in denying plaintiffs' motion for leave to amend the complaint and whether the trial court erred in granting all defendants' motions for summary judgment. Inasmuch as there are eight defendants and six appeals, we will first address the denial of plaintiffs' motion for leave to amend the complaint. We then will discuss the issue of summary judgment as it relates to each defendant.

[1] A motion to amend the pleadings, after the expiration of the statutory time for amending the pleadings as a matter of course, is addressed to the sound discretion of the trial judge. The denial of such motion is not reviewable on appeal absent a clear showing of abuse of discretion. *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 340 S.E.2d 518 (1986). The trial court, in its broad discretion, can permit or deny amendments after the time for amending as a matter of law has expired. *Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

In the case *sub judice*, the complaint was filed on 1 September 1987 and the motion to amend was made on 18 April 1988. There is no showing that the trial court abused its discretion in denying plaintiffs' motion to amend the complaint. There is also nothing in the record to indicate why plaintiffs were delayed in making this motion. This assignment is overruled.

We note at the outset of Assignment of Error numbered two that plaintiffs' appeal against all defendants is premised upon the same three theories of recovery. The applicable rules of law do not differ with respect to each defendant and, therefore, an extensive discussion of these rules, initially, will govern the analysis thereafter.

The party who moves for summary judgment must initially prove that there are no disputed factual issues and that the party is entitled to judgment as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979). Once the moving party has met this initial burden, the non-moving party must prove

the existence of a genuine issue of material fact or, in the alternative, provide an excuse for not doing so. *Id.*

Appeal No. 1

Beverly-Hanks & Associates, Inc. (Beverly-Hanks) and Wynelle M. Thompson

[2] In this appeal, plaintiffs' sole contention is that the trial court erred in granting defendants' motions for summary judgment. We disagree.

Plaintiffs' complaint sought three claims for relief: (1) fraud; (2) unfair or deceptive trade practices; and (3) civil conspiracy.

To make out an actionable case of fraud, plaintiffs must establish that there existed a

> (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive; (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). Here, plaintiffs have not produced any evidence that defendant, Wynelle Thompson, or any representative of defendant, Beverly-Hanks, made any false representations as to a material past or existing fact. As such, the trial court properly granted defendants' motions for summary judgment as to the fraud allegation.

[3] Plaintiffs' second claim for relief is based upon unfair or deceptive trade practices. G.S. sec. 75-1.1.

As a general principle, "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *rev'd on other grounds*, 323 N.C. 559, 374 S.E.2d 385 (1988). A party has committed an unfair or deceptive act if he engages in conduct that results in an inequitable assertion of his power or position. *Id.* at 264, 266 S.E.2d at 622.

The forecast of the evidence does not reveal any oppressive, unscrupulous, or deceptive conduct on the part of Wynelle Thompson or any representative of Beverly-Hanks. The trial court, therefore, properly granted defendants' motion for summary judg-

ment with respect to the unfair or deceptive trade practices allegation.

[4] Plaintiffs' third claim for relief is based upon civil conspiracy.

Although plaintiffs have labeled their action as one for "civil conspiracy," there is actually no such cause of action. Our Supreme Court has stated:

> [a]ccurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable.

Reid v. Holden, 242 N.C. 408, 414-15, 88 S.E.2d 125, 130 (1955) (*quoting* 11 Am.Jur., *Conspiracy*, sec. 45).

A claim for relief resulting from a conspiracy exists if there is "an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way, and, as a result of acts done in furtherance of, and pursuant to, the agreement, damage occurs to the plaintiff." *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737, 743 (1987). In such a case, the conspirators are to be held jointly and severally liable for the act done in furtherance of the agreement. *Id.* Evidence of the agreement must, in fact, be sufficient to create more than a suspicion or conjecture in order to justify submission of the issue to a jury. *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901 (1982).

In the present case, plaintiffs alleged that Wynelle Thompson and all other defendants agreed to cover up the defects in the house. They also alleged that as a result of this conspiracy, they were damaged. Plaintiffs have presented absolutely no evidence of any agreement between Ms. Thompson and any other defendant. The trial court correctly granted Wynelle Thompson and Beverly-Hanks summary judgment as to the plaintiffs' "civil conspiracy" claim.

Appeal No. 2

Hill-Gatewood Realty, Inc. ("Hill-Gatewood") and Thomas W. Sumner

[5] The evidence presented to the trial court indicated that very few representations were made by Thomas Sumner or any representative of Hill-Gatewood to plaintiffs. The evidence further indicated that the few representations that they in fact made were not relied upon by plaintiffs in deciding whether or not to close the transaction. Furthermore, the forecast of the evidence does not reveal any agreement by Thomas Sumner or any representative of Hill-Gatewood to do anything unlawful with regard to plaintiffs.

The trial court had ample support for its conclusions that the conduct of the defendants was not oppressive, unscrupulous or deceptive. Summary judgment for defendants was properly entered on all three counts.

Appeal No. 3

Dorothy E. Kefgen

[6] As a matter of clarity, this Court notes that plaintiffs initially brought a cause of action for fraud, unfair or deceptive trade practices and civil conspiracy against John and Dorothy Kefgen. Due to John Kefgen's death, his wife, Dorothy, defends this action.

Plaintiffs bear the burden of proving *all* elements of a cause of action. The record indicates that Dorothy Kefgen and her husband placed their house up for sale some time prior to 18 April 1986. The record further indicates that the Kefgens were present on 20 April 1986 when plaintiffs returned to the house and made inquiries as to specific defects.

Plaintiffs allege that the Kefgens committed fraud and engaged in a conspiracy to cover up the defects. They, however, have neither brought forth any fact which tends to show the Kefgens knowingly made false representations nor any evidence of any agreement between the Kefgens and any other defendant to participate in an unlawful act.

Plaintiffs next alleged a claim for relief based upon G.S. sec. 75-1.1. This statute regulates unfair and deceptive trade practices. To be accountable to any party for violating G.S. sec. 75-1.1, a defendant must be engaged in commerce. Homeowners are "private parties engaged in the sale of [a] residence [and are] not involved

in trade or commerce and cannot be held liable under the statute." *Robertson v. Boyd*, 88 N.C. App. 437, 443, 363 S.E.2d 672, 676 (1988).

The undisputed facts establish that Mrs. Kefgen was merely a homeowner who listed her house for sale. Based upon this, Mrs. Kefgen cannot be liable for any acts which might generally be considered unfair or deceptive trade practices.

The trial court properly granted Dorothy Kefgen's motion for summary judgment as to the fraud, unfair or deceptive trade practices and "civil conspiracy" claims.

Appeal No. 4

Orkin Exterminating Company, Inc. ("Orkin")

[7] In this appeal, plaintiffs contend that: (1) the termite inspection forms prepared by Orkin on 16 July 1986 and 26 July 1986 were clearly designed to mislead them; (2) the report of 26 July specifically stated that there was no structural damage; and (3) the trial court erred in granting Orkin's Rule 12(b)(6) and summary judgment motions. We disagree.

Our Supreme Court has held that statements of opinion are insufficient in terms of defining representations which constitute fraud. *Myers & Chapman, Inc. v. Thomas G. Evans*, 323 N.C. 559, 374 S.E.2d 385 (1988). Turning to the facts at hand with this principle in mind, the plaintiffs were placed on notice of "possible hidden [termite] damages" as well as the possible need for a damage evaluation by a qualified expert. The inspection reports undisputedly disclaimed all warranties as to the absence of wood destroying insects. Furthermore, a reading of the reports allows this Court to extract another unambiguous form disclaimer. Item 11, Part C of the Orkin report clearly provides that "[t]his is not a structural damage report."

We are satisfied with the trial court's apparent interpretation that such statements made by Orkin were mere opinions and therefore were not actionable as fraud.

In reviewing the record, we find that the trial court did not err in granting Orkin's 12(b)(6) motion to dismiss with respect to plaintiffs' claims of unfair or deceptive trade practices or "civil conspiracy." Plaintiffs have simply failed to put forth any evidence to support these claims.

Appeal No. 5

James H. Gordon

[8] The forecast of the evidence revealed that James Gordon inspected designated areas of the house in question and based upon this inspection, submitted the following recommendations: (1) that an enclosed and unventilated crawl space area be opened; (2) certain deteriorated and rotten support structures for the overhead cement basement floor be removed; and (3) that the area be treated for termites. Defendant Gordon's only representations were those placed in his inspection report. Plaintiffs have neither proven these representations were false nor alleged a claim of negligent inspection. Therefore, a *prima facie* case for fraud has not been established.

Though the record was voluminous, the trial court was unable to find any representations or omissions made by James Gordon that rose to the level of oppressive, unscrupulous or deceptive conduct. The evidence presented is insufficient to support an allegation of unfair or deceptive trade practices.

Lastly, the evidence does not reveal that James Gordon knew of a potential conspiracy; joined in through agreement; acted in a manner which would further the conspiracy; or committed an unlawful act. Thus, this claim for relief has no merit.

The trial court carefully considered James Gordon's motion for summary judgment and properly concluded that no triable issues of fact existed on plaintiffs' claims of fraud, unfair or deceptive trade practices or "civil conspiracy."

Appeal No. 6

Donald O. Thompson

[9] The undisputed facts provide that Donald Thompson built the residence which plaintiffs complain of and submitted a letter attesting to the settling of the house and to its general soundness. No facts were presented to show wrongful conduct, unfair or deceptive trade practices or an agreement to engage in an unlawful act. Thus, plaintiffs have failed to establish that there exists a genuine issue of material fact with respect to their claims of fraud, unfair or deceptive trade practices and "civil conspiracy."

In light of these facts, the trial court properly granted defendant's motion for summary judgment on all three counts.

Plaintiffs have failed to present any argument to support the contention that the trial court committed reversible error in the manner in which it conducted the summary judgment hearing. We therefore deem this argument abandoned and do not address it. Rule 28(b)(5), N.C. Rules App. Proc.; *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988).

The result is as follows:

Plaintiffs' appeal against Beverly-Hanks & Associates, Inc. and Wynelle M. Thompson—Affirmed on all three counts.

Plaintiffs' appeal against Hill-Gatewood Realty, Inc. and Thomas W. Sumner—Affirmed on all three counts.

Plaintiffs' appeal against Dorothy E. Kefgen—Affirmed on all three counts.

Plaintiffs' appeal against Orkin Exterminating Company, Inc.—Affirmed on all three counts.

Plaintiffs' appeal against James H. Gordon—Affirmed on all three counts.

Plaintiffs' appeal against Donald O. Thompson—Affirmed on all three counts.

Affirmed.

Judge EAGLES concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

While I agree with the majority in affirming the trial court on most of the issues presented, I believe the trial court erred in granting summary judgment for Beverly-Hanks & Associates, Inc., Wynelle M. Thompson, and Donald O. Thompson on both the fraud and unfair trade practices claims, and for Dorothy E. Kefgen on the fraud claim.

I

BEVERLY-HANKS & ASSOCIATES, INC.
and WYNELLE M. THOMPSON

The majority conclude that "plaintiffs have not produced any evidence that defendant Wynelle Thompson or any representative of defendant Beverly-Hanks, made any false representation as to a material past or existing fact." The plaintiffs, in their verified complaint, allege factual bases for an action of fraud arguing that Wynelle M. Thompson and, derivatively, Beverly-Hanks fraudulently misled the plaintiffs into purchasing the property in issue.

> A broker who makes fraudulent misrepresentations or who conceals a material fact when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller.

J. Webster, *Real Estate Law in North Carolina* § 132, at 165 (3d ed. 1988) (footnote omitted).

Plaintiffs' evidence showed that Ms. Thompson hired Jim Gordon to conduct an inspection to satisfy the plaintiffs' demand for an independent investigation of the house's structural integrity. Ms. Thompson failed to mention that Mr. Gordon had earlier inspected the house for the Kefgens at the behest of Thomas Sumner, with whom Ms. Thompson now acted in concert in marketing the house on behalf of the Kefgens. By the evidence presented, Jim Gordon arguably does not qualify as a neutral, independent inspector, yet the plaintiffs relied on Ms. Thompson's choosing him as an independent inspector. The plaintiffs provided evidence that they would not have gone through with closing had they known they had not received an independent investigation. The evidence elicited during discovery and presented for the trial court's review upon the motion of summary judgment is thus conflicting as to material facts. Wynelle Thompson produced evidence to the effect that she did not know Jim Gordon had previously inspected the house for the Kefgens, and the plaintiffs produced evidence tending to show that not only was she aware of it, but that she sought Jim Gordon's services because of it. As these defendants have not shown that they otherwise were entitled to judgment as a matter of law, summary judgment was improperly granted.

Similarly I find in the record conflicting evidence as to the unfair trade practices claim against Wynelle Thompson and Beverly-Hanks. The evidence outlined above relating to the fraud claim could also tend to prove that Ms. Thompson engaged in a deceptive act or practice in or affecting commerce. *Powell v. Wold,* 88 N.C. App. 61, 68, 362 S.E.2d 796, 800 (1987) (proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices). Thus, summary judgment was improvidently granted as to defendants Wynelle Thompson and Beverly-Hanks on this issue. *See Powell,* 88 N.C. App. 61, 362 S.E.2d 796 (motion to dismiss denied as to both realtor and real estate company where realtor made deceptive statements).

II

DOROTHY E. KEFGEN

Regarding defendant Dorothy E. Kefgen, I find that the plaintiffs presented sufficient evidence to withstand defendants' summary judgment motion since this defendant can be liable for the alleged fraud of her agent, Wynelle Thompson.

> A seller of property, as principal, is responsible to a purchaser for injuries caused by the fraud of the seller's broker committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the seller. This is true even though the seller did not have knowledge of or authorize the actions of the broker. A seller will be precluded from enforcing a contract to convey against purchaser who has entered into the contract in justifiable reliance on the fraudulent, negligent or innocent material misrepresentations of the seller's agent.

J. Webster, *Real Estate Law in North Carolina* § 133, at 166. Also, the plaintiffs produced some evidence of misrepresentations by Ms. Kefgen and her husband directly to them about the soundness of the house. The plaintiffs provided evidence that tended to prove that when the plaintiffs inquired as to the cause of certain observed defects, the Kefgens provided incomplete and misleading answers. The plaintiffs testified this induced them to forego inquiries they would otherwise have made, thus presenting an additional ground for fraud. *See Blackwell v. Dorosko,* 93 N.C. App. 310, 377 S.E.2d 814, *opinion withdrawn in part on rehearing,* 95 N.C. App. 637, 383 S.E.2d 670 (1989).

Ms. Kefgen also argues that the plaintiffs had no unfair trade practices action under N.C.G.S. § 75-1.1 since she was only an individual selling her home. The same evidence which gave rise to her liability for fraud may also support an action under the Unfair Trade Practices Act. *Powell*, 88 N.C. App. at 68, 362 S.E.2d at 800. I fail to see the logic of excusing a homeowner-seller from the application of § 75-1.1 simply because the owner-seller does not earn a living by selling homes. N.C.G.S. § 75-1.1 declares unlawful "unfair or deceptive acts or practices in or affecting commerce . . . ." Commerce "includes all business activities, however denominated. . . ." N.C.G.S. § 75-1.1(b). Some of the many definitions of "business" include:

> an activity engaged in as normal, logical, or inevitable and usually extending over a considerable period of time; . . . an activity engaged in toward an immediate specific end and usually extending over a limited period of time; . . . a usually commercial or mercantile activity customarily engaged in as a means of livelihood . . . ; [or] transactions, dealings, or intercourse of any nature but now especially economic (as buying and selling) . . .

Webster's Third New International Dictionary (1968).

The statutory definition of commerce does not indicate with certainty whether the Legislature had an expansive or restrictive definition of business in mind, but the phrase "however denominated" connotes an expansive approach. However, as the majority opinion points out, our courts have interpreted the statute restrictively, holding that homeowners "engaged in the sale of [their] residence [are] not involved in trade or commerce . . . ." *Robertson v. Boyd*, 88 N.C. App. 437, 443, 363 S.E.2d 672, 676 (1988). *Robertson* depended on *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979), which also held that a homeowner-seller was not subject to liability under N.C.G.S. § 75-1.1. To come to this conclusion the *Rosenthal* court looked to the purpose of the original version of the Unfair Trade Practices Act there enunciated as follows:

> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealing between persons engaged in business and between persons engaged in business and the consuming public within this State,

> to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

N.C.G.S. § 75-1.1(b) (1975).

The Legislature has eliminated this language from the statute, but at the time it was in force, no doubt a restrictive definition of commerce was the legislative intent. Now, however, *Rosenthal* is no longer binding precedent given the substantial change in the statutory language, which currently states that: " 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (1988). Unlike the earlier version, only professional services are excluded from the definition of commerce. When some subjects or things are specifically excluded from statutory coverage, all others are assumed included. *See generally* 82 C.J.S. *Statutes* § 333 (1953). Furthermore, the elimination of the restrictive language from the statute indicates the Legislature intended the Act to facilitate wider imposition of liability. This view is bolstered by the addition of the "in or *affecting* commerce" language to N.C.G.S. § 75-1.1(a) (emphasis added) which significantly expanded the scope of liability from the old language which contemplated liability only for acts and practices *in* commerce. In addition, the Legislature's elimination of the restrictive term "trade" from the original version "clearly 'constituted a substantive revision intended to expand the potential liability for certain proscribed acts.' " *Talbert v. Mauney*, 80 N.C. App. 477, 480, 343 S.E.2d 5, 8 (1986) (quoting *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F.Supp. 1049 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed.2d 590 (1981)). Here a deceptive act by Ms. Kefgen or her husband arguably is in commerce since it involved a commercial transaction, the sale of a house. It could arguably also affect commerce since the alleged deception could affect this particular transaction. More significantly, deception affecting this transaction would affect commerce as a whole since each individual house sale affects commerce of house sales generally.

However, the court in *Robertson* has already interpreted the Act, as it now stands, and I am bound by that decision. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Thus, I must concur with the majority that summary judgment was correctly granted to Ms. Kefgen on the Unfair Trade

Practices Act claim on the grounds that the sale was not in or affected commerce.

III

DONALD O. THOMPSON

Regarding the plaintiffs' claim of fraud against Donald O. Thompson, the housebuilder, the record shows that Mr. Thompson submitted a letter to the plaintiffs attesting to the general soundness of the house. Whether this assertion will form the basis for a fraud claim is an issue properly left for the jury since the complaint and record contain conflicting evidence of the elements of fraud. The trial court improvidently granted summary judgment for Donald O. Thompson on this issue.

Similarly, the trial court improvidently granted summary judgment for Mr. Thompson on the unfair trade practices claim. His affirmation of the general soundness of the house could be considered a deceptive act affecting commerce. Mr. Thompson did not carry the burden of showing that the plaintiffs could not prove the acts in support of an element of this action. The fact that Mr. Thompson had no contractual relationship with the plaintiffs does not preclude the imposition of liability under N.C.G.S. § 75-1.1. *See J. M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 387 S.E.2d 67 (1990).

On these claims, I would vacate the summary judgment as to defendants Beverly-Hanks & Associates, Dorothy E. Kefgen, Donald O. Thompson and Wynelle Thompson and remand for trial.

STEWART OFFICE SUPPLIERS, INC. v. FIRST UNION NATIONAL BANK

STEWART OFFICE SUPPLIERS, INC. v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA

Nos. 8926SC163
8926SC289

(Filed 20 February 1990)

1. **Uniform Commercial Code § 36 (NCI3d)— conversion of checks—restrictive endorsements—summary judgment for defendants**

The trial court erred by granting summary judgment for defendant Southern National in an action for conversion for paying checks inconsistent with a restrictive endorsement where both endorsements contained the language "For Deposit Only" and were restrictive endorsements under N.C.G.S. § 25-3-205(c). Defendant's transactions were done in good faith, but determination of commercial reasonableness is inherently a jury question which does not readily lend itself to summary judgment. While the test for commercial reasonableness in *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, was under Art. 9, the same test should apply to all commercial transactions under Chapter 25.

Am Jur 2d, Bills and Notes §§ 362, 408.

2. **Uniform Commercial Code § 36 (NCI3d)— breach of restrictive endorsement—summary judgment for defendant bank—improper**

The trial court erred by granting summary judgment for defendant Southern National for breach of restrictive endorsements; upon a proper showing, a plaintiff may recover for conversion and breach of restriction when a restrictive endorsement is violated. N.C.G.S. § 25-3-419(3).

Am Jur 2d, Bills and Notes §§ 362, 408.

3. **Uniform Commercial Code § 36 (NCI3d)— wrongful negotiation of instrument—conversion—restrictive endorsement—evidence insufficient**

The trial court did not err by granting summary judgment for defendant First Union on an action for wrongful negotiation

of instrument and conversion where the record did not contain the endorsements appearing on those checks and there was nothing in the record to dispute the trial court's findings that the endorsements were not restrictive.

Am Jur 2d, Bills and Notes §§ 362, 408.

4. **Uniform Commercial Code § 31 (NCI3d)— conversion—breach of restrictive endorsement—holder in due course doctrine—not applicable**

The trial court did not err by granting summary judgment for defendants Southern National and First Union in an action seeking the proceeds from negotiated instruments where plaintiff claimed status as the holder in due course but Key had the responsibility for filling plaintiff's customers' orders and was assigned plaintiff's accounts receivable as compensation, so that Key, not plaintiff, gave value for the checks. Moreover, plaintiff had executed a binding agreement which gave Key a claim against plaintiff's accounts receivable so that plaintiff had notice of adverse claims against its accounts receivable.

Am Jur 2d, Bills and Notes §§ 334, 345.

5. **Rules of Civil Procedure § 15.1 (NCI3d)— amendment of complaint—denied—no abuse of discretion**

The trial court did not abuse its discretion in an action seeking the proceeds from negotiated instruments by denying plaintiff's motion to amend its complaint to add claims for unfair or deceptive trade practices where those allegations were not made in the initial complaint and plaintiff made no showing of excuse for the delay in pleading them.

Am Jur 2d, Pleading §§ 310, 311, 312.

Judge JOHNSON concurring.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiff from order entered 6 December 1988 by *Judge Frank Snepp* in MECKLENBURG County Superior Court granting defendant First Union's motion, and order entered 7 December 1988 granting defendant Southern National's motion. Heard in the Court of Appeals 14 September 1989.

This is an appeal from orders granting defendants' motions for summary judgment in two separate cases involving identical

issues. Since the actions involve the same issues, plaintiff's appeals have been consolidated here.

Plaintiff Stewart Office Suppliers, Inc. (hereinafter S.O.S.), a minority owned corporation in Charlotte, North Carolina, sells and distributes office supplies. On 11 August 1986 plaintiff entered into an agreement with T & S Office Supplies, Inc. d/b/a Key Office Products (hereinafter Key) whereby Key was authorized to "negotiate any check, draft or other commercial paper given by third parties in satisfaction of debits on such third party's account attributable to orders received by Stewart."

In his deposition, Frederick Stewart, plaintiff's President, admitted that plaintiff had given Key authority to negotiate checks in the agreement, but asserted that the agreement had been cancelled on the next day. Despite this cancellation, Stewart said plaintiff continued to operate under the agreement because it had no other choice and had products to move. After entering this agreement plaintiff physically relocated its bookkeeper and warehouseman to offices operated by Key. After this, no checks from plaintiff's accounts receivable were deposited in plaintiff's account at Mechanics and Farmer's Bank until November and December 1986. In Stewart's deposition, he explained that the only reason the accounts receivable checks were deposited in the S.O.S. account in Mechanics & Farmers Bank during November and December 1986 was because at that time S.O.S. had stopped dealing with Key altogether and was involved in litigation with Key. Stewart also stated that he did not know where the checks were being deposited during the months other than November and December 1986 since the bills sent to customers instructed them to mail payment to Key.

Plaintiff then entered into another contract with Key on 5 January 1987 and the pending litigation was dismissed. This contract provided that "[a]ll accounts receivable after 9 January 1987 are to be assigned to and received by T & S Office Supplies." The agreement also provided that Key would be "responsible for all expenses related to the purchase and delivery of orders for Stewart Office Supplies and office activities." Plaintiff stated that following execution of this agreement Key and S.O.S. each paid some expenses.

During the spring of 1987 plaintiff discovered that defendant First Union National Bank (hereinafter First Union) was negotiating some of the accounts receivable checks. Plaintiff then had its at-

torney write a letter dated 11 February 1988 informing First Union that plaintiff had learned that First Union had negotiated checks without authority.

Plaintiff brought a separate action against each defendant seeking the proceeds from the negotiated instruments. After defendants answered, plaintiff moved for judgment on the pleadings or in the alternative summary judgment. In the action against First Union the trial court denied plaintiff's motion and granted defendant First Union's motion for summary judgment. The trial court did so on the grounds that the checks payable to plaintiff and deposited in the account of T & S Office Supplies at First Union National Bank did not contain restrictive indorsements, that the indorsement and deposit of the checks were fully authorized by the plaintiff and that the defendant acted in a commercially reasonable manner. The trial court also granted defendant Southern National's motion for summary judgment in the second action on the grounds that the "pleadings, answers to interrogatories, and the admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law." Plaintiff appeals in each case.

Lawrence U. Davidson, III for plaintiff-appellant.

Perry, Patrick, Farmer & Michaux, by Roy H. Michaux, Jr., for defendant-appellee First Union National Bank.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Craig T. Lynch, for defendant-appellee Southern National Bank.

EAGLES, Judge.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." G.S. 1A-1, Rule 12(c).

On this record, we conclude that summary judgment in favor of defendant Southern National was erroneous on the conversion

and breach of contract claims. We affirm the lower court's holding with respect to all other claims against Southern National and all claims against defendant First Union.

I. Conversion and Breach of Restrictive Indorsement Claims

A. Claims Against Defendant Southern National

[1] The plaintiff first assigns as error the trial court's determination that defendant Southern National was not liable for conversion and breach of restrictive indorsement to plaintiff as a matter of law for paying checks inconsistent with the restrictive indorsement. Plaintiff argues that the trial court erred in granting summary judgment for defendant Southern National based on the Bank's contention that there was not a material issue of fact in dispute. Plaintiff agrees that the facts were not in dispute but asserts that they warranted summary judgment in plaintiff's favor. Plaintiff asserts that the entry of summary judgment for the bank is contrary to an admission by defendant Southern National and the plain language of G.S. 25-3-205(c). Plaintiff points out that defendant admitted in its answer that it was "a federally chartered Bank and received certain checks for deposit which were made payable to the order of the plaintiff and which bore varying restrictive indorsements." After careful review of the record, we agree with plaintiff and accordingly reverse the summary judgment for the defendant Southern National on the conversion and breach of contract claims.

We note initially that General Statutes Chapter 25, the Uniform Commercial Code, governs commercial transactions in North Carolina. Chapter 25 begins with these general guidelines: "(1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies. (2) Underlying purposes and policies of this chapter are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." G.S. 25-1-102.

G.S. 25-3-205(c) provides that an indorsement is restrictive if it includes *inter alia* the words "for deposit" or "like terms signifying a purpose of deposit or collection." G.S. 25-3-205. Also, G.S. 25-3-419(3) provides that:

> Subject to the provisions of this chapter concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

Here, the record from the Southern National case includes a photostatic copy of a check which does in fact bear varying stamped restrictive indorsements. On the back of a check made payable to S.O.S. the following stamped indorsements appear:

(1) Stewart Office Suppliers
For Deposit Only

(2) For Deposit Only
Acct.: Illegible

Since both of the indorsements contain the language "For Deposit Only," under G.S. 25-3-205(c) they are restrictive indorsements. They are the "varying restrictions" admitted by the defendant.

However, in order to hold defendant Southern National liable for "conversion or otherwise" plaintiff must show that defendant did not act with good faith or failed to use reasonable commercial standards.

G.S. 25-1-201(19) defines good faith as "honesty in fact in the conduct or transaction concerned." The defendant Southern National knew of the contractual arrangement between the parties and acted in reliance on the contractual arrangement. Scott Anderson, an officer of Southern National, stated that he was "aware of the business relationship and contractual agreement." He stated he knew that S.O.S. solicited orders for office products which LVP Corporation would fill and that S.O.S.'s accounts receivable were assigned to LVP Corp. in return for a certain percentage of commission for sales. From that we conclude its transactions with Key were done in good faith.

With respect to the commercial reasonableness, this court held in *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 329 S.E. 2d 728 (1985) that "commercial reasonableness presents a factual issue to be determined by the jury in light of the relevant cir-

cumstances of each case." *Id.* at 722, 329 S.E. 2d at 728, citing *ITT-Industrial Credit Co. v. Milo Concrete Co., Inc.*, 31 N.C. App. 450, 458, 229 S.E. 2d 814, 820 (1976). In *Parks* the defendant appealed on the issue of whether the resale of his automobile was commercially reasonable citing G.S. 25-9-504(3) which provided that every aspect of the disposition of collateral after default "including the method, manner, time, place and terms must be commercially reasonable." *Id.* at 721, 329 S.E. 2d at 730. While the test *Parks* articulated for commercial reasonableness was under Article 9, the same test should apply to all commercial transactions under Chapter 25. "Because reasonable minds may differ over the application of a standard such as commercial reasonableness, this determination is inherently a jury question which does not readily lend itself to summary judgment." *Id.* at 722, 329 S.E. 2d at 730.

[2] Secondly, plaintiff argues that the trial court erred in allowing summary judgment for defendant Southern National on the issue of breach of restrictive indorsement. Our research discloses no North Carolina cases addressing whether an action exists for breach of restrictive indorsement in these circumstances. We hold that upon a proper showing, a plaintiff may recover for conversion and breach of restriction when a restrictive indorsement is violated. *See Mid-Atlantic Tennis Courts, Inc. v. Citizens Bank and Trust Co.*, 658 F. Supp. 140 (D. Md. 1987). However, we note that G.S. 25-3-419(3) provides liability for conversion or *otherwise* will not exist beyond the amount of any proceeds remaining in his hands if the depository bank acted in "good faith and in accordance with the reasonable commercial standards applicable to the business."

Accordingly, we reverse the trial court's entry of summary judgment for defendant Southern National and remand the cause for further proceedings on the issues of conversion and breach of restrictive indorsement.

B. Claims Against Defendant First Union

[3] Initially, we note that the same principles of law would apply to plaintiff's claim of wrongful negotiation of instrument against defendant First Union. However, the record before us does not include the reverse sides of the checks found in Exhibit One that were made payable to S.O.S. The record does not contain evidence to indicate the indorsements appearing on those checks. There is nothing in the First Union record to dispute the trial court's findings that the indorsements there were not restrictive. Where

there is no evidence of record that the indorsements are restrictive, the jury determination of commercial reasonableness required to resolve the claim against Southern National is not necessary here. Accordingly, on the issues of conversion and wrongful negotiation of an instrument, we affirm the court below with respect to defendant First Union.

II. Holder in Due Course

[4] Next, plaintiff contends that the trial court committed reversible error in denying its motion for summary judgment because as payee it is a holder in due course and this status cuts off any defenses raised by defendant bank First Union and defendant bank Southern National. We disagree.

"To qualify as a holder in due course, plaintiff . . . must have been a holder who took the check for value, in good faith, and without notice that it was overdue, had been dishonored, or of any defense against or claim to it." *City National Bank v. Rojas*, 64 N.C. App. 347, 349, 307 S.E. 2d 387, 389 (1983), citing G.S. 25-3-302. If the plaintiff is a holder in due course, he takes a check free from all claims to it or all defenses against it by any party. *Id.*, citing G.S. 25-3-305. In order to show that summary judgment was improperly granted for the defendant Bank, plaintiff is required to produce a forecast of evidence to show that no genuine issue of fact exists to plaintiff's status as a holder in due course.

Here, plaintiff was not responsible for filling its customers' orders. Instead, Key had this responsibility and in return was assigned plaintiff's accounts receivable as compensation. Here Key, not plaintiff, gave value for the checks. Even if plaintiff's role as a solicitor of orders could be considered value, plaintiff fails to meet another criterion of the holder in due course test. Since plaintiff and Key had executed a binding agreement which gave Key a claim against plaintiff's accounts receivable, plaintiff could not be a holder in due course because it had notice of adverse claims as to its accounts receivable.

Because plaintiff has failed to produce a forecast of evidence establishing its status as holder in due course, this assignment of error must fail.

III. Motion to Amend

[5] Finally, plaintiff assigns as error the trial court's denial of a motion to amend its complaint in each separate action. Plaintiff

contends that it filed its motion to amend in a timely fashion. The proposed amendment alleged a claim for unfair and deceptive trade practices. Plaintiff argues that the trial court erred in denying its motion. We disagree.

We note that "Rule 15(a) gives the trial court broad discretion in determining whether leave to amend will be granted after the time for amending as a matter of course has expired." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629, 347 S.E. 2d 473, 476 (1986), citing *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d 11, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978). "The denial of such a motion is not reviewable absent a clear showing of abuse of discretion." *Id.*, citing *Carolina Garbage, Inc. v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979).

Here, plaintiff has attempted to amend its complaint to bring an allegation of unfair and deceptive trade practices. These allegations were not brought in the initial complaint and plaintiff made no showing of excuse for the delay in pleading them. We find no abuse of discretion. Accordingly, this assignment of error must fail.

For the foregoing reasons the summary judgment in favor of defendant First Union National Bank is affirmed. The summary judgment in favor of defendant Southern National Bank is reversed and remanded for further proceedings not inconsistent with this opinion.

As to First Union—affirmed.

As to Southern National—reversed and remanded.

Judge JOHNSON concurs.

Judge GREENE concurs in part and dissents in part.

Judge JOHNSON concurring.

I concur with all of the majority opinion, but write separately to add to and advance the conclusion that the order granting summary judgment in favor of the defendant Southern National Bank must be reversed.

G.S. sec. 25-3-205 provides that "an indorsement is restrictive [if it] includes the words . . . 'for deposit.' " The statute does not,

however, specify additional words which must accompany the restrictive indorsement nor does it specify a particular order for such wording.

The restrictive indorsement

Stewart Office Suppliers
For Deposit Only

was stamped on the back of each check received by Stewart Office Suppliers, Inc. ("S.O.S.") from its customers. Key Office Products ("Key") thereafter stamped its bank account number on the back of each check, directly under the aforementioned restrictive indorsement. Southern National Bank ("Southern National") subsequently negotiated the checks for Key despite the stamped restrictive language which appeared above Key's indorsement.

I am of the opinion that both the unambiguous language used by S.O.S. and the use of the company stamp to create the indorsement placed Southern National on notice of the restrictive indorsement. The checks should have been negotiated only for deposit on behalf of S.O.S. Accordingly, Southern National paid the checks in a manner that was inconsistent with the restrictive indorsement.

Judge GREENE concurring in part and dissenting in part.

I first doubt whether the indorsement

Stewart Office Suppliers
For Deposit Only

was a restrictive indorsement as that term is used in N.C.G.S. § 25-3-205(c) (1986). The mere use of the words "For Deposit Only" *after* "Stewart Office Suppliers" is not a term, without more, which signifies a specific "purpose" as required by the statute. *Id.* The vagueness of the indorsement in question is reflected when contrasted with an indorsement reflecting a clear, specific purpose: For deposit only to account of Stewart Office Suppliers. In any event, as noted in Comment 5 to N.C.G.S. § 25-3-206, an indorsement "for deposit" "may be either special or blank." As the indorsement in question did not specify "to whom or to whose order" the instrument was payable, it was a blank indorsement. N.C.G.S. § 25-3-204(1) (1986). Therefore, while the check could be negotiated only for deposit, there was no restriction that it be deposited to the account of Stewart Office Suppliers. Accordingly, I find no

error in granting summary judgment for Southern National Bank who paid the check consistent with the second indorsement on the check which was clearly a special indorsement directing payment to a certain account.

As I fully concur with the majority in all other aspects of the opinion, I would vote to affirm the trial court in every respect.

MICHAEL A. SMITH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CRYSTAL MICHELLE SMITH, DECEASED v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8810SC1288

(Filed 20 February 1990)

1. **Declaratory Judgment Act § 4.3 (NCI3d)— refusal of insurer to state extent of UIM coverage—issue ripe for judicial resolution**

Defendant's refusal to state the extent of the UIM coverage under two policies issued to plaintiff by defendant sparked the actual controversy between plaintiff and defendant which provided the basis for this suit, and there was no merit to defendant's contention that a judgment establishing the amount of damages for the insured's death had not yet been entered in the underlying wrongful death action, and, therefore, the extent of available underinsurance coverage was an issue not ripe for judicial resolution.

Am Jur 2d, Declaratory Judgments §§ 123, 124, 133.

2. **Insurance § 69 (NCI3d)— household-owned vehicle exclusion—UIM coverage in two policies—no stacking allowed**

The UIM coverages provided in two separate automobile insurance policies issued to the plaintiff insured could not be "stacked" to compensate him for the death of his daughter who was killed while driving a vehicle owned by the insured and the daughter, since the "household-owned vehicle" exclusion in one of the policies precluded UIM coverage for the daughter's death and therefore prevented "stacking."

Am Jur 2d, Automobile Insurance § 329.

Judge PHILLIPS dissenting.

APPEAL by defendant from order entered 11 August 1988 in WAKE County Superior Court by *Judge B. Craig Ellis*. Heard in the Court of Appeals 6 June 1989.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Theodore B. Smyth, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and H. Chalk Broughton, Jr., for defendant-appellant.

BECTON, Judge.

This appeal presents the question whether the underinsured motorist ("UIM") coverages provided in two separate automobile insurance policies issued to the plaintiff-insured may be aggregated or "stacked" to compensate him for the death of his daughter who was killed while driving a vehicle owned by the insured and the daughter, given that the daughter and the vehicle were directly insured under only one of the policies. To answer this question, we must decide whether the so-called "family-member vehicle" or "household-owned vehicle" exclusion in one of the policies precludes UIM coverage for the daughter's death, and, therefore, prevents stacking. For the reasons that follow, we reverse the order granting summary judgment in favor of the insured, and remand the cause.

I

The two automobile insurance policies at issue in this declaratory judgment action were purchased by the plaintiff Michael A. Smith from the defendant Nationwide Mutual Insurance Company. The first policy (No. 61J097608, hereafter "Policy A") covers a 1977 Toyota owned by Mr. Smith and his daughter, Crystal Michelle Smith (now deceased). The "Declarations" section of Policy A lists both Mr. Smith and Crystal as named insureds. The second policy (No. 61E449873, "Policy B") covers a pickup truck and a station wagon, and lists only Mr. Smith as the named insured. Both policies provide, for each covered automobile, $100,000 per person bodily injury liability coverage and $100,000 UIM bodily injury coverage, with a per accident limit of $300,000. With the exception of the vehicles and insureds named in the Declarations section, the remaining terms of Policy A and Policy B are identical.

The liability coverage in the policies applies, in relevant part, to bodily injury or property damage caused by an automobile accident arising out of the "ownership, maintenance or use of *any*

auto" by the named insured or any family member residing with the named insured. (Emphasis added.) This seemingly broad liability coverage is narrowed by several important exclusions. The exclusion pertinent to this case, the "family member" or "household-owned vehicle" exclusion, states:

> We do not provide Liability Coverage for the ownership, maintenance or use of . . . [a]ny vehicle, *other than [the] covered auto* [listed in the Declarations], *which is . . . owned by [the named insured] [or] . . . which is . . . owned by any family member . . .*

(Emphasis added.) The medical payments coverage section of each policy contains essentially the same exclusion.

With respect to UIM coverage, each policy likewise covers the named insured and any family member residing with the named insured. Although that part of the policy concerning UIM coverage lists certain exclusions which parallel those found in the liability coverage section, there is no "household-owned vehicle" exclusion for bodily injury occurring in a vehicle owned by the named insured or a family member but which was not insured under the policy.

Crystal Smith was killed in October 1986 when the car she was driving—the Toyota covered by Policy A—was struck by another vehicle. A wrongful death suit against the other driver ("the tortfeasor") remains pending. Following a $50,000 payment to Crystal's estate by the tortfeasor's insurance company (representing the maximum liability limit provided by the tortfeasor's automobile insurance policy), Mr. Smith, individually and as administrator of Crystal's estate, sought acknowledgment from Nationwide that each of the $100,000 UIM coverages under Policies A and B could be stacked in the event of a recovery exceeding $50,000 in the wrongful death suit. Mr. Smith brought this action seeking a declaration that the coverages could be stacked after Nationwide declined to state the amount of available UIM coverage.

The trial judge granted Mr. Smith's motion for summary judgment, and denied Nationwide's motions to dismiss the action or in the alternative to stay it pending the outcome of the wrongful death suit. The judge ruled that Policy A and Policy B together provided $200,000 in UIM coverage, subject to a $50,000 setoff for payments made by the tortfeasor's insurance carrier. Thus, the judge ruled that "there is $150,000 in underinsured motorist

coverage available for a judgment, if any, in excess of $50,000 obtained by the plaintiff for the wrongful death of Crystal Michelle Smith."

Nationwide appeals from this ruling, contending that (1) Mr. Smith's declaratory judgment action should have been dismissed because it was not ripe for judicial resolution and (2) the contractual terms of Policies A and B limit the total UIM coverage to $50,000.

II

[1] We turn first to Nationwide's contention that the court had no jurisdiction to render a declaratory judgment because no actual controversy presently exists between the parties. Nationwide argues that a judgment establishing the amount of damages for Crystal's death has not yet been entered in the underlying suit and, therefore, the extent of available underinsurance coverage is an issue not ripe for judicial resolution. We disagree.

The construction of insurance contracts to determine the extent of coverage is an issue appropriate for declaratory judgment so long as an actual controversy exists between the parties. *See, e.g., Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*, 258 N.C. 69, 128 S.E.2d 19 (1962); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *Travelers Ins. Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, *disc. rev. denied*, 289 N.C. 615, 223 S.E.2d 396 (1976); *cf. Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 174-75, *disc. rev. denied*, 322 N.C. 607, 370 S.E.2d 248 (1988) (no actual controversy in declaratory judgment action since there was no pending action nor any practical certainty of future action involving insureds).

In the present case, there was more than the mere threat of a lawsuit which would implicate the insurer in some way; an underlying wrongful death action was pending against the tortfeasor. *Cf. Ramsey*, 89 N.C. App. at 101, 365 S.E.2d at 174 ("cases in which a declaratory judgment has been found appropriate for determining the existence or extent of insurance coverage have involved situations in which *legal action was pending*, or judgment had been entered, against the insured") (emphasis added, citations omitted). Moreover, although the case had not yet come to judgment, the tortfeasor's insurer had already paid the limits of his liability insurance policy to Crystal's estate. Significantly, this exhaustion of the limits of the liability policy triggered the applica-

bility of Nationwide's UIM coverage. *See* N.C. Gen. Stat. Sec. 20-279.21(b)(4) (1989) (UIM coverage is deemed to apply only when all applicable liability insurance policies have been exhausted through payment of the limits of liability—unless the UIM insurance carrier elects to pay its insured before all applicable liability limits are paid, preserving the right of assignment or subrogation).

At that stage in the litigation, without information about the extent of coverage, Mr. Smith could not determine what a reasonable settlement offer might be or the advisability of pursuing the wrongful death suit at potentially great personal and economic cost. As a federal court considering a similar question stated:

> [i]t would turn the reality of the claims adjustment process on its head to hinge justiciability of an insurance agreement on the maturation of a suit to a judgment when the overwhelming number of disputes are resolved by settlement. . . . [D]eclaratory judgment relief was intended to avoid precisely the "accrual of avoidable damages to one not certain of his rights."

ACandS, Inc. v. Aetna Cas. & Sur. Co., 666 F.2d 819, 823 (3d Cir. 1981) (citations omitted). We thus conclude that Nationwide's refusal to state the extent of the UIM coverage under Policies A and B sparked the actual controversy between Mr. Smith and Nationwide which provides the basis for this suit. *Accord* 22A Am. Jur. 2d *Declaratory Judgments* Sec. 122 (1988) (insurer's refusal to admit or deny coverage without specifying reason for refusal affords sufficient basis for jurisdiction in declaratory judgment action by insured). This assignment of error is overruled.

III

[2] Nationwide next contends that the judge erred in ruling that the amount of UIM coverage available to Crystal's estate is $150,000. Conceding on appeal—apparently for the first time—that Policy A applies to the accident, Nationwide posits a variety of arguments, the gist of which is that the amount of available coverage is $50,000, representing the limits of UIM coverage under Policy A ($100,000) with a $50,000 credit for the tortfeasor's liability insurance payment. The recent landmark decision in *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), renders meritless all but one of Nationwide's arguments regarding stacking. Accordingly, we will ad-

dress only that contention that a household-owned vehicle exclusion in Policy B bars UIM coverage for Crystal's death and therefore prevents stacking of that coverage with the UIM coverage provided by Policy A.

The Motor Vehicle Safety and Financial Responsibility Act ("the Act"), N.C. Gen. Stat. Secs. 20-279.1 to -279.39, explicitly approves the stacking of UIM coverages provided by two or more automobile insurance policies applicable to an accident; the avowed legislative purpose in permitting stacking is to provide the innocent victim of an inadequately insured driver with an additional source of recovery so that she may receive full compensation for her injuries. *See* N.C. Gen. Stat. Sec. 20-279.21(b)(4) (1989); *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763; *see also* Note, Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties, 64 N.C.L. Rev. 1408, 1410 (1986). Family members residing with a named insured are included in that class of persons protected by the Act. *See* Sec. 20-279.21(b)(3).

Viewing the Act as a remedial statute to be liberally construed to accomplish its beneficial purposes, our Supreme Court in *Sutton* rejected policy language limiting UIM stacking, holding that the statute prevailed over the conflicting terms in the policy. 325 N.C. at 263, 382 S.E.2d at 762. The Court concluded that "the legislature intended N.C.G.S. (Sec.) 20-279.21(b)(4) to require both *interpolicy* and *intrapolicy* stacking of UIM coverages," meaning that all applicable UIM coverages in separate policies, as well as applicable coverages within the same policy, are stackable. *Id.* at 265, 382 S.E.2d at 763 (emphasis added).

The question decided in *Sutton* was whether an injured insured could stack UIM coverages for each of four vehicles listed in two separate policies. Analyzing the language of the statute, the legislative intent, and the public policy implications of its decision, the Court held that the coverages for each of the vehicles listed under the two policies was available to compensate the insured. The Court reasoned that interpreting the statute to permit interpolicy and intrapolicy stacking (1) is "consistent with the nature and the purpose of the [A]ct, . . . to compensate innocent victims of financially irresponsible motorists"; (2) "enhances the injured party's potential for full recovery of all damages"; (3) "gives the insured due consideration for the separate premiums paid for each UIM coverage"; and (4) avoids anomalous results (inherent in per-

mitting stacking of separate policies purchased for each vehicle but prohibiting stacking of coverages within a multivehicle policy). *Id.* at 266-67, 382 S.E.2d at 764.

It is not clear from *Sutton* who owned the vehicle driven by the injured insured. Thus, the *Sutton* opinion cannot be read to explicitly address the question presented here, namely, the effect on stacking of a policy provision excluding coverage for an accident involving an automobile owned by a named insured or a family member which is not insured by that policy. In our view, this court's decision in *Driscoll v. United States Liability Ins. Co.*, 90 N.C. App. 569, 369 S.E.2d 110, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988) is dispositive.

Driscoll purported to answer the question left open in *Crowder v. N.C. Farm Bureau Mutual Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986), namely "whether Section 20-279.21 and [the insured's] insurance policy provide underinsured motorist coverage for a covered person for injuries sustained in a household-owned vehicle not named in the policy." *Id.* at 571, 369 S.E.2d at 112. This court answered the question in the negative. *Id.* at 572, 369 S.E.2d at 112. We reasoned that because UIM coverage is provided only in conjunction with bodily injury liability coverage, a family member for whom *liability* coverage is inapplicable by reason of the household-owned vehicle exclusion is not entitled to *UIM* coverage. *Id.* We noted that:

> "it is scarcely the purpose of any insurer to write a single [UIM] coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other vehicles—any more than it would write liability, collision or comprehensive coverages upon one such vehicle and indemnify for such losses as to any other vehicle involved."

Id. at 572, 369 S.E.2d at 112-13 (quoting 8C Appleman, *Insurance Law and Practice* Sec. 5078.15, at 179).

We acknowledge the recent nationwide trend, reflected in *Sutton*, toward liberally permitting stacking of UIM coverages—particularly when the policies sought to be stacked were issued to the injured insured and a resident family member. *See* Annot., *Combining of "Stacking" Uninsured Motorist Coverages Provided in Separate Policies Issued by Same Insurer to Different Insureds*,

23 A.L.R. 4th 108, Sec. 3. We also note that many jurisdictions have held the household-owned vehicle exclusion invalid, frequently in the context of stacking of uninsured and underinsured motorist coverages, and recognize that *Sutton* arguably could be read as providing the basis for doing so in North Carolina. *See* Annot., *Uninsured Motorist Coverage: Validity of Exclusion of Injuries Sustained by Insured while Occupying "Owned" Vehicle Not Insured by Policy*, 30 A.L.R. 4th 172, Secs. 3[b], 4, 6, 7[b], 9[b], 10, 11[b], 12[b], 13. Indeed, were we writing on a clean slate we would follow the nationwide trend reflected in *Sutton*. However, because *Sutton* neither overruled *Driscoll* nor directly addressed the issue presented here, we are compelled to follow the *Driscoll* rule enforcing the household-owned vehicle exclusion. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (one Court of Appeals panel lacks authority to overrule prior decisions of another panel on same issue and is bound by that decision unless it is overruled by an intervening decision from a higher court). Accordingly, we hold that, because the Toyota driven by Crystal was a household-owned vehicle not insured under Policy B, the UIM coverage provided by that policy is not available to compensate Mr. Smith for Crystal's death.

We note that the result we reach arguably conflicts with the public policy justifications set out in *Sutton*. Enforcing the policy's household-owned exclusion does nothing to accomplish the Act's purpose of compensating insureds or their family members unfortunate enough to be injured both by a financially irresponsible motorist and while driving a household-owned vehicle. Moreover, enforcing the exclusion creates an anomalous situation abhorred by *Sutton*. A different result would have been obtained in this case if Crystal had been driving a nonfamily-owned car, for example, a car owned by a neighbor: In that case, she would have been covered by Policy A (as a named insured), Policy B (as a family member), and any underinsurance benefits provided in the neighbor's insurance policy (which would provide UIM coverage for any driver of a neighbor's car); under the Act and the rule set out in *Sutton*, these UIM coverages would have been stackable. Finally, the number of premiums paid by the insured for the benefit of UIM coverages in this hypothetical example and in Crystal's case are no different, but the amount of compensation received is.

Despite our reservations in light of *Sutton*, *Driscoll* provides the law we must follow.

IV

We reverse the ruling below, which declared, in essence, that the UIM coverages provided by Policy A and Policy B were stackable. Because Policy B provides no UIM coverage for Crystal's death, we remand with directions to enter a judgment declaring that the policies are not stackable, and, therefore, that the amount of UIM coverage available to the plaintiff-insured is $50,000, reflecting the $100,000 UIM coverage provided by Policy A with a setoff of $50,000 for payments made by the tortfeasor.

Reversed and remanded.

Judge LEWIS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I believe that this case is controlled by *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), and that under it the underinsured motorist coverages of both policies are available to the plaintiff. Even if the "household-owned vehicle" exclusion provision of the policy in *Driscoll v. United States Liability Insurance Co.*, 90 N.C. App. 569, 369 S.E.2d 110, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988) was properly enforced, which it apparently was not in view of *Sutton*, the policies here contain no such exclusion and one should not be written therein by us. As in *Sutton*, the two underinsured motorist coverages in this case were paid for by plaintiff and in keeping with *Sutton*, as well as ordinary business practice, he is entitled to receive what he paid for. Both coverages would certainly be available to plaintiff, as the majority concedes, if the daughter had been riding in a neighbor's car. That she was riding in an insured family car is no proper basis, in my opinion, for holding that only one coverage applies.

PRESTON AND PEGGY HUNTER v. GEORGE F. SPAULDING

No. 8810SC1404

(Filed 20 February 1990)

1. **Rules of Civil Procedure §§ 33, 37 (NCI3d)— interrogatories answered—knowledge of answers disavowed at trial—answer struck—default judgment proper sanction**

N.C.G.S. § 1A-1, Rule 33 does not permit a party to swear to the truth of answers given on interrogatories and then, at trial, to disavow knowledge about those answers; where defendant in this case did that, the trial court properly struck his answer and entered default judgment against him.

Am Jur 2d, Depositions and Discovery §§ 391, 392.

2. **Rules of Civil Procedure §§ 33, 37 (NCI3d)— interrogatories not answered by person served—imposition of sanctions proper**

By attesting to answers which were not his, defendant did not meet the requirements of N.C.G.S. § 1A-1, Rule 33 because the party served in this case did not answer the interrogatories and the responses returned to plaintiffs were not verified by the person who gave them; therefore, the imposition of sanctions against defendant was proper under N.C.G.S. § 1A-1, Rule 37(d).

Am Jur 2d, Depositions and Discovery §§ 391, 392.

3. **Fraud § 9 (NCI3d)— sale of house at inflated price—sufficiency of complaint to allege fraud**

Plaintiffs' complaint averred the necessary elements of fraud with sufficient particularity to allow default judgment to be entered for plaintiffs when the judge struck defendant's answer where the complaint alleged that defendant realtor concealed his purchase of a house and immediately resold it to plaintiffs for $10,000 more than he had just paid for it.

Am Jur 2d, Brokers §§ 91-94.

4. **Rules of Civil Procedure § 55 (NCI3d)— default—punitive damages—right to present evidence**

A party who is defaulted for failure to answer interrogatories must be afforded an opportunity to be heard on the question of punitive damages.

Am Jur 2d, Depositions and Discovery §§ 391, 392.

APPEAL by defendant from judgment entered 30 June 1988 in WAKE County Superior Court by *Judge B. Craig Ellis*. Heard in the Court of Appeals 24 August 1989.

Hensley, Huggard, Seigle, Obiol and Bousman, by John P. Huggard, for plaintiff-appellees.

Hunton and Williams, by Odes L. Stroupe, Jr., and A. Todd Brown, and Thigpen, Blue and Stephens, by Ralph L. Stephens, for defendant-appellant.

BECTON, Judge.

Plaintiffs instituted this action alleging unfair and deceptive trade practices and actual and constructive fraud on the part of defendant. At trial, defendant was called as an adverse witness. Plaintiffs moved to strike his answer when he admitted he had not personally answered plaintiff's written interrogatories. The trial judge struck the answer and entered a default judgment against defendant on the actual fraud claim and awarded compensatory damages of $10,000.00. The question of punitive damages was then submitted to the jury, which returned a verdict for plaintiffs in the amount of $1,100,000.00. Defendant appealed. We affirm in part and reverse and remand in part.

I

The plaintiffs, Preston and Peggy Hunter, are citizens of Wake County. Defendant, George Spaulding, and his partner, Grady Perkins, own Spaulding and Perkins, Ltd., a North Carolina corporation. The two also own Spaulding and Perkins Realty Company, a North Carolina partnership. The Hunters joined several other Wake County residents in a lawsuit against Spaulding and Perkins individually and against their corporation and partnership. The Hunters allege that Spaulding and Perkins used the real estate company to defraud them in the purchase of a house. According to the Hunters, Spaulding and Perkins sold them a house ostensibly owned by a third party. In fact, the complaint charges, Spaulding and Perkins previously had purchased this home through their corporation for $47,000.00. They then sold the house to the Hunters for $57,000.00, never telling the Hunters about the prior transaction.

At trial, the Hunters called Mr. Spaulding as an adverse witness, and their lawyer, Mr. Huggard, attempted to examine him about certain answers he had furnished to written interrogatories. The following ensued:

[Mr. Spaulding]. We had basically two divisions. I operated the convenience food stores, Mr. Huggard. I had nothing to do with any real estate. I don't know anything about it so ask me anything you want to.

Q. But you are one of the defendants in this suit—

A. Yes.

Q. —and you have been sued?

A. Yes, sir.

Q. And the case is a case for real estate fraud?

A. If you say so, Mr. Huggard. I really don't know.

Q. Have you had the opportunity to talk with any of your attorneys about this case?

A. No, sir, because I wasn't involved in the beginning so there was no need for me getting involved in it now. I didn't know anything about it.

Q. Have you received any discovery from our office, interrogatories or requests for admission or anything like that directed expressly to you?

A. Yes, and we gave them to—I gave mine to our attorney.

Q. Okay.

A. Because I didn't know anything about it and he handled it.

Q. Those interrogatories are directed to you personally because they are required to be answered under oath and returned. Do you remember answering them under oath and returning them?

A. No, sir. Like I said, Mr. Huggard, I gave it to my attorney . . . and he handled it. I didn't know anything about it.

Q. You did not give him any answers then?

A. No, sir.

The next day, Mr. Spaulding returned to the stand and "adopted" the written answers saying, "I can't deny that I didn't sign [them] or anything. It was done in good faith and since I had no knowl-

edge of the transaction . . . what answers are on here through Perkins and my attorney, that's the answers I have to live with."

The Hunters moved that Mr. Spaulding's answer be stricken because, among other grounds, his testimony showed he had not personally answered the interrogatories. After initially denying the motion, the judge agreed to strike the answer and to enter a default judgment against Mr. Spaulding for actual fraud.[1] The judge ruled that the Hunters were entitled to compensatory damages of $10,000.00. After the Hunters took a voluntary dismissal against the remaining defendants (Perkins, the corporation, and the partnership), the judge submitted the issue of punitive damages to the jury. The jury returned a verdict holding Mr. Spaulding individually liable for punitive damages of $1,100,000.00.

II

[1] Mr. Spaulding first argues that the judge erred as a matter of law by striking his answer and entering the default judgment. N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 33(a) in part states that "any party may serve upon any other party interrogatories to be answered by the party served . . . ." Answers to interrogatories must be signed "by the person making them." When that party "is a public or private corporation or a partnership or association . . . any officer or agent . . . shall furnish such information as is available to the party." Our Rule has been read as requiring that "[w]ritten interrogatories . . . be answered by the party served and [that] those answers . . . contain such information as is reasonably available to the party and not simply his personal knowledge." W. Shuford, *N.C. Civil Practice and Procedure*, Sec. 33-10 (3d ed. 1988) (citing *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 451 (1947)). Using Shuford and federal cases, Mr. Spaulding contends that Rule 33 required that he furnish information available to him through Mr. Perkins and his lawyers, in spite of his lack of any personal knowledge about the real estate transaction with the Hunters. We disagree.

Rule 33 does not permit a party to swear to the truth of answers given on interrogatories and then, at trial, to disavow

1. Lengthy arguments are made by the parties as to whether Mr. Spaulding should have been defaulted on other grounds argued by the Hunters when they made their motion to strike the answer. We do not address those grounds because our review of the trial transcript convinces us that the judge defaulted Mr. Spaulding on the basis of Spaulding's admission that the answers given to the interrogatories were not his.

knowledge about those answers. Our courts have often noted that the emphasis of our discovery rules "is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). This purpose cannot be served if a party is allowed to return written answers to which he has sworn—and on which the opposing party is entitled to rely—and then effectively disaffirm those answers at trial. Any requirement that a person supply answers that are "reasonably available" does not mean that a person may distend Rule 33 to fashion a shield of so-called "deniability." Furthermore, later protestations by the party that he adopts the answers given for him does not excuse nor obviate his failure to comply with Rule 33.

The interrogatories in this case are directed to Mr. Spaulding in his individual capacity as well as in his capacity as an agent of his companies. Trial was not the time for him to aver his lack of personal knowledge about the matters inquired of him by the interrogatories. We hold that the judge correctly ruled that Mr. Spaulding violated Rule 33.

[2] Mr. Spaulding next argues that, even if his answers were improper under Rule 33, he could not be sanctioned under N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 37(d) (1983) in that sanctions may be applied under that rule only for a complete failure to answer interrogatories. He cites language by our Supreme Court in *Willis* wherein the Court said that "if a party files answers . . . no sanctions under Rule 37(d) may be obtained and the proper procedure for the party seeking discovery is to obtain an order compelling discovery under Rule 37(a)." 291 N.C. at 35, 229 S.E.2d at 201. The Court, however, prefaced that passage by saying that "Rule 37(d) does not . . . come into operation *if the responding party meets the requirements of Rule 33* . . . ." *Id.* (emphasis added). By attesting to answers that were not his, Spaulding did not "meet the requirements of Rule 33"; the party served in this case did not answer the interrogatories and the responses returned to plaintiffs were not verified by the person or persons who gave them. We hold, therefore, that the imposition of sanctions against Mr. Spaulding was proper under Rule 37(d).

Pursuant to N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 37(b)(2)c (Cum. Supp. 1989), a party who fails to serve answers may have his pleadings stricken or have a default judgment entered against him. When a judge imposes sanctions, even in the severe form of defaulting the party, our review addresses whether the judge's actions constituted an abuse of discretion, *First Citizens Bank and Trust Co. v. Powell*, 58 N.C. App. 229, 230, 292 S.E.2d 731, 731-32 (1982), *aff'd*, 307 N.C. 467, 298 S.E.2d 386 (1983), remembering that the general purpose of our rules is to encourage trial on the case's merits. *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978). In the face of Mr. Spaulding's admission on the stand that he had not answered the interrogatories he verified—an admission that undermined trial on the case's merits—we cannot say that the judge abused his discretion by sanctioning Mr. Spaulding as he did.

[3] Mr. Spaulding next contends that, even if his answer could be stricken, defaulting him on the Hunters' fraud claim was improper in that the Hunters' complaint for fraud was deficient. As a preliminary matter, we hold that Mr. Spaulding's exception to the judgment, entered in open court, permits him to challenge on appeal whether a default judgment could be based upon the Hunters' complaint, N.C. R. App. P. 10(b)(1) (1989), and we reject the Hunters' contention that this issue has not been preserved for appeal.

A default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery. *Lowe's of Raleigh, Inc. v. Worlds*, 4 N.C. App. 293, 295, 166 S.E.2d 517, 518 (1969); *accord, Weft, Inc. v. G. C. Investment Associates*, 630 F.Supp. 1138, 1141 (E.D.N.C. 1986), *aff'd*, 822 F.2d 56 (4th Cir. 1987) (default not treated as absolute confession by defendant of plaintiff's right to recover and court must consider whether plaintiff's allegations are sufficient to state claim for relief). The well-recognized elements of fraud are 1) a false representation or concealment of a material fact, 2) reasonably calculated to deceive, 3) made with intent to deceive, 4) which does in fact deceive, and which 5) results in damage to the injured party. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). A complaint charging fraud must allege these elements with particularity. N.C. Gen. Stat. Sec. 1A-1, R.

Civ. P. 9(b) (1983). Among other things, the Hunters' complaint makes the following claims:

> 4. In May, 1981, the plaintiffs . . . were in the market to purchase a home. The Hunters were shown a house which was currently being sold by its owners through the defendant Spaulding and Perkins Realty Company.
>
> 5. Upon seeing this house, the Hunters informed both their real estate broker and Spaulding and Perkins that they were interested in purchasing the home. A real estate contract was signed showing the owners of the house as sellers and the Hunters as the buyers.
>
> 6. . . . [On] June 4, 1981, Spaulding and Perkins, Ltd., without notifying the plaintiff-buyers . . . [of] their intentions, purchased for their own interest the house the Hunters wanted to buy. Spaulding and Perkins, Ltd., paid $47,000 for the house. They immediately set up a closing date on which date the Hunters would purchase the property. The closing date was set for July 22, 1981. The owners (sellers) who signed the contract to sell their house were not present.
>
> 7. On July 22, 1981, the Hunters attended a real estate closing at the office of Spaulding and Perkins Realty Company and received some closing documents on the house they purchased . . . . At this closing, the Hunters paid $57,000 for the house.
>
> 8. At no time did Spaulding and Perkins Realty Company or Spaulding and Perkins, Ltd. tell the Hunters that they (Spaulding and Perkins) had purchased the house from the previous owners a short while before the closing for a price of $47,000
>
> . . . .
>
> 10. The acts of the defendant corporation and partner[s]hip and their agents, partners, and officers caused actual financial injury to the plaintiffs in the amount of $10,000. The false statements and concealments mentioned above were done to induce plaintiffs to buy a house in such a manner as to allow Spaulding and Perkins to make a secret profit of $10,000 and keep such improperly obtained profits.

We hold that the complaint avers the necessary elements of fraud with sufficient particularity to have allowed default judg-

ment to be entered for the Hunters when the judge struck Mr. Spaulding's answer.[2] The Hunters' claim, although not, perhaps, a model pleading, sets forth the time, place, and content of the concealment, and charges that neither Spaulding nor Perkins informed plaintiffs of the prior purchase of the house. We reject, in the same vein, Mr. Spaulding's contention that the judge could not award compensatory damages to the Hunters without a trial of that issue. When the judge struck Spaulding's answer and entered the default judgment, that constituted an admission by Mr. Spaulding of the $10,000.00 "actual financial injury" alleged by the Hunters in their complaint. *See Lowe's*, 4 N.C. App. at 295, 166 S.E.2d at 518.

Mr. Spaulding's assignments of error directed to the entry of default judgment for his failure to answer interrogatories and the awarding of $10,000.00 actual damages to the Hunters are overruled.

III

[4] Mr. Spaulding argues that the punitive damages awarded by the jury cannot stand because, among other grounds, he was not permitted to present any evidence on the issue. We agree that the judge erred by submitting the question to the jury without affording Mr. Spaulding the opportunity to put on evidence and, accordingly, we vacate that portion of the judgment and remand for a new trial.[3]

N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 55(b)(2) in part provides that

> [i]f, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and *shall* ac-

---

2. In light of our holding, we do not decide whether a plaintiff whose complaint is deficient may have a default judgment entered in his or her favor if evidence offered subsequently at trial furnishes the requisite particularity. *See Nishimatsu Constr. Co. v. Huston Nat'l Bank*, 515 F.2d 1200, 1206 n.5 (5th Cir. 1975).

3. The Hunters argue that Mr. Spaulding's failure to object to the jury instruction on punitive damages precludes his right to contest damages on appeal. Again, we hold that Spaulding's exception to the default judgment preserves for our review the judge's failure to submit the punitive damages question without hearing additional evidence.

> cord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

(Emphasis added.) As other jurisdictions have recognized, the rule embodies important concepts of due process, and due process requires adherence to the procedural safeguards of notice and hearing even when default is used as a Rule 37 sanction. *See Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133-34, 692 P.2d 309, 312-13 (Ariz. App. 1984), and cases cited. We think that due process concerns equally demand that a party who is defaulted for failure to answer interrogatories be afforded an opportunity to be heard on the question of punitive damages.

Compensatory damages are demonstrable and capable of being alleged in a sum certain by a plaintiff. A defendant, moreover, can admit that the plaintiff has been damaged in that amount. Punitive damages, in contrast, are not recoverable as a matter of right but are always within the discretion of the trier of fact. *See Harris v. Queen City Coach Co.*, 220 N.C. 67, 69, 16 S.E.2d 464, 465 (1941). The judge in this case properly entered judgment for the Hunters on their claim of compensatory damages, and he rightly left the question of their entitlement to punitive damages for the jury. By submitting the issue without affording Mr. Spaulding an opportunity to contest those damages, however, the judge erred. It is, for example, questionable whether the damages the jury awarded relate to the real estate claim or, in part or in whole, to Mr. Spaulding's failure to comply with discovery. Permissible sanctions for the latter do not include the party's answering in punitive damages.

We hold, therefore, that it was error for the judge to submit the punitive damages issue to the jury without first allowing Mr. Spaulding an opportunity to present evidence addressed to that issue. Conducting the trial in this way deprived Mr. Spaulding of his rights to be heard and a trial of the punitive-damages claim and contravened both his due process rights and the requirement of Rule 55(b)(2). For these reasons, we remand for a new trial on the question of punitive damages.

IV

Mr. Spaulding argues that the judge erred by allowing certain documents into evidence. The Hunters meet these challenges by charging that Mr. Spaulding failed to object to the evidence when

offered at trial and thus has waived his right to object on appeal. As we have awarded a new trial so that Mr. Spaulding may present evidence, we could only speculate, at this point, as to how those documents might or might not be relevant should they be introduced at trial. Therefore, we do not address these assignments of error.

V

The judgment of the trial judge in favor of the Hunters on their claim of actual fraud is affirmed; the award of punitive damages is vacated and that issue is remanded for a new trial. The Hunters' motion to dismiss defendant's assignments of error is denied.

Affirmed in part, vacated and remanded in part.

Judges ARNOLD and COZORT concur.

EVERETT LONZO FELTS AND WIFE, SHIRLEY G. FELTS v. LIBERTY EMERGENCY SERVICE, P.A., D/B/A MT. AIRY PRIMARY CARE, KIP LARSON, M.D. AND JOHN CANON, M.D.

No. 8917SC204

(Filed 20 February 1990)

Physicians, Surgeons, and Allied Professions § 17 (NCI3d) — heart attack — malpractice — sufficiency of evidence

Evidence in a medical malpractice case was sufficient to be submitted to the jury where it tended to show that defendants' failure to take plaintiff's medical history, to hospitalize, and to diagnose more thoroughly plaintiff's condition contributed to his myocardial infarction and its severity.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 264, 357.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiffs from *Mills (F. Fetzer), Judge*. Judgment signed 1 August 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 23 August 1989.

This is an action for compensatory damages in a complaint filed 3 August 1987 by plaintiffs alleging medical malpractice and loss of consortium against defendants.

Prior to the close of plaintiffs' evidence at trial on 25 July 1988, plaintiffs took a voluntary dismissal without prejudice of their claim against defendant John Canon, M.D. Plaintiffs also acknowledged in open court that there was no evidence of independent corporate negligence by defendant Liberty Emergency Service, P.A. d/b/a Mt. Airy Primary Care (hereinafter Mt. Airy), and that any negligence claim against Mt. Airy would be limited to a claim of *respondeat superior* arising out of the allegations of negligence against defendant Larson.

At the close of plaintiffs' evidence, defendants moved for directed verdict, pursuant to N.C. Gen. Stat. sec. 1A-1, Rule 50. The trial court granted defendants' motion "on the grounds that the evidence was insufficient to support a verdict against the defendants, . . . failed to establish the appropriate standard of care, breach of any appropriate standard of care, or that any breach was a proximate cause of any injuries or damages . . . ." From this judgment, plaintiffs appeal.

Sarah S. Stevens for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Richard V. Bennett, for defendants-appellees.

ORR, Judge.

The sole question presented on appeal is whether the trial court erred in directing verdict for defendants at the close of plaintiffs' evidence.

The purpose of a motion for directed verdict under N.C. Gen. Stat. sec. 1A-1, Rule 50(a) is to test the legal sufficiency of the evidence to take the case to the jury. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982). In determining such a motion, plaintiffs "should be given the benefit of all reasonable inferences; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements." *Id.* at 146, 298 S.E.2d at 194 (citations omitted).

Evidence presented at trial that raises only a mere possibility or conjecture is insufficient to withstand a motion for directed verdict; however, the evidence in favor of the nonmovant must be taken as true. *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508, 350 S.E.2d 918 (1986) (citations omitted).

These principles apply equally in a medical malpractice action.

> When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570, *reconsideration of denial of disc. rev. denied*, 304 N.C. 195, 291 S.E.2d 148 (1981). On such motion, plaintiff's evidence is to be viewed in the light most favorable to plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). A directed verdict for defendant is improper 'unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.' *Id. Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E.2d 832, 833 (1983), *aff'd*, 310 N.C. 589, [313] S.E.2d [565] (1984).

Mitchell v. Parker, 68 N.C. App. 458, 459, 315 S.E.2d 76, 77, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984).

A defendant is not entitled to a directed verdict in a negligence action unless the plaintiff has not established the elements of negligence as a matter of law. *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987) (citation omitted).

Plaintiffs' evidence at trial showed that plaintiff Everett Felts (hereinafter plaintiff) was treated by defendant Kip Larson, M.D., at Mt. Airy Primary Care on 8 November 1986, for a sore throat, pain in his upper right chest, dizziness and pallor. Plaintiff testified that he was holding his chest and had difficulty breathing. Upon examination, Dr. Larson noted that plaintiff was generally ill-looking, had a sore throat, supple neck, clear chest, regular heartbeat without murmurs, was somewhat overweight and was a smoker.

Dr. Larson concluded from these symptoms that plaintiff possibly had strep throat, pneumonia, pericarditis or myocarditis. He sub-

sequently ordered a strep throat test, chest x-ray, complete blood count and an electrocardiogram. The complete blood count reflected a slightly elevated white blood count which was consistent with a strep infection. All other tests were within normal limits.

Plaintiff received oxygen for his dizziness and a shot of penicillin for his strep pharyngitis. Dr. Larson told plaintiff of his diagnosis and requested that plaintiff return in two days or go to the emergency room at the local hospital should his condition worsen or new symptoms develop. Plaintiff was sent home.

One of Dr. Larson's employees called plaintiff the following day to determine his progress. Plaintiff's wife told the employee that plaintiff was "fine—no problems."

Plaintiff returned to work on 10 November 1986 and became ill. He then returned to Mt. Airy Primary Care and was treated by defendant John Canon, M.D. During this examination, plaintiff reported pain in his jaw and neck with chest pain and difficulty breathing. Plaintiff testified that his symptoms decreased during the examination, and Dr. Canon prescribed additional penicillin for plaintiff's strep throat infection.

The next evening plaintiff competed in a bowling tournament with his bowling team. While bowling, plaintiff received a call from his wife to return home to assist her in taking their son to the emergency room. Plaintiff testified that he began to feel sick as he drove home and felt worse on his way to the hospital. When he reached the hospital, he had a myocardial infarction and was treated by Charles R. Bokesch, M.D.

Two days later, plaintiff was transferred to Duke University Medical Center and underwent angioplasty. At trial, Dr. Bokesch testified that when he treated plaintiff on 11 November 1986, plaintiff was suffering from cardiorespiratory arrest and that plaintiff had no evidence of strep throat on that date. Dr. Bokesch further testified that he was familiar with medical practices in emergency room settings in Mt. Airy and similar communities, and that "a more explicit medical history probably would have been taken [by physicians] from [plaintiff or his family on 8 November 1986,]" and that "[plaintiff] may have been admitted to the hospital . . . for 24 or 48 hours . . ." for further evaluation.

Joseph Jackson, M.D., qualified as a medical expert and testified that in his opinion it was "maybe . . . outside the standard of

care . . ." in Mt. Airy or similar communities to send a patient like the plaintiff home in his condition on 8 November 1986. Dr. Jackson stated that he believed plaintiff "should have been observed for an additional period of time to determine the cause of his chest pain."

Regarding allegations that defendants breached the standard of care owed to plaintiff, Dr. Bokesch testified that in his opinion it was "possible that the heart attack could have been prevented if he [plaintiff] had been admitted to the Coronary Unit, or for that matter, to the hospital."

In the case before us, the trial court granted defendants' directed verdict on the grounds that plaintiffs' evidence failed to establish the appropriate standard of care, breach of standard of care, or that any breach was a proximate cause of any injuries or damages to plaintiffs. Because the trial court did not specify which one or all of the above grounds upon which it directed verdict, this Court will address all three.

Plaintiffs contend that in their testimony at trial Dr. Bokesch and Dr. Jackson established that the standard of care required in Mt. Airy and similar communities was to take a more detailed medical history and possibly to admit a patient with plaintiff's symptoms to the hospital for observation. According to Dr. Bokesch, the standard of care required a more thorough diagnosis and possible hospitalization to assist in that diagnosis. We find no evidence that Dr. Bokesch stated that failure to hospitalize plaintiff was the equivalent of failure to diagnose his condition. Dr. Bokesch's testimony established only that hospitalization would have assisted in a more accurate diagnosis.

Regarding the standard of care, Dr. Bokesch testified:

> Q. Let's see. In the event that—would it have been the standard of care in Mount Airy and similar communities in November of 1986 among family practitioners, emergency rooms, or Dr. Larson, or Dr. Canon, or physicians similarly situated to have elicited further medical history in the event that one of their patients exhibits an EKG such as the one that Mr. Felts exhibited?
>
> . . .
>
> A. I think so. I would think so.

Q. And what type of information, if any in your opinion, would the standard of care required that physician to inquire about?

. . .

A. Again, the nature of the chest pain, how long he's had it, whether it radiates, whether it's associated with smothering or shortness of breath or tightness in his chest, whether it goes down both arms or to his back, whether it occurs when he's resting or when he's working or exercising, whether it's intermittent or constant, whether he feels any palpitations or rapid irregular heart beats associated with the pain when he has it, whether he has to stop working when he has it, whether or not he breaks out in a cold sweat when he has the discomfort, that sort of thing.

Q. Dr. Bokesch, is there any indication in the medical records from Primary Care that such a history was taken?

A. Not that's in the record.

(Exceptions and objections omitted.)

Dr. Bokesch also testified that:

In all probability, from the experience I've had in this community since I've been here, a more explicit history probably would have been taken by either the emergency room physicians or the family practitioners or the general practitioners in town. And the patient may have been admitted to the hospital by the emergency room physician for observation for 24 or 48 hours, or if seen by a family practitioner or general practitioner they may have been referred to an internist or somebody specializing in this problem for further evaluation, and possibly then considered for admission to the hospital for observation.

Dr. Jackson also testified to the standard of care and the breach of the standard of care regarding plaintiff being sent home by Dr. Larson in his [plaintiff's] physical condition on 8 November 1986. Regarding the standard of care, Dr. Jackson testified:

Assuming the situation as you have stated it I felt that the standard of care would dictate that this patient should not have been sent home and should have been observed for an additional period of time to determine the cause of his

chest pain, that his treatment maybe fell outside the standard of care.

Dr. Jackson testified concerning breach of the standard of care.

A. I believe that, assuming the findings are as you've stated, I believe the, most physicians would have some concern about sending a patient like this home without maybe determining the reason for his complaints. I think observation in a hospital or some type of care facility for 24 hours or so would have been a reasonable thing to rule out any other serious cardiac problems.

There is a couple of points that there is some question about, apparently. And that is whether or not the patient is short of breath and whether or not his pain he was having was pleuritic or not. And if the patient was indeed short of breath and chest pain was not pleuritic and he was in fact dizzy and pale appearing, all of the tests that were done did not provide an explanation of why the patient had these symptoms.

And I believe he appeared to be a little bit sicker than you would expect the normal patient to be with a strep throat. That's why the tests were done. And even after they were done there was still no good explanation as to why the patient was short of breath, why he was having non-pleuritic chest pain. And in that situation you always, you're trained to, if you're going to make a mistake make it toward being too cautious, rather than sending the patient home and assuming that there's nothing more serious going on. And usually you can do that within 24 hours without a lot of extra expense if the patient is observed in a hospital setting, not even in a coronary unit, but in a setting where you can monitor his heart rate and blood pressure, and see if he develops worsening chest pain or recurrence of his symptoms, and then repeat the EKG and certain other blood tests. You can usually determine within 24 hours if the patient at least has a life threatening cardiac problem.

We note that defendants argue that plaintiffs' hypothetical questions were defective surrounding the issue of the standard of care. While plaintiffs' hypothetical question to Dr. Jackson contained at least one error, it was not sufficiently prejudicial to

render the question invalid. Hypothetical questions are rarely perfect at the trial level. *Lockwood v. McCaskill*, 262 N.C. 663, 666, 138 S.E.2d 541, 544 (1964). We find that plaintiffs' hypothetical questions, while unusually long, met the essential requirements of including facts in evidence or those which a jury might logically infer therefrom, and did not include irrelevant matters. *Thompson v. Lockert*, 34 N.C. App. 1, 6, 237 S.E.2d 259, 262, *disc. rev. denied*, 293 N.C. 593, 239 S.E.2d 265 (1977).

We now turn to whether plaintiffs produced sufficient evidence to establish that the failure to hospitalize plaintiff was a proximate cause of plaintiff's injuries. Dr. Bokesch testified as follows:

> Q. Dr. Bokesch, do you have an opinion satisfactory to yourself and to a reasonable medical certainty that the heart attack suffered by Mr. Felts on November 11, 1988, (sic) might have been prevented had the plaintiff, had the plaintiff's cardiac condition been diagnosed on November 8, 1986?
>
> . . .
>
> A. Yes.
>
> Q. What is that opinion?
>
> . . .
>
> A. It's possible that the heart attack could have been prevented if he had been admitted to the Coronary Unit, or for that matter, to the hospital. There are certain drugs that can be given now to help prevent a heart attack. Simply rest and oxygen can help prevent a heart attack. But there are other drugs that can be administered in the Coronary Care Unit that can possibly prevent a heart attack.
>
> Also, if a patient is admitted and observed in a Coronary Care Unit and they do start to deteriorate at this hospital, or hospital of similar size in a community this size, you can transport them by helicopter. . . . They can then undergo cardiac catheterization and certain other procedures that may be necessary to possibly alleviate a heart attack or at least limit its damage.

Both plaintiffs and defendants argue the merits of whether the terms "maybe," "possible," "may have been" and "could have been" used by Dr. Jackson and Dr. Bokesch are sufficient assertions to establish breach of a standard of care and proximate cause.

We believe that the testimony above raises more than a "mere possibility or conjecture" and is sufficient to withstand a directed verdict. *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508 at 510, 350 S.E.2d 918 at 919 (1986).

Dr. Bokesch's testimony that "It's possible that the [plaintiff's] heart attack could have been prevented if he had been admitted . . ." would be a "mere possibility" standing alone. However, Dr. Bokesch then gave a detailed explanation of how admission to a hospital on 8 November 1986 could have prevented plaintiff's heart attack.

Our case bears a resemblance to the facts in *Lockwood*, 262 N.C. 663 at 669, 138 S.E.2d 541 at 543 (1964), where expert opinion was found admissible because additional testimony from a non-expert supported the expert's opinion that the accident "may have had" an influence on the plaintiff's condition. Moreover, the *Lockwood* court stated that:

> The expert may express the opinion that a particular cause 'could' or 'might' have produced the result—indicating that the result is capable of proceeding from the particular cause as a scientific fact, i.e., reasonable probability in the particular scientific field. If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish *prima facie* the causal relation and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken. The trial judge is not, of course, required to make subtle and refined distinctions and he has discretion in passing on the admissibility of expert testimony, and if in the exercise of his discretion it reasonably appears to him that the expert witness, in giving testimony supporting a particular causal relation is addressing himself to reasonable probabilities according to scientific knowledge and experience, and the testimony *per se* does not show that the causal relation is merely speculative and mere possibility, the admission of the testimony will not be held erroneous.

Id. at 669-70, 138 S.E.2d at 545-46. *See also Lee v. Regan*, 47 N.C. App. 544, 267 S.E.2d 909, *disc. rev. denied*, 301 N.C. 92, 273 S.E.2d 299 (1980).

We find that plaintiffs' evidence at trial establishes more than a minimal "showing that different treatment would have improved [his] chances of recovery." Plaintiffs' evidence before the trial court tended to show that defendants' failure to hospitalize and failure to more thoroughly diagnose plaintiff's condition contributed to his myocardial infarction and its severity. We hold that this is sufficient to overcome a directed verdict motion on the issue of proximate cause. It is a well-established principle that proximate cause is ordinarily a jury question. *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989) (citations omitted).

Defendants cite many cases discussing evidence held to be only a "mere possibility" or "possible liability" of the defendants and therefore are insufficient to establish proximate cause. Defendants correctly note that "[p]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery." *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988) (citations omitted).

However, for the reasons set forth above, we find that the evidence in the case before us sufficiently establishes all elements required including the standard of care, breach of the standard of care and proximate cause to allow the case to go to the jury. Therefore, we hold that the directed verdict in favor of defendants was granted improperly by the trial court.

Reversed.

Judge LEWIS concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I respectfully dissent from the opinion reversing the judgment directing a verdict for defendants in this case. In my opinion, the evidence when considered in the light most favorable to plaintiffs is not sufficient to raise an inference from which the jury could find that either of the defendants was negligent in the diagnosis and treatment of the plaintiff, and that such negligence was a proximate cause of plaintiff's heart attack. I vote to affirm.

ROBERT P. IVES AND LOIS A. IVES, PLAINTIFFS v. REAL-VENTURE, INC., JAMES R. HOYLE AND STEPHEN B. CORBOY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. McCOY, WEAVER, WIGGINS, CLEVELAND AND RAPER, A NORTH CAROLINA PARTNERSHIP, DONALD W. McCOY, L. STACY WEAVER, RICHARD WIGGINS, NEIL V. DAVIS, ELMO RUSSELL ZUMWALT, III, AND DONALD STEPHEN BUNCE, THIRD-PARTY DEFENDANTS

No. 8912SC154

(Filed 20 February 1990)

1. Rules of Civil Procedure § 58 (NCI3d)— entry of judgment— notation by clerk erroneous

Where a trial judge indicated the nature of his decision and ordered counsel for third-party defendants to draft a judgment to be entered after both the judge and opposing counsel had opportunity to review it, the judge did not render judgment in open court; therefore, the clerk erred in noting in the court's minutes the entry of judgment, and that judgment was not "entered" for purposes of giving notice of appeal until the written order was signed and filed. N.C.G.S. § 1A-1, Rule 58.

Am Jur 2d, Judgments §§ 54, 157, 158.

2. Deeds § 14.1 (NCI3d)— severance and reservation of mineral rights by predecessor—effectiveness

The severance and reservation of mineral rights to plaintiffs' predecessor in title was not rendered invalid because the granting, habendum, and warranty clauses in the deeds conveying the property recited a transfer of fee simple interests without mention of any reservation, since the severance created two distinct estates, and the language in the deeds constituted a limitation on the quantity of the property described, not a limitation on the quality of the estate conveyed. Since title to the mineral rights had been severed from the title to the surface of the land described and was vested in a third party, plaintiffs as a matter of law breached their covenant of seisin when they conveyed to defendants with no limitation in the description of the property conveyed.

Am Jur 2d, Deeds § 75.

3. Attorneys at Law § 5.1 (NCI3d) — defendants' duty to conduct title search and obtain title insurance — summary judgment improper

A genuine issue of material fact existed as to whether third-party defendants had a duty to conduct a title search or obtain title insurance on behalf of defendants, their clients, and the trial court therefore erred in granting summary judgment for third-party defendants.

Am Jur 2d, Attorneys at Law § 207.

APPEAL by defendants and third-party plaintiffs from order entered 17 October 1988 by *Judge Giles R. Clark* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 14 September 1989.

In 1983 defendant, Real-Venture, Inc. (herein "Real-Venture"), purchased from plaintiffs a 53.58-acre tract of land in Cumberland County, intending to develop the land for residential housing. The purchase was partially financed by Real-Venture executing a promissory note payable to plaintiffs in the amount of $25,000.00. This note was endorsed by defendants James R. Hoyle and Stephen B. Corboy. Defendants retained Neil V. Davis of the law firm of McCoy, Weaver, Wiggins, Cleveland and Raper to represent Real-Venture in the acquisition and development of the property. Defendants were not informed before purchasing the land that plaintiffs' predecessor in title, Dixie Yarns, Inc. (herein "Dixie"), purportedly retained mineral rights to the property. Upon learning of the cloud on its title, Real-Venture did not proceed with its development plans and failed to make payments to plaintiffs on the promissory note.

Plaintiffs instituted this action to recover on the promissory note executed by Real-Venture and endorsed by Hoyle and Corboy. Defendants defended by asserting plaintiffs' failure to transfer good title. Defendants also filed a third-party complaint against Mr. Davis and the firm of McCoy, Weaver, Wiggins, Cleveland and Raper alleging negligence in failing to find and report the reservation of mineral rights and in failing to obtain title insurance for defendants.

Plaintiffs and third-party defendants moved for summary judgment. These motions were heard before the Honorable H. Pou Bailey at the 13 June 1988 Civil Session of Cumberland County Superior Court. At the conclusion of the hearing Judge Bailey

indicated his intention to grant the motions for summary judgment in favor of plaintiffs and third-party defendants. He then directed counsel for third-party defendants to draw a judgment, circulate it among counsel and submit it to the court. Unbeknown to Judge Bailey the clerk made an entry of judgment in the minutes of the court. The written judgment was signed and filed on 27 June 1988.

On 30 June 1988, defendants filed notice of appeal. Plaintiffs and third-party defendants filed motions to dismiss the appeal as untimely, contending that judgment had been entered in open court on 13 June 1988 and that the statutory ten-day period had elapsed. Defendants appeal from an order by the Honorable Giles R. Clark granting the motions to dismiss the appeal from the summary judgment. Additionally, defendants have petitioned this Court for a writ of certiorari to review the summary judgment. That petition was denied without prejudice on 28 February 1989.

Reid, Lewis & Deese, by Renny W. Deese, for plaintiff-appellees.

Bailey & Dixon, by Gary S. Parsons and Alan J. Miles, for defendant-appellants.

Purser, Cheshire, Parker, Hughes & Manning, by Thomas C. Manning, for defendant-appellants.

Russ, Worth, Cheatwood & Guthrie, by Walker Y. Worth, Jr., for third-party defendant-appellees.

PARKER, Judge.

[1] The first issue before this Court is whether the court below erred in dismissing defendants' appeal as untimely. For judgments entered prior to 1 July 1989, Rule 3 of the N.C. Rules of Appellate Procedure requires that written notice of "appeal from a judgment or order in a civil action or special proceeding must be [given] within 10 days after its entry." Rule 3(c), N.C. Rules App. Proc. General Statute 1A-1, Rule 58 provides:

> Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare,

sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties.

G.S. 1A-1, Rule 58.

The question for this Court is whether Judge Bailey's announcement in open court allowing plaintiffs' and third-party defendants' motions for summary judgment was judgment for "a sum certain or costs or that all relief [should] be denied," and thus a judgment whose "entry" is controlled by paragraph one of Rule 58, or whether the "entry" of judgment in this case was controlled by another provision of Rule 58.

After careful review of the judgment, the minutes, and Judge Bailey's affidavit, we conclude that entry of judgment in the present case is controlled by paragraph three of Rule 58. In his affidavit Judge Bailey avers the following:

4. That at the conclusion of the hearing, he indicated that he would allow the Plaintiffs' Motion for Summary Judgment, and allow the Third-Party Defendants' various Motions for Summary Judgment, and directed counsel for the Third-Party Plaintiffs [sic] to prepare an Order and submit it to the Court and to opposing counsel for their consideration prior to entry.

. . . .

6. That the Order which the undersigned signed on June 27, 1988 was the Judgment of the Court, and that the undersigned had the case under advisement until the order was signed on June 27, 1988. No final judgment was entered, nor was it intended to be entered, until the undersigned, after consulting with all counsel on the proposed order, signed the

order and sent it to the Clerk of Cumberland County Superior Court for filing.

From this affidavit it is clear that Judge Bailey did not render judgment in open court on 13 June 1988 for the purposes of entry of judgment under Rule 58; rather, he indicated the nature of his decision and ordered counsel for third-party defendants to draft a judgment to be entered after both the judge and opposing counsel had opportunity to review it.

The present case is analogous to *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E.2d 345, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 675 (1980), *overruled on other grounds in Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982) where, after a hearing on defendant's motion to dismiss plaintiff intervenor's complaint for insufficiency of process, the trial judge instructed plaintiff intervenor's attorney to draw an order and granted defendant's request to receive notice of the signing and entry of the order. Also in *Kahan*, as in the present case, on the day of the hearing, without the trial judge's knowledge, the clerk noted in the minutes of the court that defendant's motion to dismiss plaintiff intervenor's complaint had been denied. After defendant appealed from the order, plaintiff intervenor moved to dismiss the appeal as untimely, contending that judgment had been entered on the date of the hearing and that the appeal was not timely. The motion to dismiss the appeal was denied and plaintiff intervenor appealed to this Court. This Court held that the clerk erred in noting in the court's minutes the entry of judgment denying defendant's motion, and that judgment was not "entered" for purposes of giving notice of appeal until the written order was signed and filed. *Id.* at 371, 263 S.E.2d at 348.

The purpose of Rule 58 is to provide notice of the entry of judgment to all parties and to identify the moment of entry of judgment. *Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 206 S.E.2d 301 (1974). Although, in the present case, the effect of the judgment was to dismiss the defendants' claim against the third-party defendants and to award sums certain on all other claims, the trial judge gave instructions about the judgment and the parties were entitled to rely on the judge's indication that he would not enter judgment until all parties had opportunity to review the written judgment. *See Council v. Balfour Products Group*, 74 N.C. App. 668, 673, 330 S.E.2d 6, 9, *disc. rev. denied*, 314 N.C. 538, 335 S.E.2d 316 (1985); *Arnold v. Varnum*, 34 N.C. App. 22, 28,

237 S.E.2d 272, 275, *disc. rev. denied and appeal dismissed*, 293 N.C. 740, 241 S.E.2d 513 (1977); *Fitch v. Fitch*, 26 N.C. App. 570, 574-75, 216 S.E.2d 734, 736-37, *cert. denied*, 288 N.C. 240, 217 S.E.2d 679 (1975). *But see L. Harvey and Son Co. v. Shivar*, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

When defendants appealed the order dismissing their appeal from the 27 June 1988 judgment, they also petitioned the Court for a writ of certiorari to review the merits of their appeal from that judgment. The petition for certiorari was denied without prejudice. In their brief, counsel for defendants have urged the Court to exercise its discretion to review the merits of the appeal from the 27 June 1988 summary judgment. Since we have now determined that defendants' appeal from the 27 June 1988 judgment should not have been dismissed and since the judicially settled record before this Court is sufficient to permit effective judicial review of the summary judgments, opposing counsel having fully briefed all arguments related to the appeal, we review the merits of defendants' appeal at this time.

[2] The written judgment granting plaintiffs' and third-party defendants' motions for summary judgment was based on Judge Bailey's determination that the reservation by plaintiffs' predecessor in interest of mineral rights on the 53 acres purchased by Real-Venture from plaintiffs was ineffective and that Real-Venture received fee simple title to the land. The essential facts to the transaction are as follows.

In 1965 Dixie Yarns, Inc. executed a deed to 36.5 acres of land in the Rockfish Township of Cumberland County conveying fee simple title to Rockfish Golf Club, Inc. (herein "Rockfish"). In 1967 a second deed was executed conveying fee simple interest from Dixie to Rockfish in 13.28 acres similarly situated. Both deeds contained language reserving all mineral rights in the grantor, Dixie Yarns. The following are the relevant parts of these deeds from Dixie to Rockfish with the words which appear to have been typed on the forms italicized:

> WITNESSETH: That the said *party* of the first part, for certain good and valuable considerations and TEN DOLLARS to *it* paid by said *party* of the second part, the receipt of which is hereby acknowledged, *has* bargained and sold, and by these presents do bargain, sell and convey to said *party of the second part*, and *its sucessors* ~~heirs~~ and assigns, *a* certain tract or

> parcel of land in *Rockfish* Township, *Cumberland* County, State of *North Carolina*, and bounded as follows, viz:

Following the granting clause in the deed was a description of the property. Immediately following the description was this provision:

> The grantor reserves all mineral rights in the above described property.

The habendum clause followed, providing:

> TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all of the privileges and appurtenances thereto belonging, to the said party of the second part, *its successors* ~~heirs~~ and assigns, to *its* only use and behoof forever. And the said party of the first part, for its successors or assigns, COVENANTS with the said party of the second part, *its successors* ~~heirs~~ and assigns, that it is seized of said premises in fee and has the right to convey in fee simple; that the same is free and clear from all encumbrances, and that it does hereby WARRANT and will forever DEFEND the said title to the same against the claims of all persons whomsoever.

In 1971 Rockfish transferred the Dixie property to an individual named Tyson without mention of Dixie's reservation of the mineral rights. In 1973 Tyson transferred the property to Golfview Enterprises, Inc. In 1980 Golfview transferred an undivided one-half interest in the entire tract to an individual named Harrington. In 1983 both Golfview and Harrington conveyed their undivided interests in the land to plaintiffs who subsequently conveyed to defendants. In this chain of title only the deeds from Dixie to Rockfish contained the mineral rights reservation.

Defendants assert that this reservation was a breach of plaintiffs' covenant of seisin; that they relied on plaintiffs' warranties and have been damaged in excess of $100,000.00; and that they were entitled to a set-off for damages thus incurred. As to third-party defendants, defendants claim that third-party defendants were negligent in failing to discover and disclose the mineral rights reservation and in failing to procure title insurance. Plaintiffs assert that the reservation and severance of mineral rights to Dixie was invalid because the granting, habendum, and warranty clauses in the deeds conveying the property to Rockfish recited a transfer of fee simple interests without mention of any reservation or excep-

tion. Plaintiffs argue, therefore, that they conveyed a fee simple marketable title to defendants and that defendants are liable for the full amount of their promissory note.

The parties agree that deeds executed prior to 1 January 1968 are to be construed according to common law rules as opposed to the statutory rule of construction found in G.S. 39-1.1(a). *Whetsell v. Jernigan*, 291 N.C. 128, 133, 229 S.E.2d 183, 187 (1976); *Frye v. Arrington*, 58 N.C. App. 180, 182, 292 S.E.2d 772, 773 (1982). Plaintiffs contend that the following rule enunciated by our Supreme Court is controlling: "[W]here the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected." *Artis v. Artis*, 228 N.C. 754, 761, 47 S.E.2d 228, 232 (1948). *See also Whetsell v. Jernigan*, 291 N.C. at 130, 229 S.E.2d at 185; *Oxendine v. Lewis*, 252 N.C. 669, 672, 114 S.E.2d 706, 709 (1960). We disagree with plaintiffs' contention.

The law in this State has long recognized that "the surface of the earth and the minerals under the surface may be severed by a deed, or reservation in a deed, and when so severed, they constitute two distinct estates." *Hoilman v. Johnson*, 164 N.C. 268, 269, 80 S.E. 249, 250 (1913) (citing *Outlaw v. Gray*, 163 N.C. 325, 79 S.E. 676 (1913)). The owner may convey a present estate in the unmined minerals and retain title to the surface, or the owner may convey a present estate in the surface and retain title to the minerals. *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 267, 192 S.E.2d 449, 453-54 (1972). Viewed in light of this principle, the language in the deeds to be construed in this case is a limitation on the quantity of the property described, not a limitation on the quality of the estate conveyed. *Hardison v. Lilley*, 238 N.C. 309, 311, 78 S.E.2d 111, 112 (1953). *See also Frye v. Arrington*, 58 N.C. App. at 183, 292 S.E.2d at 774 (1982). Dixie Yarns conveyed a fee simple in the surface of the land to its successors in title and retained the mineral rights. Because the fee simple in the surface of the land was conveyed, the language following the description wherein Dixie Yarns retained the mineral rights was not repugnant to the granting, habendum, or warranty clauses in the deeds. The rule of construction stated in *Artis v. Artis, supra*, is, therefore, not applicable.

The deed from plaintiffs to defendants contained no limitation in the description of the property conveyed. "Ordinarily, a general grant is sufficient to convey minerals in and under the surface of the described land." *Frye v. Arrington*, 58 N.C. App. at 183, 292 S.E.2d at 774. Therefore, by their covenant of seisin plaintiffs warranted that they had the right to convey the estate described in the deed both as to quality and as to quantity. *See Riddle v. Nelson*, 84 N.C. App. 656, 660, 353 S.E.2d 866, 869 (1987). Since title to the mineral rights had been severed from the title to the surface of the land described and was vested in a third party, plaintiffs as a matter of law breached their covenant of seisin when they conveyed to defendants. Accordingly, the trial judge erred in entering summary judgment for plaintiffs and the action must be remanded for a jury to determine the measure of defendants' damages for plaintiffs' breach of their covenant of seisin. In *Campbell v. Shaw*, 170 N.C. 186, 86 S.E. 1035 (1915), our Supreme Court held:

> Where there is a failure of title to a part of the land, or a partial breach of the covenant of seizin, the rule is thus stated: "The measure of damages for breach of warranty of title to land is the proportion that the value of the land to which title fails bears to the whole consideration paid. That is, the proportion of the value of the land as to which the title fails bears to the whole, estimated on the basis of the consideration paid." *Lemly v. Ellis*, 146 N.C., 221.

Id. at 186-87, 86 S.E. at 1035.

[3] We also hold that the trial court erred in granting summary judgment for third-party defendants dismissing the third-party complaint. Although third-party defendants presented deposition testimony that they were not retained to conduct a title search or purchase title insurance, defendants presented an affidavit that third-party defendants were retained for these purposes. Therefore, a genuine issue as to a material fact exists as to whether third-party defendants had a duty to conduct a title search and/or obtain title insurance on behalf of defendants.

Finally, we note that the summary judgment could not have adjudicated Dixie Yarns' interest in the property, Dixie not having been joined as a party to the litigation. *See Long v. City of Charlotte*,

306 N.C. 187, 293 S.E.2d 101 (1982), and *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

The judgment dismissing defendants' appeal is reversed.

The trial court's grant of summary judgment in favor of plaintiffs is reversed and the case remanded for trial as to damages.

The trial court's grant of summary judgment dismissing the third-party complaint for negligence is reversed and remanded for trial on the merits.

The trial court's grant of summary judgment dismissing plaintiffs' cross-claim for indemnity against third-party defendants is reversed and remanded for trial on the merits.

The grant of summary judgment as to third-party defendants' counterclaims against defendants for professional services rendered is also reversed.

Judges WELLS and PHILLIPS concur.

QUALITY WATER SUPPLY, INC., AND CAPE FEAR UTILITIES, INC. v. CITY OF WILMINGTON AND LANDFALL ASSOCIATES

No. 895SC413

(Filed 20 February 1990)

1. **Municipal Corporations § 23.3 (NCI3d)— water service supplied by city outside corporate limits—standing of private company to contest whether action within statutory limits**

Plaintiffs had a legitimate expectation toward providing water service to a subdivision since, by virtue of their contiguity to the subdivision, they were in a superior position to any other utility in the area to provide service to the development, as no other competitor would be able to provide for the development without first obtaining a certificate from the Utilities Commission; therefore, plaintiffs who had a legitimate interest in servicing the subdivision had standing to contest whether defendant municipality which was supplying private

customers beyond the city's corporate limits was acting in accord with statutory mandates.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 228, 568.

2. **Municipal Corporations § 23.3 (NCI3d)— city's extension of water service beyond corporate limits—extension within reasonable limitations**

Defendant city's extension of water service to private customers beyond its corporate limits was "within reasonable limitations" as required by N.C.G.S. § 160A-312 where the trial court considered the future benefits to the city of having a major water line, financed by a land development company, in place so that areas contiguous to the city might be annexed; the trial court also properly took into consideration the potential for connecting defendant's water system with that of a nearby town; and the trial court was not required to find factors such as the readiness, willingness, and ability of each supplier to provide for new customers.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 228, 568.

APPEAL by plaintiffs from order entered 1 December 1988 in NEW HANOVER County Superior Court by *Judge James D. Llewellyn.* Heard in the Court of Appeals 6 November 1989.

Shipman and Lea, by Gary K. Shipman, for plaintiff-appellants.

City Attorney Thomas C. Pollard and Assistant City Attorney Robert W. Oast, Jr., for defendant-appellee City of Wilmington.

Manning, Fulton and Skinner, by John B. McMillan, for intervenor defendant Landfall Associates.

BECTON, Judge.

In this action for injunctive relief, plaintiffs, Quality Water Supply, Inc., and Cape Fear Utilities, Inc., seek to enjoin defendant, the City of Wilmington, from providing water service to the Landfall Subdivision, a development of some 2,200 acres located in New Hanover County. Landfall Associates, the developers, intervened as a party defendant. In March 1986, plaintiffs' motion for a preliminary injunction was denied, and a temporary restraining

order previously issued against the City was dissolved. The case came on for trial in October 1988. At the conclusion of the evidence, the trial judge entered an order dismissing plaintiffs' complaint for lack of standing to contest the City's actions. Additionally, the judge ruled that plaintiffs had failed to show by the greater weight of the evidence that the City did not act within reasonable limitations when it extended its water service. Plaintiffs appealed. We affirm on the ground that the City's actions were within reasonable limitations.

I

Plaintiffs, Quality Water Supply, Inc. ("Quality Water"), and Cape Fear Utilities, Inc. ("Cape Fear Utilities"), are North Carolina corporations selling water to the public in New Hanover County. Gabriel William Dobo ("G. William Dobo") is the sole stockholder of Quality Water, and he and his brother, Robert Dobo, each own one-half of Cape Fear Utilities. Defendant, the City of Wilmington ("the City"), is a municipal corporation organized and chartered under the laws of North Carolina. The intervenor defendant, Landfall Associates, is the developer of the Landfall Subdivision ("Landfall"). This development lies outside the corporate limits of the City. Included in Landfall, along with residential and integrated commercial development, is a proposed hotel with 1,030 rooms; this hotel would require a fire flow of 3,500 gallons per minute to satisfy fire insurance underwriting requirements.

Plaintiffs' evidence showed that previous owners of Landfall provided G. William Dobo with a map of a proposed water distribution system for the subdivision, and plaintiffs subsequently submitted a proposal offering to provide water to the development. The proposal advocated the merits of Landfall Associates' engaging plaintiffs rather than municipalities such as the City or the Town of Wrightsville Beach. Mr. Dobo testified that plaintiffs "took in consideration" their future service to Landfall when they expanded their water systems in that area of the county. Ultimately, however, neither Quality Water nor Cape Fear Utilities obtained a contract to supply water to the development.

On 28 June 1985, Landfall Associates requested permission to connect Landfall to the City of Wilmington's water system. On 17 December of that year, the Wilmington City Council authorized extending the City's water mains to serve Landfall and authorized executing a contract with Landfall Associates to that effect. Pur-

suant to the contract, Landfall Associates was to finance the extension of the City's water main out to the subdivision by constructing a 24-inch line to run for approximately 16,000 feet. The closest point from the City's corporate limits to the closest point on Landfall is approximately 1.5 miles.

The City presently is the supplier of Landfall's water. The City's extended line parallels, "for some distance," an 8-inch water line installed by Cape Fear Utilities in 1985.

II

Plaintiffs seek to challenge whether the City may provide water service to Landfall consistent with the requirements of N.C. Gen. Stat. Sec. 160A-312 (1987). That section provides in part that "a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations . . . ." Section 160A-312 grants cities limited authority to extend utility services beyond their corporate limits. *See Duke Power Co. v. City of High Point ("Duke Power #1")*, 69 N.C. App. 335, 337, 317 S.E.2d 699, 700 (1984). Plaintiffs contend that the City's contract with Landfall does not come within the "reasonable limitations" language of the statute and is therefore ultra vires. The City disagrees and argues further that plaintiffs are without standing to contest the City's actions. As we noted above, the trial judge agreed with the City on both grounds. We will begin our review by addressing whether plaintiffs have standing to complain about the City's provision of water to Landfall.

A

An injunction is a proper remedy when a franchise, even though not exclusive, or rights under a franchise are being invaded. *See Public Serv. Co. v. City of Shelby*, 252 N.C. 816, 821, 115 S.E.2d 12, 16 (1960). Plaintiffs argue that they are proper parties to challenge the reasonableness of the City's actions by virtue of N.C. Gen. Stat. Sec. 62-110(a) (1989). Subsection (a) provides that

> . . . no public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the [North Carolina Utilities] Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition or operation: *Provided, that this section shall not apply to construc-*

> *tion into territory contiguous to that already occupied and not receiving similar service from another public utility,* nor to construction in the ordinary conduct of business. [Emphasis added.]

Subsection (a) requires a utility—but not a city, *see Town of Grimesland v. City of Washington,* 234 N.C. 117, 125-26, 66 S.E.2d 794, 800 (1951)—to apply to and obtain from the Utilities Commission a certificate of public convenience and necessity ("certificate") before it may service a given area. A certificate, once granted, is, like a franchise, a valuable property right. *See State ex rel. Utilities Comm'n v. Gen. Tel. Co.,* 281 N.C. 318, 335, 189 S.E.2d 705, 716 (1972). If the area to be served is "contiguous" to a territory already occupied by the utility, the company need not obtain a certificate before serving the contiguous area.

Andy Russell Lee, Director of the Public Staff, Water Division, of the Utilities Commission testified that "if [a water company is] extending mains from an existing system, then [the Commission] would consider that as being contiguous to an existing system." The Commission relies upon the utilities themselves to determine initially whether a new territory is contiguous to an area they currently serve.

[1] Cape Fear Utilities presently serves the Lions Gate development, located across the street from Landfall, and Wrightsville West, located to the east of Landfall. Plaintiffs do not hold certificates for these specific areas, but serve them on the basis of their contiguity to other areas for which plaintiffs have certificates. Quality Water has a certificate to serve the Windemere Subdivision, and Cape Fear Utilities holds certificates for the Pirate's Cove Subdivision and the El Ogden Subdivision. The trial judge found that twelve subdivisions, none of which are served by plaintiffs, are located between Windemere or Pirate's Cove and Landfall. Our initial task is to determine if plaintiffs have any right they may assert against the City's efforts to service Landfall. We hold that they do.

Plaintiffs argue that Landfall, because it is "contiguous" to areas plaintiffs currently occupy, could be served by plaintiffs without their needing to secure a certificate from the Commission. Mr. Lee substantiated this claim when he testified that the Public Staff would not recommend that plaintiffs be made to apply for a new certificate to service the subdivision. The evidence at trial showed

that no other utility would be in the position to serve Landfall without first having to apply to the Commission for a certificate. If any other company had made application, moreover, the Commission would have informed plaintiffs, "and if [plaintiffs] had any objections, then the matter would be scheduled for a hearing before the Commission to decide who would have the right to serve it."

Electric utilities are assigned service areas in which they have a nonexclusive right to serve all premises located within those areas. N.C. Gen. Stat. Sec. 62-110.2(b)(8) (1989); *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974). An electric company assigned such an area thus has standing to challenge the encroachment of a municipality into it. *See generally Domestic Electric; Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E.2d 209 (1983); *Duke Power Co. v. City of High Point ("Duke Power #2")*, 69 N.C. App. 378, 317 S.E.2d 701, *disc. rev. denied*, 312 N.C. 82, 321 S.E.2d 895 (1984). No comparable statute authorizes the granting of service areas to water utilities. A water utility seeking to challenge the legality of a municipality's extension of service to private customers outside the city's limits must assert, therefore, its rights pursuant to Section 62-110(a).

In our view, plaintiffs have shown that they have a sufficient property right at stake in Landfall. The parties vigorously dispute whether Landfall is, in fact, contiguous to any area currently occupied by plaintiffs, and the trial judge held that Landfall is not. At least implicitly, both the judge and the City recognized that, in this case, contiguity is significant to a standing analysis. We hold, in contrast to what the judge found, that Landfall is a territory contiguous to areas occupied by these plaintiffs. Section 62-110(a) requires only that a company "occupy" an area not being served by another utility. A water company "occupies" through the presence of its water lines in the territory. These plaintiffs, by virtue of their contiguity to Landfall, are in a superior position to any other utility in the area to provide service to the development, since no other competitor would be able to provide for Landfall without first obtaining a certificate. In the event another company sought a certificate, plaintiffs, specifically, would be afforded the opportunity to contest the application. We think that plaintiffs have demonstrated more than a "unilateral expectation" toward providing service to Landfall. *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 241, 371 S.E.2d 302, 305-06 (1988). Rather, plain-

tiffs' claim is more in the nature of a "legitimate expectation of entitlement," *id.*, and is sufficient to give them a protectible interest in this case.

B

"Injunctive relief is premised on an injury actually threatened and practically certain, not one anticipated and merely probable." *Duke Power #1*, 69 N.C. App. at 337, 317 S.E.2d at 700. In *Duke Power #1*, this court held that an electric utility had not shown that a prospective loss of potential customers was an injury warranting injunctive relief. We cited the trial judge's finding of fact that the City of High Point, when it extended its electric lines beyond its corporate limits to supply power to a pollution control plant, a police academy, and a garbage pulverizer plant—all of which were owned and operated by the City of High Point—had no plans to serve any specific electric customers other than itself. *Id.* at 337, 317 S.E.2d at 701. We noted, however, that if High Point sought, in the future, to serve private customers outside the city, that action would be governed by the reasonable limitations standard of Section 160A-312. *Id.* at 338, 317 S.E.2d at 701. In this case, plaintiffs, who have a legitimate interest in Landfall, seek to contest whether a municipality that is supplying private customers beyond the City's corporate limits, is acting in accord with statutory mandates. We think plaintiffs are proper parties to do this, and we hold that they have standing to challenge the City's provision of water to Landfall. We vacate that portion of the judge's order dismissing the complaint on standing grounds.

III

[2] We turn now to the question whether the City's extension of service to private customers beyond its corporate limits was "within reasonable limitations" as required by Section 160A-312. Reasonable limitations does not refer solely to the territorial extent of the City's venture but "embraces all facts and circumstances which affect the reasonableness of the venture." *Shelby*, 252 N.C. at 823, 115 S.E.2d at 17. Factors to consider in determining the reasonableness of a city's proposed extension of service include the level of current service in the territory in question; the readiness, willingness and ability of each competitor to provide service; the location of the territory in relation to the city limits; and the existence of any annexation plans by the city. *Duke Power #2*, 69 N.C. App. at 388, 317 S.E.2d at 707. There is, however, no ex-

clusive list of factors; rather, all facts and circumstances within each case must be weighed. *Id.*

N.C. Gen. Stat. Sec. 160A-45 (1987) in part says that

> (1) . . . sound urban development is essential to the continued economic development of North Carolina;
>
> (2) . . . municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;
>
> . . . .
>
> (5) . . . areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality . . . .

We agree with the City that the legislative policy expressed in the statute is that municipalities remain "dynamic growing entit[ies]." N.C. Gen. Stat. Sec. 160A-47(3)b (1987) mandates that an annexing municipality must provide, among other things, for the extension of major trunk water mains into the area to be annexed.

The judge, in findings not excepted to by plaintiffs, found that Landfall lies adjacent to areas which have been studied by the City for annexation. The annexation reports note that one of the limitations on the annexing of these areas was the cost of extending trunk water mains. The City contends that it is reasonable to consider the future benefits to Wilmington of having a major water line, financed by Landfall Associates, in place so that the areas might be annexed, and we agree. *Cf. Duke Power #2*, 69 N.C. App. at 390, 317 S.E.2d at 708 ("central" to court's consideration of long-term benefits was city's plans to annex and subsequent annexation of proposed service area).

The judge also found that the City and the Town of Wrightsville Beach have discussed the extension of a water line from Wilmington to Wrightsville Beach. Interconnected public water systems are likewise consistent with legislative policy. *See* N.C. Gen. Stat. Sec. 162A-21 (1987). The presence of the City's water line at Landfall, with the potential for connecting the City's system with Wrightsville

Beach, is another factor the judge properly considered in determining the reasonableness of the City's actions.

Plaintiffs argue that the trial judge failed to find factors—such as the readiness, willingness and ability of each supplier to provide for the new customers—that must be considered when determining the reasonableness of a city's extension of service. Plaintiffs are correct that no finding addresses the factors of readiness, willingness and ability. There is evidence in the record to support a finding that neither plaintiffs nor the City were ready to meet the fire-flow needs of Landfall had Landfall's proposed hotel been in place.

Even if, arguendo, plaintiffs were more ready, willing and able to supply Landfall, the trial judge need not have found this, nor any other single factor, dispositive. Indeed, factors weighing in favor of a supplier may be obviated by other factors showing the reasonableness of the City's plan. *Duke Power #2*, 69 N.C. App. at 389-90, 317 S.E.2d at 707-08. We have cited the judge's findings related to annexation and the interlocal agreements. We further note that a city has the discretionary authority to provide water service outside its city limits, *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E.2d 407, 412-13 (1985), and that the authority of cities to execute powers conferred upon them by law is to be construed broadly. *Id.* (citing N.C. Gen. Stat. Sec. 160A-4).

We therefore hold that the facts found by the judge support his conclusion of law that the City's actions were within the reasonable limitations requirement of Section 160A-312. Consequently, we overrule this assignment of error.

IV

That portion of the judgment dismissing plaintiffs' complaint for lack of standing is vacated. That portion upholding the reasonableness of the City's actions is

Affirmed.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. WILLIAM "BILLY" GREIME

No. 8929SC326

(Filed 20 February 1990)

1. **Criminal Law § 51 (NCI3d)— fire department lieutenant— expert opinion testimony**

Though it would have been the better practice for the state to have tendered a fire department lieutenant as an expert, any error in permitting the witness to state opinions as an expert was harmless where the witness testified that he had attended three arson schools and had investigated a number of suspicious fires in the past, and the trial court implicitly found him to be an expert.

Am Jur 2d, Arson and Related Offenses § 49.

2. **Criminal Law § 75.10 (NCI3d)— defendant's statement during interrogation—waiver of constitutional rights**

The trial court did not err in admitting into evidence defendant's statement made during custodial interrogation that "he couldn't say that he did do the break-in and the arson or that he didn't," since evidence supported the trial court's finding that defendant knowingly and intelligently waived his rights, and the interrogating officer honored the limits which defendant had placed on his waiver of counsel.

Am Jur 2d, Evidence §§ 555, 556, 557.

3. **Criminal Law § 1079 (NCI4th)— sentence—finding that aggravating factors outweighed mitigating factors**

The trial court did not err in finding that aggravating circumstances outweighed mitigating circumstances and in ordering defendant's imprisonment for a term exceeding the presumptive sentence.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from Judgment of *Judge Bruce Briggs* entered 10 November 1988 in HENDERSON County Superior Court. Heard in the Court of Appeals 21 September 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Cheryl D. Jackson, for the State.

J. Michael Edney for defendant appellant.

COZORT, Judge.

The defendant was convicted of burning a building used for trade and sentenced to ten years in prison. On appeal, he contends that the trial court erred in three respects: first, by allowing a lay witness to testify as an expert; next, by refusing to suppress defendant's inculpatory statement regarding the fire; and, lastly, in finding that aggravating circumstances outweighed mitigating circumstances and ordering defendant's imprisonment for a term exceeding the presumptive sentence. We find no prejudicial error.

The State offered evidence tending to show that on the night of 2-3 July 1988, the Hendersonville Police and Fire Departments responded to Mr. Greime's report of a fire at Yung's Wig Shop. Andre Massey, the first police officer to reach the shop, testified that he found a kerosene can "just inside the door and then about eight or ten feet up." Police Captain John Nicholson testified that, in his opinion, the back door had been forced open from the inside. Further investigation revealed a common attic or crawlspace above the ceilings of Yung's Wig Shop and the adjacent Lawn Mower Shop operated by defendant. The State's evidence also tended to show the following: a piece of cord, like the "pull cord" used by defendant to repair lawn mowers and chain saws, was attached to a piece of tin ceiling tile above the wig shop; there were footprints in the dust above the ceiling; and, "smushed into the tin [ceiling tile] . . . was a Marlboro cigarette butt," the same brand of cigarette that defendant smoked.

On 15 July 1988, Mr. Greime called the Hendersonville Police Department and was told that the police would seek warrants charging him with felony breaking and entering, larceny, and burning a building used for trade. Later that day, when he voluntarily surrendered, he was charged with those offenses. At approximately 10:15 p.m. that night, Captain Nicholson interrogated Mr. Greime.

Over Mr. Greime's objection the trial court permitted Lieutenant Philip Cagle of the Hendersonville Fire Department to testify as an expert on a number of points, including the "odor of a flammable liquid" in Yung's Wig Shop. The trial court permitted Cap-

tain Nicholson of the Police Department to testify, also over objection, that during custodial interrogation the defendant said: "he couldn't say that he did do the break-in and the arson or that he didn't."

[1] The defendant contends that Lieutenant Cagle, who was neither tendered as nor expressly found to be an expert in investigating arson or other fires, was a lay witness, qualified to offer only "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (1989). Thus, defendant argues that the trial court erroneously allowed Lieutenant Cagle to offer expert testimony on the following: whether he detected the odor of kerosene; whether he conducted an arson investigation; the characteristics of a kerosene fire; and how long the fire burned.

When the defendant objected to testimony from the witness on the grounds that he was not an expert, the trial court overruled the objection. The court's ruling came at the end of this exchange:

Q Did you smell anything that smelled like kerosene—

MR. CARPENTER: Objection.

THE COURT: Overruled.

Q Have you ever smelled kerosene before?

A Yes, sir.

Q You know what kerosene smells like?

A Yes, sir.

* * * *

Q Now, have you had any experience in arson training or—

A Yes, sir, I have.

Q —or training to investigate arson cases?

A Well, I have been to two that I can recall and approximately three arson schools over the years.

Q Okay. In your arson training did you receive any certificates for attending these schools?

A Yes, sir.

Q As a matter of course in your occupation as a Lieutenant with the Fire Department did you routinely investigate cases looking for possible arson?

A Most all our fires that are, you know, fairly suspicious, then we do some kind of investigation. For a period of time we did our own, but the Police Department has taken care of that for the last several years, however.

* * * *

Q Okay, I'll ask you if you did such an investigation at the scene of this gift shop fire as to looking for signs or indications of possible arson?

A Oh, yes, sir.

MR. CARPENTER: Objection.

THE COURT: Overruled.

* * * *

Q Did you examine the carpet area there where the burning had occurred?

A Yes, sir, we did.

Q Did you notice anything unusual about that area?

A The odor of a flammable liquid. I could not determine the exact liquid other than I could absolutely swear that it was kerosene or a Varsol, something other than gasoline. We did not have the flash area that would be involved with gasoline or lacquer thinner. That probably would have exploded rather than setting [*sic*] there and smoldering as long as it did.

Q When you burn kerosene, in your experience, what effect does that have in one local area like that?

MR. CARPENTER: Objection, no foundation.

THE COURT: Overruled.

A Usually the kerosene itself will burn after it gets started and it will actually burn itself before the material that it is on will ignite. After the kerosene itself burns then the material will get involved. So it acts almost like a wick, almost like a wick would.

Q Comparing that with your experience with the way kerosene burns, on the physical evidence you saw there at that six by six foot spot, compare that with what you saw as to what you just testified as to the way kerosene burns?

MR. CARPENTER: Objection, if your Honor please, he has not been qualified as an expert witness, I don't believe.

THE COURT: Overruled.

Taking these rulings in context, we hold that the trial court implicitly found Lieutenant Cagle to be an expert. The record would support such a finding, and the "opinion of an expert witness is admissible when it is shown that the witness, through study or experience, has acquired such skill and expertise that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *State v. Monk*, 291 N.C. 37, 52, 229 S.E.2d 163, 173 (1976). While "it would have been better practice for the [State] to have tendered" Lieutenant Cagle as an expert, in the circumstances disclosed by the record, any error in permitting the witness to state opinions as an expert was harmless. *State v. Perry*, 275 N.C. 565, 572, 169 S.E.2d 839, 844 (1969); *see also State v. Jenerett*, 281 N.C. 81, 90, 187 S.E.2d 735, 741 (1972), and *State v. Cates*, 293 N.C. 462, 471-72, 238 S.E.2d 467, 472 (1977).

[2] The defendant contends next that the trial court erred by refusing to suppress his inculpatory statement. Mr. Greime argues that during custodial interrogation he expressed the desire to deal with the police only through counsel. A defendant in those circumstances is "not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Mr. Greime maintains that Captain Nicholson impermissibly continued the interrogation, and Mr. Greime eventually said "he couldn't say that he did do the break-in and arson or that he didn't."

After voir dire examination the trial court overruled Mr. Greime's motion to suppress his statement and permitted Captain Nicholson to testify as follows:

Q State to the members of the jury whether or not you advised him of his Constitutional Rights?

A Yes, I did.

Q In that regard, what rights did you advise him of and what was his response?

A I first advised him since he was in custody at the jail charged with breaking, entering, larceny and arson, that I was going to advise him of his rights, and I proceeded to do so.

I said, "You have the right to remain silent." Then I asked him if he understood that.

Mr. Grieme said, "Yeah."

Then I stated, "Anything you say can be used against you in a court of law." And then I asked him if he understood that and Mr. Grieme said, "Yes, sir."

Then I said, "You have the right to talk to a lawyer, to have a lawyer present while you are being questioned. Do you understand that?" Mr. Grieme said, "Yes, sir."

"If you want a lawyer before or during questioning, but cannot afford to hire one, one will be appointed to represent you at no cost before any questioning. Do you understand that?"

Mr. Grieme said, "Yes, I do."

"If you answer questions now without a lawyer here, you still have the right to stop answering questions at any time. Do you understand that?"

Mr. Grieme: "Yes, I do."

"Do you understand each of the rights that I have just explained to you?

Mr. Grieme: "Yes, I do."

"Having these rights in mind, do you wish to answer questions?"

Mr. Grieme: "Yes, okay."

"You now wish to answer questions now without a lawyer present?"

Mr. Grieme: "No."

"Do you have an attorney?"

Mr. Grieme: "Yes, I do."

"Who is your attorney?"

Mr. Grieme: "Youngblood."

"And you don't want to answer questions at all?"

Mr. Grieme: "He advises me not to say anything, but I don't know what you would be asking, so—"

At that time I said, "Huh?" I didn't really understand what his response was.

Mr. Grieme then stated, "I don't know what you would be asking me."

So he stated, "I could stop at any time, correct." That was his question to me.

Then I stated, "Right."

Mr. Grieme: "Okay. I will go ahead and answer any questions you need to, but if you want to stop—excuse me—if I want to stop, I just stop, okay?"

And to him I replied, "Okay, but you don't have to without your attorney being present."

Mr. Grieme: "I understand that, he advised me not to say anything, really, that is what he told me."

At that time I asked Mr. Grieme, "Well, what do you want to do?"

And at that time Mr. Grieme said, "Talk about it, but I will stop if I feel—" Then he asked for a pen so he could sign the waiver of rights.

* * * *

Q Now, Officer Nicholson, later in the interview did Mr. Grieme—Did you have a tape recorder?

A Yes, sir, I did.

Q Did Mr. Grime ask you to shut the tape recorder off?

A Yes, sir, he did.

Q What point did he do that?

A Okay. I had talked to him about some of the inconsistencies in the evidence that I was trying to send off to

the lab. Mr. Grime at that time said, "Will you shut that off a minute?"

At that time, at his request, I turned off the tape recorder. And he stated that he could not talk with one of those things and that he couldn't say that he did do the break-in and the arson or that he didn't. He said that he had been under a lot of stress and a lot of pressure and when he is under a lot of stress pressure he doesn't know what he does, he kind of like blacks out and couldn't remember things. He didn't know if he did or didn't.

At that time he started to cry.

I didn't question him or push him at that time. I waited for a minute or two for him to get his composure back. *Before I could ask another question, he stated that he didn't want to answer any more questions and requested his attorney.*

Q Did you then terminate your interview?

A Yes, sir, I did. [Emphasis added.]

The admissibility of Mr. Greime's statement is controlled by *Smith v. Illinois*, 469 U.S. 91 (1984). In *Smith* the Supreme Court held:

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries . . . .
>
> * * * *
>
> Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself nor do we decide the consequences of such ambiguity or equivocation. We hold only that, under the clear logical force of settled precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

Id. at 98-100. Thus, when Captain Nicholson asked, "You now wish to answer questions now [*sic*] without a lawyer present?" and Mr. Greime replied, "No," his subsequent statements became relevant only to the issue of waiver.

Mr. Greime's subsequent statements are susceptible to differing interpretations. After voir dire examination and arguments from counsel, the trial court found

> that from a totality of the circumstances the defendant knowing that he had a right to remain silent, and he had a right to counsel, and that he in fact conferred with counsel, and had in fact been advised by counsel to say nothing; [*sic*] initiated further conversation with the investigating officer and in doing so voluntarily, knowingly, and intelligently waived the rights which he had had explained to him and to each of which he had indicated that he understood.

Findings of fact "concerning the admissibility of a confession are conclusive and binding if supported by competent evidence. This is true even though the evidence is conflicting." *State v. Nations*, 319 N.C. 318, 325, 354 S.E.2d 510, 514 (1987) (citation omitted). The trial court's finding was supported by competent evidence, and we hold that Captain Nicholson honored the limits ("if I want to stop, I just stop, okay?") that Mr. Greime placed on his waiver of counsel. *See Patterson v. Illinois*, 108 S. Ct. 2389, 2395 n.5 (1988).

[3] The defendant contends, lastly, that the sentencing procedure in the trial court was fatally flawed. Specifically, the defendant maintains that the trial court "did not consider and weigh all factors" in aggravation and mitigation as required by N.C. Gen. Stat. § 15A-1340.4.

The alleged factor to which defendant points, however, is one weighing in aggravation of his offense. During the sentencing hearing, the State offered evidence tending to show "damage causing great monetary loss." N.C. Gen. Stat. § 15A-1340.4(a)(1)(m). The trial court considered but did not find that factor. In aggravation it did find the defendant's seven prior convictions of offenses punishable by more than sixty days' confinement. In mitigation the court found that defendant suffered from a mental condition insufficient to constitute a defense but one that significantly reduced his culpability. After weighing these factors, the court sen-

tenced Mr. Greime to ten years for a Class E felony, which has a presumptive sentence of nine years.

A trial judge is required to consider all of the aggravating and mitigating factors listed in N.C. Gen. Stat. § 15A-1340.4 before imposing a sentence greater than the presumptive term, but "he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present." *State v. Davis*, 58 N.C. App. 330, 334, 293 S.E.2d 658, 661, *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982). In the sentencing hearing the defendant has shown neither abuse of discretion, nor procedural conduct operating to his prejudice, nor circumstances manifesting inherent unfairness. In the absence of those flaws in sentencing, a judgment will not be disturbed. *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

No error.

Judges PHILLIPS and LEWIS concur.

EMBREE CONSTRUCTION GROUP, INC. v. RAFCOR, INC., UNITED CAROLINA BANK, ANTHONY J. SAPIENZA, RONALD THOMAS TEDESCO AND FREDERICK ANTHONY OCCHINO

No. 8926SC587

(Filed 20 February 1990)

1. **Laborers' and Materialmen's Liens § 8 (NCI3d)— contractor's lien against bank holding construction funds—equitable lien**

Plaintiff alleged a legally enforceable claim against defendant bank, and the trial court erred in dismissing the complaint for failure to state a claim pursuant to N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff contractor alleged that it had an equitable lien on the construction loan balance for the building it built because in reliance upon the fund being disbursed it completed the construction when the property owner was not in default, and that by acquiring the completed building as security for the loan without disbursing the agreed amount the bank had unjustly enriched itself at plaintiff's expense.

Am Jur 2d, Mechanics' Liens §§ 2, 268, 273.

2. Contracts § 33 (NCI3d) — tortious interference with contract — sufficiency of allegations

Plaintiff's allegations were sufficient to state a claim for tortious interference with contract where plaintiff alleged that, with actual knowledge of both the construction contract and the loan contract, the individual defendants, as officers and directors of defendant corporation, intentionally caused the corporation not to request defendant bank to make the final payment due plaintiff under the construction contract for the wrongful purpose of limiting their personal liability under their guaranty agreement, and plaintiff was thereby damaged to the extent of the undisbursed loan funds.

Am Jur 2d, Interference § 55.

Judge GREENE dissenting.

APPEAL by plaintiff from orders entered 3 February 1989 and 13 February 1989 by *Snepp, Judge*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 15 November 1989.

Plaintiff's appeal is from orders under the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure, dismissing its complaint against the defendant bank and defendants Tedesco and Occhino for failing to state a claim on which relief can be granted. The action seeks to recover from defendant Rafcor, Inc. a balance of approximately $110,000 for constructing its restaurant building; to recover from defendant bank a balance of approximately $70,000 that it agreed to loan Rafcor for constructing its building; and to recover damages from the individual defendants for tortiously interfering with plaintiff's construction contract with Rafcor and Rafcor's loan agreement with the bank. Defendants Rafcor and Sapienza are not parties to this appeal.

The allegations deemed not to state an enforceable claim against either the bank or the individual appellees are to the following effect: On 27 September 1987 the bank agreed to loan Rafcor $942,500 to construct a restaurant building and buy the lot it was to be built on; to periodically advance money on the project as construction progressed; and to advance the full amount upon the project being completed in accord with the agreement. The loan was secured by a deed of trust on the construction site and its payment was guaranteed by the individual defendants, who are shareholders,

directors and officers of Rafcor. On 2 October 1987, plaintiff contracted with Rafcor to construct the building. In reliance upon the loan funds being disbursed as agreed, plaintiff completed the construction in March 1988, and is owed a contract balance of $70,000 plus $32,973 for extra construction not specified by the contract. Pursuant to its periodic applications for payment during construction, all the loan funds except approximately $70,000 were disbursed directly to plaintiff; the final $70,000 has not been disbursed though plaintiff duly applied for it after construction was completed and when Rafcor's loan was not in default. Through plaintiff's performance of the construction contract the bank received all the security it bargained with Rafcor for, to wit, a completed building on the lot specified. By holding the remaining loan proceeds and refusing to apply them to plaintiff's construction costs it has unjustly enriched itself at plaintiff's expense, and plaintiff has an equitable lien upon the funds.

After construction of the building was completed and plaintiff was entitled to the balance owed by Rafcor the individual defendants without justification, in their own interest, and for the purpose of avoiding further liability to the bank under their guaranty agreement, caused Rafcor not to request the disbursement of the remaining loan funds, and induced the bank not to pay them to plaintiff to its resulting damage.

Perry, Patrick, Farmer & Michaux, by Roy H. Michaux, Jr. and Timothy E. Cupp, for plaintiff appellant.

Petree Stockton & Robinson, by Jackson N. Steele, for defendant appellee United Carolina Bank.

Casstevens, Hanner, Gunter & Gordon, by Marc R. Gordon, for defendant appellees Tedesco and Occhino.

PHILLIPS, Judge.

[1] Accepting the foregoing allegations as true, as we must since the sufficiency of a complaint to state a claim for relief is being determined, *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976), and bearing in mind that complaints may not be dismissed for not stating a claim under Rule 12(b)(6), N.C. Rules of Civil Procedure, unless it appears "to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim," *Stanback v. Stanback*, 297 N.C.

181, 185, 254 S.E.2d 611, 615 (1979), *citing* 2A Moore's Federal Practice, Sec. 12.08, pp. 2271-74 (2d ed. 1975) (emphasis omitted), we first consider whether a legally enforceable claim is alleged against defendant bank. The claim, in substance, is that plaintiff contractor has an equitable lien on the construction loan balance for the building it built because in reliance upon the fund being disbursed it completed the construction when the property owner was not in default, and that by acquiring the completed building as security for the loan without disbursing the agreed amount the bank has unjustly enriched itself at plaintiff's expense. The enforceability of such a claim as plaintiff's has not been considered by our Courts. Contrary to the appellee bank's argument, that our comprehensive lien statute, Chapter 44A of the North Carolina General Statutes, makes no provision for a lien of this type is not determinative; for that legislation did not purport to abrogate long established principles under which equitable liens have been enforced by our Courts in a variety of situations, as *Garrison v. The Vermont Mills*, 154 N.C. 1, 69 S.E. 743 (1910), and the cases cited indicate. Nor was the Court's refusal to enforce such a lien in *Urban Systems Development Corp. v. NCNB Mortgage Corp.*, 513 F.2d 1304 (4th Cir. 1975), a bar to this claim, for the contractor in that case had not completed the construction bargained for and the lender was holding an uncompleted building as security for its loan.

But claims indistinguishable from this one have been considered by other Courts, some of which have approved them. *See* Annotation, Building and Construction Contracts: Contractor's Equitable Lien Upon Percentage of Funds Withheld by Contractee or Lender, 54 A.L.R.3d 848 (1974). In a number of well reasoned decisions, including *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898 (1928), *disapproved on other grounds by Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987, 7 L.Ed.2d 525, 82 S.Ct. 603 (1962), *Swinerton & Walberg Co. v. Union Bank*, 25 Cal. App. 3d 259, 101 Cal. Rptr. 665, 54 A.L.R.3d 839 (1972), and *Hayward Lumber & Investment Co. v. Coast Federal Savings & Loan Ass'n of Los Angeles*, 47 Cal. App. 2d 211, 117 P.2d 682 (1941), the California Courts have upheld the lien under circumstances similar to those alleged. In *Miller v. Mountain View Savings & Loan Ass'n*, 238 Cal. App. 2d 644, 661, 48 Cal. Rptr. 278, 290 (1965), the California Court of Appeals cogently said—

> Where the lender has received the benefit of the claimant's performance, and therefore a more valuable security for its note, it is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance and relied upon by the claimant in rendering its performance.

This is sound equitable doctrine, in our opinion, and it applies to the circumstances alleged. For if the bank's security has been enhanced and perfected by plaintiff's performance in reliance upon the loan funds being disbursed, and if the bank has not been relieved of its obligation to disburse the balance of funds by the borrower's default, retaining the funds to plaintiff's detriment and its own unearned enrichment would be unjust. Whether any of the allegations can be proved is, of course, not before us; our role under the record is to decide the sufficiency of the complaint, and we are of the opinion that it states an enforceable claim.

The bank's argument that the view we have adopted was overruled in *Boyd & Lovesee Lumber Co. v. Modular Marketing Corp.*, 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (1975), is incorrect. The reversal in that case was based upon a subsequently enacted California statute which abolished all rights of equitable lien against trust funds except those based upon a written contract between the claimant and the person holding the fund. North Carolina has no similar statutory prohibition. The bank's further argument that Rafcor was in default under the terms of the deed of trust cannot be considered because the appeal concerns only the sufficiency of the complaint to state a claim for relief, the deed of trust is not a part of either the complaint or the record on appeal, as stipulated to by the parties, and the complaint alleges that Rafcor was not in default.

[2] As to the enforceability of the claim asserted against the individual defendants the claim in substance is that: With actual knowledge of both the construction contract and the loan contract, they intentionally caused Rafcor not to request the bank to make the final payment due plaintiff under the construction contract for the wrongful purpose of limiting their personal liability under their guaranty agreement, and that plaintiff was thereby damaged to the extent of the undisbursed loan funds. The claim stated is for tortious interference with contract, the elements of which are as follows: (1) a valid contract between plaintiff and a third per-

son; (2) defendants had knowledge of the contract; (3) defendants intentionally induced the third person not to perform the contract; (4) in doing so defendants acted without justification; and (5) plaintiff was damaged thereby. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988); *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954), *reh'g dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955). All of these elements—contract, knowledge, interference, absence of justification, and damage—are explicitly alleged by plaintiff's complaint. In dismissing the claim the court apparently was under the mistaken impression that element (4), that defendants acted without justification, cannot be established since defendants, as officers and directors of the contracting corporation, had the right and duty to act for the company in regard to its contracts and other business. G.S. 55-35. But their justification in interfering with the contract in question is not established by that duty. For "[j]ustification imports 'a sufficient lawful reason why a party did or did not do the thing charged,' " *Childress v. Abeles*, *supra*, at 674-75, 84 S.E.2d at 182, *citing* 51 C.J.S. 421, and the right of an officer and director of a corporation to interfere with its contracts is not unlimited; " '[i]ndividual liability may . . . be imposed where . . . acts involve individual and separate torts distinguishable from acts solely on his employer's behalf or where his acts are performed in his own interest and adverse to that of his firm.' " *Wilson v. McClenny*, 262 N.C. 121, 133-34, 136 S.E.2d 569, 578 (1964) (citations omitted). The allegations in the complaint that the individual defendants acted purely for their own personal benefit, rather than in the best interest of Rafcor as they were obligated to do, entitle plaintiff to support the allegations with evidence if it can.

Reversed.

Judge BECTON concurs.

Judge GREENE dissents.

(Former Judge BECTON concurred in the result reached in this case prior to 9 February 1990.)

Judge GREENE dissenting.

I reject the view that the contractor, who had no contractual relationship with the lender, has an equitable lien against monies not disbursed by the lender to the owner. No North Carolina cases establish such a cause of action for the plaintiff, and the better reasoned view in my opinion requires rejection of such an equitable lien. Our Legislature has provided for liens to protect builders (N.C.G.S. § 44A-7 et seq. (1989)), and I perceive no good reason for the courts to judicially legislate additional security for the builder. *See* 51 Am.Jur. 2d *Liens* § 24, at 163 (1970) ("there must be some ground for equitable intervention, including the absence of an adequate remedy at law"); *see also R. M. Shoemaker Co. v. Southeastern Pennsylvania Economic Development Corp.*, 419 A.2d 60 (1980); *Pratt Lumber Co. v. T. H. Gill*, 278 F. 783, 789-90 (E.D.N.C. 1922).

The plaintiff argues that "the gravamen of the equitable lien claim . . . is equity's abhorrence for the unjust enrichment of a lender at the expense of the performing contractor who relied on the loan proceeds for payment." I fail to see the unjust enrichment which theoretically accrues to a creditor since the creditor possesses an interest only to the extent of the amount actually disbursed. Any value of the building in excess of that amount, presumably the value added by the contractor for which the contractor was not paid, cannot be considered a windfall for the creditor since the creditor has no interest in that value.

Regarding the tortious interference with contract claim against defendants Tedesco and Occhino, the fourth element of that cause of action requires that the defendants acted without justification. As the majority notes, an officer or director of a corporation acts without justification, such that individual liability can be imposed, only where "his acts are performed in his own interest *and* adverse to that of his firm" (emphasis added). Here the plaintiff failed to allege that these defendants' acts were adverse to that of their firm, Rafcor, Inc. Therefore, the pleadings here fail to state a claim upon which relief can be granted for interference with contract.

Accordingly, I would affirm the order of the trial court dismissing the complaint against United Carolina Bank, Tedesco and Occhino.

ALLAN TODD JACKSON v. N.C. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 8910IC550

(Filed 20 February 1990)

1. **State § 8.2 (NCI3d)— arrest of inebriated plaintiff—excessive force used by officers—sufficiency of evidence**

Evidence was sufficient to support findings by the Industrial Commission that defendant's officers used excessive force in arresting plaintiff where the evidence tended to show that there were five law enforcement officers present to arrest the inebriated plaintiff; he was never abusive or profane and made no attempt to escape; he did not respond quickly to officers' requests that he get in the patrol car and remain seated; and officers struck him five times about the neck and shoulders with a blackjack and banged his handcuffs more tightly closed with a metal flashlight.

Am Jur 2d, Arrest, § 80; Municipal, County, School, and State Tort Liability §§ 464-466.

2. **State § 8.2 (NCI3d)— intentional violent restraint of intoxicated plaintiff—excessive force not intended—officers negligent—action under Tort Claims Act proper**

The Industrial Commission's conclusion that defendant's officers were negligent in using more force than was necessary, thus injuring the intoxicated plaintiff, was supported by its findings that the officers intended violently to restrain plaintiff, did not intend to use excessive force, but in fact did.

Am Jur 2d, Arrest § 80; Municipal, County, School, and State Tort Liability §§ 464-466.

3. **State § 9 (NCI3d)— Tort Claims Act—injury to plaintiff's hand—amount of compensation proper**

The amount of damages for pain and suffering and partial disability awarded by the Industrial Commission to plaintiff who sustained injuries when he was struck by officers during an arrest was not excessive where the right handed plaintiff had continued intermittent pain and weakness in his right wrist; the dorsal side of his right hand remained numb; as a result of the injury plaintiff was no longer able to perform

some tasks in his work as an upholsterer; plaintiff had particular difficulty during damp or cold weather; and he experienced wrist pain when using pliers, picking up furniture, or cutting fabric in his work.

Am Jur 2d, Damages § 324.

APPEAL by defendant from order of North Carolina Industrial Commission entered 22 March 1989. Heard in the Court of Appeals 18 October 1989.

James R. Vosburgh for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by D. Sigsbee Miller, Associate Attorney General, for the State.

GREENE, Judge.

This is an appeal from the Industrial Commission. The plaintiff, Allan T. Jackson sought damages under the Tort Claims Act for injuries allegedly resulting from negligent acts of defendant's agents. The Commission found for plaintiff, and the defendant appeals.

At approximately 12:35 a.m. on 12 April 1986 North Carolina Alcohol Law Enforcement (ALE) agents, Richard Thornell and Warren Hopkins, stopped the plaintiff and his wife as the plaintiff was driving along a public highway. The plaintiff is 22 years old, six feet, four inches tall and weighs 215 pounds. Agent Thornell is six feet, three inches tall and weighs approximately 205 pounds and Agent Hopkins is approximately five feet, ten inches tall and weighs about 200 pounds. The Industrial Commission found, in part, the following facts:

6. After stopping the plaintiff's vehicle, Agents Thornell and Hopkins radioed for a Highway Patrolman to be dispatched to the scene.

7. Agents Thornell and Hopkins alighted from their vehicle and walked forward to the plaintiff's vehicle and asked him to get out. After some extended inquiry by the plaintiff as to why he was being stopped, and after repeated requests by the A.L.E. Agents that he get out of his vehicle, the plaintiff complied with their request and got out of the jeep on the driver's side. His wife, Tracy Jackson, was present and sitting on the passenger side front seat.

8. At this time Trooper Leroy Oglethorp Batts, III arrived on the scene as did Grifton Police Officer Robert Jones and Grifton Auxiliary Police Officer Joe Wade in a separate vehicle. Trooper Batts is five feet, nine inches tall and at the time of this incident weighed between 190 and 195 pounds. He was 24 years of age as of April 12, 1986.

9. Trooper Batts got out of his Highway Patrol vehicle and approached the plaintiff and his wife and A.L.E. Agents Thornell and Hopkins who were standing outside of the passenger side of the plaintiff's jeep. Trooper Batts asked the agents, "Have we got a problem here?" He conferred briefly with the A.L.E. Agents and then placed the plaintiff under arrest and handcuffed him with his hands behind his back.

10. Trooper Batts and Agent Thornell then escorted the handcuffed plaintiff to the Trooper's patrol car and placed him inside the vehicle on the passenger side.

11. The plaintiff continued to ask the officers why they were doing this to him and complained that the handcuffs were clamped on so tight that they were hurting his wrists. While Agent Thornell and Trooper Batts were engaged in conversation outside the Highway Patrol vehicle, the plaintiff with his hands still cuffed behind his back, opened the door to the patrol vehicle and placed his right foot on the ground and attempted to stand up beside the patrol vehicle again asking the officers why he had been arrested.

12. After the intoxicated plaintiff did not immediately obey an instruction to get back in the patrol vehicle, Trooper Leroy Oglethorp Batts, III drew his standard issue convoy or blackjack and struck the plaintiff about the shoulders, neck and head approximately five times. At the same time, Agent Thornell grabbed the plaintiff by the right wrist and proceeded to bang the handcuffs more tightly closed with his metal flashlight, thereby increasing the pressure to the plaintiff's wrists.

13. Begging the officers not to hurt him anymore, the plaintiff was placed back in the patrol vehicle. Subsequently, the plaintiff was transported by Trooper Batts to the Ayden Police Department where a breathalyzer test was administered resulting in a blood alcohol reading of .11.

14. When the plaintiff's handcuffs were finally removed by Trooper Batts at the command of his supervisor, Sgt. Blackman, the plaintiff's wrists were swollen and the right wrist and arm was swollen to the point that the arm was roughly the same size from the elbow to the hand. The skin on his right wrist was bruised; it was deeply indented where the cuffs had been and the skin was a blue or reddish color and a scab formed subsequently where the cuff had been on his right wrist.

15. As a result of the blows inflicted on the plaintiff by Trooper Batts and Officer Thornton, the plaintiff suffered contusions to his neck and wrist for which he sought medical treatment at the emergency room of the Pitt County Memorial Hospital after he was taken to Ayden for a breathalyzer test.

16. The plaintiff has continued to seek medical treatment for the injury to his right wrist because he has continued to experience intermittent pain and weakness and the dorsal side of his right hand remains numb. He has had particular difficulty during damp or cold weather with his right wrist. The plaintiff is right-handed. The condition of his wrist causes him pain when he must use pliers, pick up furniture or cut fabric with scissors in his work as an upholsterer and there are some tasks he can no longer perform. The plaintiff had no prior problems with his right wrist.

17. There is insufficient expert medical evidence to support a finding of permanent injury to the plaintiff's right wrist.

18. Some of the actions of Trooper Batts and the A.L.E. Agents were observed by Mrs. Janie Haddock, whose front porch was approximately 50 feet from where the incident took place. David Springer, an acquaintance of the plaintiff and his wife, observed the Trooper and Agent Thornell escort the handcuffed plaintiff to the Highway Patrol vehicle from his jeep.

19. The various accounts provided by the law enforcement personnel involved in this matter were significantly contradictory. For instance, Agent Hopkins testified that he and Agent Thornell and Trooper Batts had to wrestle the plaintiff to the ground before they were able to place handcuffs upon him. This account was specifically denied by the plaintiff and his wife and no mention was made of such an episode by

Trooper Batts, Agent Thornell or Grifton Police Officer Robert Jones. The officers also varied widely in their description of the relative contributions of Agent Hopkins and the Grifton Police Officers. Also, Agent Thornell testified that Trooper Batts pulled the plaintiff out of the patrol vehicle with the convoy around the plaintiff's neck while Trooper Batts himself claimed that he pulled the plaintiff out with his fingers in the plaintiff's ears.

20. The contention of law enforcement personnel that the plaintiff was not handcuffed when he was struck by Trooper Batts is directly refuted by the testimony of the plaintiff, his wife and an eyewitness, David Springer. The officer's account is indirectly refuted by or is inconsistent with the testimony of eyewitness Jane Haddock whose observation of the events in question was interrupted on several occasions by her attempts to awaken her husband. Mrs. Haddock observed the arrival of Trooper Batts and his inquiry as to whether or not there was a problem. At this juncture she attempted to awaken her husband again and when she returned to observe the situation, the plaintiff was in the highway patrol car and his wife was "hollering" and hysterical. This behavior of the plaintiff's wife prior to any struggle and before his being struck is consistent with the testimony that he had been handcuffed prior to being placed in the patrol vehicle but is inconsistent with the version offered by Trooper Batts wherein he described a calm, uneventful and voluntary stroll by the plaintiff to the passenger side of the highway patrol vehicle.

21. Trooper Batts' testimony that the plaintiff was struck only on his upper arm and wrist is refuted by the findings of Dr. Roy Graves who examined the plaintiff in the emergency room and noted: "contusions to the neck and wrist" and "multiple areas of ecchymosis over posterior neck and medial left trapezius."

22. Trooper Batts intentionally struck the plaintiff believing that these blows would persuade the intoxicated plaintiff to do as he had been instructed by Trooper Batts. Employing what he alleged to be a defensive technique, Agent Richard Thornell intentionally struck the plaintiff on the wrist with his metal flashlight. Both men believed they were employing reasonable and lawful force to effect an arrest and detention.

Neither intended an unlawful assault. Neither man intended to use excessive or unreasonable force under all the circumstances.

23. The fact of the plaintiff's intoxication which precipitated his being stopped in the first place also reduced his ability to respond quickly and intelligently to instructions.

24. By all accounts the plaintiff and his wife were neither profane nor verbally abusive towards the officers at this time. More importantly, there was no evidence whatsoever that the plaintiff at any time threatened, struck or attempted to strike any of the law enforcement personnel involved. Likewise, there was no evidence that the plaintiff, by exiting the patrol car, was trying to escape—he merely continued his intoxicated inquiry as to why he had been stopped and arrested. Finally, there were no reasonable grounds for belief by the law enforcement personnel that the plaintiff and his wife were armed or desperate people.

25. Considering the physical sizes of the plaintiff and the officers involved, the absence of any hostile or aggressive conduct on his part and the presence of five adult males including a Highway Patrol Officer, two A.L.E. Agents, a Grifton Police Officer and a Grifton Auxiliary Police Officer, the striking of the plaintiff by Trooper Batts and Officer Thornton was not necessary to effect the arrest and detention of the plaintiff or protect the law enforcement personnel involved.

26. The striking of the handcuffed and intoxicated plaintiff for his failure to obey Trooper Batts' instruction to stay seated was unreasonable under all the circumstances and the force employed by Agent Thornell and Trooper Batts was excessive. The excessive use of force by Trooper Batts and Agent Thornell was negligent.

The Industrial Commission concluded that the plaintiff's arrest was legal, that Agents Thornell and Batts "negligently used excessive force resulting in injury and damage to the plaintiff," that these injuries were not intentionally inflicted, and that the plaintiff was not contributorily negligent. The Commission ordered that the plaintiff recover from the defendant $249.00 for medical expenses and $9,000.00 for pain and suffering and partial disability.

The issues presented are I) whether the evidence supports the Commission's finding that defendant's agents used excessive force in arresting the plaintiff; II) whether the Commission's findings support its legal conclusion that plaintiff was injured as a result of defendant's agents' negligent rather than intentional acts; and III) whether the award was excessive.

I

[1] The defendant argues that Trooper Batts and Agent Thornell used reasonable force to bring the plaintiff under control and to affect his arrest. Thus, the defendant excepts to the Commission's findings nos. 24 and 25 which essentially detailed facts showing the defendant's agents used excessive force. "[T]he findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C.G.S. § 143-293 (1987); *Mackey v. North Carolina State Highway Comm.*, 4 N.C. App. 630, 633, 167 S.E.2d 524, 526 (1969). Our review of the record reveals competent evidence to support these findings, and thus we overrule these exceptions.

II

[2] The defendant next argues that since the findings of fact show the defendant's agents intended to strike the plaintiff, no cause of action lies under the Tort Claims Act which provides State liability only for negligent acts. In essence, the defendant asserts that, as a matter of law, the Commission's findings cannot support its conclusions. We review for errors of law "under the same terms and conditions as govern appeals in ordinary civil actions. . . ." N.C.G.S. § 143-293.

The Tort Claims Act, N.C.G.S. § 143-291 et seq. (1987), provides for the State's liability only for the negligent acts or omissions of its employees. *See Phillips v. North Carolina Dept. Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986). "Negligence is a mixed question of fact and of law." *Lowe v. North Carolina Dept. Motor Vehicles*, 244 N.C. 353, 359, 93 S.E.2d 448, 452 (1956). The defendant cites *Jenkins v. North Carolina Dept. Motor Vehicles*, 244 N.C. 560, 563, 94 S.E.2d 577, 580 (1956), for the proposition that the acts described in the Findings cannot constitute negligence since "an intentional act of violence is not a negligent act." The Court in *Jenkins* also stated that " '[n]egligence, a failure to use due care, be it slight or extreme, connotes inadvertence.' " 244 N.C.

at 563-64, 94 S.E.2d at 580 (citation omitted). However, an actor may intend to act in one way, yet inadvertently act in another way. We reject the defendant's argument that its agents' intent to use reasonable force to restrain the plaintiff made it legally impossible for them to negligently exceed the limits of reasonableness. "One who undertakes to do something and does it negligently commits a *negligent* act. . . ." *Mackey*, 4 N.C. App. at 634, 167 S.E.2d at 526 (emphasis in original).

The Commission found as fact that although the defendant's agents intended to violently restrain the plaintiff, they did not intend to use excessive force, but in fact did. Thus the Commission's conclusion that the defendant's agents were negligent in using more force than was necessary, thus injuring the plaintiff, is supported by the findings.

III

[3] The defendant last argues that the award of $9,249.00 was excessive. Of that amount only $249.00 was for medical bills. The remainder was for pain and suffering and partial disability. The amount of damages awarded is a matter within the discretion of the Commission. The Commission's order may not be disturbed unless, in view of the Commission's findings as to the nature and extent of the injury, the award is so large as to shock the conscience. *Brown v. Charlotte-Mecklenburg Board of Education*, 269 N.C. 667, 671, 153 S.E.2d 335, 339 (1967). Here the Commission's findings reflect that the defendant's agents beat the plaintiff about the head and neck and wrist with a blackjack and other weapons resulting in contusions to his neck and wrist. The findings indicate the plaintiff has continued intermittent pain and weakness in his right wrist, and the dorsal side of his right hand remains numb. Also, as a result of the injury the plaintiff is no longer able to perform some tasks in his work as an upholsterer. The plaintiff, who is right handed, has particular difficulty during damp or cold weather with his right wrist, and he experiences wrist pain when using pliers, picking up furniture or cutting fabric in his work. We cannot say as a matter of law that the award shocks the conscience.

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. TONY LEE OAKMAN

No. 8912SC688

(Filed 20 February 1990)

1. **Rape and Allied Offenses § 19 (NCI3d)— taking indecent liberties with minor—sufficiency of evidence**

Testimony by the 13-year-old male victim that someone was feeling on his "private area" permitted the jury reasonably to conclude that the activity concerned the victim's genital area, and his testimony, taken with the remainder of the State's evidence, was clearly sufficient to establish the underlying felony of taking indecent liberties with a child and, *a fortiori*, the offense of first degree burglary.

Am Jur 2d, Infants § 17.5.

2. **Criminal Law § 427 (NCI4th)— defendant's election not to testify—prosecutor's comment not improper**

The prosecutor's comment which merely noted for the jury that the court would instruct them as to the law regarding defendant's election not to testify did not amount to an improper comment on defendant's failure to testify.

Am Jur 2d, Trial § 240.

APPEAL by defendant from judgment entered 16 February 1989 by *Bowen, Wiley F., Judge*, in CUMBERLAND County Superior Court. Heard in the Court of Appeals 6 February 1990.

Defendant was convicted of one count of first degree burglary in violation of N.C. Gen. Stat. § 14-51 and one count of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. The State's evidence at trial tended to establish that at approximately 5:30 a.m. during the night of 11 September 1988, the thirteen-year-old male victim, asleep on the top bunk of his bunkbed, was awakened by an intruder whom the victim testified was "feeling on me . . . [m]y private area." When the victim awoke, the intruder stepped backward, then approached the victim and touched him again. The victim pushed the intruder's hand away, jumped out of bed, and demanded that the touching stop. From the hall light, and from nearby floodlights which shone through the bedroom window, the victim saw the intruder. The intruder

fled, leaving the house through the kitchen door, and the victim followed. The victim saw the intruder get into a "blue Regal" parked in front of the victim's house and speed away from the scene. He recognized the car as belonging to defendant and later identified defendant, age 27, as being the intruder. Although the victim had closed the window and curtains to his bedroom prior to going to bed, both the curtains and the window were open at the time of the crime and a large hole had been cut in the windowscreen.

The State also presented evidence which tended to establish that defendant worked with the victim's cousin, drove a car of the type described by the victim, and that such a car was observed to be parked near the front of the victim's home approximately one hour before the time of the crime. When asked whether he knew the defendant, the victim testified that he had "seen him around [for] close to a year."

Defendant presented no evidence.

From the judgment entered on the jury's verdict of guilty, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Barbara A. Shaw, for the State.

Assistant Public Defender Stephen C. Freedman for defendant-appellant.

WELLS, Judge.

Defendant brings forward two assignments of error challenging the court's denial of his motion to dismiss at the conclusion of the State's evidence and the court's failure to give an instruction, *ex mero motu*, to cure an improper comment of the prosecutor during the State's closing argument to the jury. We find no error.

[1] We first examine whether the trial court erred in denying defendant's motion to dismiss. Defendant contends that the State presented insufficient evidence to take the case to the jury on the charge of taking indecent liberties with a child in that the victim's testimony that someone was "feeling on me. . . . [m]y private area" is too vague and inconclusive to satisfy a reasonable mind beyond a reasonable doubt that an act of indecent liberties occurred. Defendant further contends that, because the State failed

to establish this offense as an underlying felony to first degree burglary, the trial court also erred in failing to dismiss the latter charge. We disagree.

When presented with a motion to dismiss in a criminal action, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985). The evidence must be examined in the light most favorable to the State, and any contradictions or discrepancies are for the jury to resolve and do not warrant dismissal. *Rasor, supra.* When considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. Allison*, 319 N.C. 92, 352 S.E.2d 420 (1987). 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 offense of taking indecent liberties with a child, a felony, is set forth at N.C. Gen. Stat. § 14-202.1 which provides:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

North Carolina retains the common law definition of burglary. Hence, to establish burglary, the State must prove a "breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with [the] intent to commit a felony therein." *State v. Goodman*, 71 N.C. App. 343, 322 S.E.2d 408, *cert. denied*,

313 N.C. 333, 327 S.E.2d 894 (1985). Differing degrees of burglary were unknown at common law. N.C. Gen. Stat. § 14-51 provides in pertinent part:

> There shall be two degrees in the crime of burglary as defined at the common law. If . . . any person is in the actual occupation of any part of [the] dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree.

Measuring the State's evidence against these standards, we conclude that the State presented sufficient evidence of the crimes charged to withstand defendant's motion to dismiss. The victim's testimony that someone was feeling on his "private area" permitted the jury to reasonably conclude that the activity concerned the victim's genital area. This testimony, taken with the remainder of the State's evidence, is clearly sufficient to establish the underlying felony of taking indecent liberties with a child and, *a fortiori*, the offense of first degree burglary. This assignment of error is overruled.

[2] We next address defendant's contention that he was denied a fair trial in that the prosecutor improperly commented on defendant's election not to testify, and the trial court failed to give a curative instruction to the jury, *ex mero motu*, to rectify the alleged impropriety.

To place this issue in the appropriate context, the record reveals that the following occurred during the prosecutor's closing argument to the jury:

> [PROSECUTOR]: Folks, in a case like this, the Judge is going to instruct you on a number of different things. . . . He is going to be talking to you about credibility of witnesses. He is going to be talking to you about the affect [sic] of the Defendant's decision not to testify, the fact that you can't hold it against him that he didn't get up there and tell you what you usually think of one side and then the other side telling you . . . their story. You cannot consider—
>
> [DEFENSE ATTORNEY]: Objection[.]
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: The Judge is going to instruct you of the affect [sic] of the Defendant's decision not to testify before you folks.

Defendant made no further objection, requested no curative instruction, and the prosecutor proceeded with the State's closing argument. Following defendant's closing argument, the court stated its charge to the jury which included the following instruction:

> The Defendant has not testified. The Defendant in a criminal case is neither expected or [sic] required to take the witness stand on his own behalf. His right not to take the stand is guaranteed to him by both the Federal and State constitution [sic]. The Defendant's right not to take the stand is guaranteed to him by law.
>
> The same law also assures him that his decision not to testify creates no presumption against him.
>
> Therefore, I instruct you that the Defendant's silence is not to influence your decision in any way. It must take no part in your deliberation. You must not draw any inference or conclusion from his silence, nor should you discuss the matter with your fellow jurors.

A prosecutor may not comment on a defendant's election not to testify, and a court's failure to promptly give a curative instruction where such comment is made is generally held to be prejudicial error. *State v. Oates*, 65 N.C. App. 112, 308 S.E.2d 507 (1983) (and cases cited therein). An exception is made, however, where the prosecutor's reference to a defendant's decision not to testify is "so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the [defendant] to testify." *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

In the present case, the prosecutor's comment merely noted for the jury, albeit somewhat inartfully, that the court would instruct them as to the law regarding defendant's election not to testify. This the court did. While the prosecutor's comment was arguably improper, we conclude that it is unlikely the jury in this case inferred guilt from defendant's election not to testify.

We also note that defendant failed to request a curative instruction at the time of his objection. Although the better practice in such circumstances is for the trial court to promptly intervene and give a curative instruction to rectify any potential prejudice resulting from the improper reference, we conclude that the prosecutor's comment in this case "was not so grossly improper as to require the trial court to act *ex mero motu.*" *Randolph, supra;*

see also State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383 (1989) (and cases cited therein).

No error.

Judges COZORT and LEWIS concur.

JANICE BILLMAN WILLIAMS v. THOMAS E. (JOCK) TYSINGER AND WIFE, PEGGY J. TYSINGER

No. 8919SC3

(Filed 20 February 1990)

Animals § 2.2 (NCI3d)— child kicked by horse—no showing of horse's prior viciousness

In an action to recover for injuries sustained by plaintiff's minor child when he was kicked in the face by a horse owned by defendants, the trial court properly directed verdict for defendants where plaintiff failed to offer any evidence of defendants' prior knowledge of the horse's viciousness or any evidence from which such prior knowledge could be inferred.

Am Jur 2d, Animals §§ 86, 100.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from judgment entered 30 August 1988 by *Judge William Z. Wood* in RANDOLPH County Superior Court. Heard in the Court of Appeals 24 August 1989.

Ottway Burton, P.A., by Ottway Burton, for plaintiff-appellant.

Henson Henson Bayliss & Teague, by Jack B. Bayliss, Jr. and Lawrence J. D'Amelio, III, for defendant-appellees.

PARKER, Judge.

Plaintiff Janice Williams instituted this action seeking medical expenses resulting from personal injuries allegedly sustained by her minor child when he was kicked in the face by a horse owned by defendants Thomas E. and Peggy J. Tysinger. At trial the judge granted defendants' motion for a directed verdict at the close of plaintiff's evidence and entered judgment thereon.

On appeal, plaintiff argues that the evidence, taken in the light most favorable to her, raises a jury issue as to whether defendants violated a duty to their business invitees by inviting the children to play with the horse without warning of the danger of which they had actual or constructive knowledge. Defendants contend that the directed verdict was proper because plaintiff's evidence failed to establish that defendants had prior knowledge, actual or constructive, that their horse had a dangerous or vicious propensity.

On appellate review of a directed verdict all evidence must be considered in the light most favorable to the nonmovant. *Snider v. Dickens*, 293 N.C. 356, 357, 237 S.E.2d 832, 833 (1977). Reviewing the evidence by this standard, we hold that the trial judge did not err.

Plaintiff's evidence at trial tended to show the following. On 28 May 1983 plaintiff, her husband, and their two sons went to defendants' house to inquire about some lumber which the Williamses had ordered. Mr. Tysinger owned a sawmill located a few miles from defendants' home in Randolph County, North Carolina, and regularly received customers at his home where he also had his office for the lumber business. The children waited in the car while plaintiff and her husband conversed with defendants on the porch of their house. After about ten minutes, plaintiff had the boys get out of the car. Mr. Tysinger suggested that the boys go around to the back of the house to play with the horse and cow pastured there. The horse and cow were kept in a field surrounded by a wooden board fence approximately four feet high. Plaintiff asked whether it was safe for the children to play with the animals since the children had never been around such animals before. Mrs. Tysinger stated that the horse and cow had been raised around her children and that they would not hurt anyone. The children then went to the back yard. One of the boys was eleven; the other was nine. In a few minutes plaintiff heard her older son, Daniel, yell that her younger son, Matthew Jonathan (herein "Jimmy"), had been hurt. She ran around to the pasture and found Jimmy lying on his back in the field.

Daniel testified that Jimmy had been inside the fence petting the horse. As Daniel attempted to climb through the fence into the pasture, the horse became scared and reared up, kicking Jimmy. Jimmy flew through the air and landed on his back. Jimmy was taken by ambulance to Moses Cone Memorial Hospital, kept over-

night for observation of a concussion, and released the next day. Jimmy also sustained permanent dental injury.

In North Carolina the owner is not liable for injury resulting from the behavior of a domestic animal unless the owner had prior knowledge of the animal's dangerousness or unless there is evidence showing that a reasonable person would have had such knowledge. *See Sanders v. Davis*, 25 N.C. App. 186, 189, 212 S.E.2d 554, 556 (1975); *Miller v. Snipes*, 12 N.C. App. 342, 345-46, 183 S.E.2d 270, 272-73, *cert. denied*, 279 N.C. 619, 184 S.E.2d 883 (1971).

The rule governing liability of the owner of an animal that has injured someone has been stated as follows:

> The liability of an owner for injuries committed by domestic animals, such as dogs, horses and mules, depends upon two essential facts:
>
> 1. The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in the law as possessing a "vicious propensity."
>
> 2. The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal.

Rector v. Coal Co., 192 N.C. 804, 807, 136 S.E. 113, 115 (1926), *quoted in Griner v. Smith*, 43 N.C. App. 400, 406-07, 259 S.E.2d 383, 388 (1979). Applying this standard in *Swain v. Tillett*, 269 N.C. 46, 152 S.E.2d 297 (1967), our Supreme Court ruled that the gravamen of the action is not negligence, but the wrongful keeping of the animal with knowledge of its viciousness. *Id.* at 51, 152 S.E.2d at 301.

The prior behavior of an animal is admissible to show both the animal's vicious propensities and the owner's actual or constructive knowledge of such propensities, even though the behavior falls short of actual injury. *See Hill v. Moseley*, 220 N.C. 485, 488-89, 17 S.E.2d 676, 678-79 (1941). Additionally, the animal's reputation, while inadmissible to show directly the animal's vicious propensities, is admissible to show the owner's knowledge of the alleged propensity and to corroborate the testimony of those who have sworn to the animal's viciousness. *Id.* at 488, 17 S.E.2d at 678.

In the present case plaintiff failed to offer any evidence of defendants' prior knowledge of the horse's viciousness or any evidence from which such prior knowledge could be inferred. Plain-

tiff did offer evidence showing that the horse charged and struck out with its hooves at both the ambulance crew and Mr. Tysinger while Jimmy's injuries were being treated in the pasture. While this evidence of subsequent vicious behavior by the horse is corroborative of the horse's propensity to engage in the conduct which injured Jimmy, as a subsequent act it was not probative on the issue of defendants' knowledge prior to Jimmy's injury. The only evidence presented by plaintiff relating to defendants' prior knowledge of the horse's nature was Mrs. Tysinger's statement that the horse was raised around her children and grandchildren and that it was safe for plaintiff's children also. This statement tended to show that defendants believed the animal was well-disposed towards children.

Although plaintiff alleges in her complaint that defendants failed to use due care in their control, management and restraint of the horse, the record is devoid of any evidence to support this allegation. The evidence showed that the horse remained at all times in the pasture which was surrounded by a wooden rail fence approximately four feet high. Hence defendants' alleged liability is not premised on their negligent failure to restrain or manage the horse but on their keeping of an animal possessing a "vicious propensity." In this situation, liability, if any, is dependent upon the owner's or keeper's knowledge of the animal's dangerousness. *See Swain v. Tillett*, 269 N.C. at 51, 152 S.E.2d at 301.

Plaintiff having failed to produce evidence of defendants' knowledge of the horse's vicious propensities or evidence that a reasonable person would have had such knowledge, defendants were entitled to a directed verdict.

No error.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Plaintiff's action does not fit into the "keeping a dangerous animal" niche that the majority confines it to. The main thrust of the complaint, her evidence, and her argument here is that defendants were negligent in inviting and encouraging inexperi-

enced children to go into the horse lot by themselves and play with the animal. In my view, however tame and mild the animal may have appeared to the defendants, gratuitously encouraging young children unfamiliar with large animals to go in a lot and play with a horse by themselves is evidence of negligence, and the jury should have been permitted to consider it.

JIMMY C. BRITT, PLAINTIFF v. AMERICAN HOIST & DERRICK COMPANY AND RAY ALDEN, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. MILLER BUILDING CORPORATION, THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF v. GOODYEAR MECHANICAL CONTRACTING COMPANY, INCORPORATED, FOURTH-PARTY DEFENDANT

No. 895SC432

(Filed 20 February 1990)

1. **Appeal and Error § 6.2 (NCI3d)— summary judgment on negligence claim appealable—summary judgment on indemnity claim not appealable**

Defendant AmHoist could properly appeal summary judgment on its negligence claim against third party defendant Miller, though the appeal was interlocutory, since in the claim appealed, third party defendant Miller alleged plaintiff's contributory negligence; in the remaining claim defendant alleged plaintiff's contributory negligence, and these common allegations of negligence presented common factual issues which should be determined by the same jury. However, the trial court's entry of summary judgment for third party defendant on the indemnity claim did not affect a substantial right, as there existed no common factual issues in the claim determined and the claim remaining, since indemnity was not an issue in plaintiff's claim against defendant AmHoist.

Am Jur 2d, Appeal and Error § 104.

2. **Negligence § 30.1 (NCI3d)— injuries on construction job—summary judgment for builder proper**

In an action to recover for injuries sustained on a construction job, the trial court properly entered summary judgment for third party defendant builder on the issue of negligence where the builder offered evidence tending to show that the

incident giving rise to the injury could have been caused by the negligence of an employee of defendant AmHoist, the plaintiff, or an employee of a subcontractor; none of the builder's employees were in the vicinity at the time of the incident or affected the incident in any manner; defendant builder had not trained plaintiff who worked for the subcontractor; and defendant builder was not involved in directing the subcontractor's operations.

Am Jur 2d, Building and Construction Contracts §§ 132, 134, 144.

3. Master and Servant § 33 (NCI3d)— negligence of subcontractor—no imputation to contractor

The negligence of a subcontractor and its employees could not be imputed to the contractor where there was no evidence that the contractor controlled the subcontractor's operations.

Am Jur 2d, Building and Construction Contracts §§ 132, 134, 144.

APPEAL by defendants and third-party plaintiffs American Hoist & Derrick Company and Ray Alden from order entered 7 December 1988 by *Judge James D. Llewellyn* in NEW HANOVER Superior Court. Heard in the Court of Appeals 18 October 1989.

Anderson, Cox, Collier & Ennis, by Henry L. Anderson, Jr. and R. Alfred Patrick, for defendants and third-party plaintiff-appellants American Hoist and Derrick Company and Ray Alden.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for third-party defendant and fourth-party plaintiff-appellee Miller Building Corporation.

GREENE, Judge.

This appeal arises out of a civil action in which plaintiff Jimmy C. Britt (Britt) sought damages from defendants American Hoist & Derrick Company (AmHoist) and Ray Alden (Alden) for personal injuries allegedly sustained from defendants' negligence. The defendants brought Miller Building Corporation (Miller) into the action as a third-party defendant, and Miller brought Goodyear Mechanical Contracting Company, Inc. (Goodyear) into the action as a fourth-party defendant. The trial court granted the motions for summary judgment of Miller and Goodyear. The defendants

AmHoist and Alden appeal the grant of summary judgment in favor of Miller.

AmHoist entered into a contract with Miller to convert a building into an AmHoist manufacturing facility. Goodyear was a subcontractor of Miller. On 15 October 1985 Britt was employed by Goodyear to work at the AmHoist facility being converted by Miller. Britt and another Goodyear employee, Michael A. Burton, were operating a manlift while another Goodyear employee, Dennis Bossinger, served as a lookout from the ground nearby. In the same area where Britt and Burton were elevated in the manlift, an AmHoist employee, Alden, was operating a pendant crane. The crane struck the manlift basket allegedly causing injuries to Britt.

After being sued by Britt, AmHoist asserted a third-party action for contribution and indemnity against Miller, claiming that Miller was either negligent in its supervision or operation of the work site or that a provision of the construction contract between AmHoist and Miller required Miller to indemnify AmHoist for any liability.

The issues presented are: I) whether this interlocutory appeal involves potential harm to a substantial right of the appellants as to (A) the negligence claim or (B) the indemnity claim; and II) whether an issue of material fact as to Miller's negligence was presented such as to preclude the trial court's grant of summary judgment for Miller.

I

A summary judgment which does not dispose of the case is interlocutory, and immediate appeal lies only in two events. "First, if there has been a final disposition of at least one but fewer than all claims, the final disposition of those claims may be appealed if the trial judge in addition certifies that there is no just reason to delay the appeal. N.C.G.S. § 1A-1, Rule 54(b) (1988)." *Davidson v. Knauff Ins. Co.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490, *review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). Since the trial judge here did not provide certification, we look to the second avenue of appeal which arises out of the pertinent provisions of § 1-277 (1983) and § 7A-27(b) (1986). "Interlocutory appeals are most commonly allowed under Sections 1-277 and 7A-27(d) if delaying the appeal will prejudice any substantial rights." 93 N.C. App. at 24,

376 S.E.2d at 491. We now must determine whether delaying the appeal here will prejudice any substantial rights.

A

[1] Delaying the appeal of the denial of AmHoist's claim against Miller affects a substantial right "*if* there are overlapping factual issues between the claim determined [here the AmHoist claim against Miller] and any claims which have not yet been determined [the Britt claim against AmHoist]." 93 N.C. App. at 26, 376 S.E.2d at 492. In the claim appealed Miller alleges contributory negligence of Britt, and in the remaining claim AmHoist alleges the contributory negligence of Britt. These common allegations of negligence present common factual issues and should be determined by the same jury. Otherwise there exists the possibility that different juries addressing the same issue would reach inconsistent verdicts. *See Green v. Duke Power Co*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

B

Our finding that the negligence claim is immediately appealable does not mandate that all other issues in the claim determined are appealable. *See Davidson*, 93 N.C. App. at 27, 376 S.E.2d at 492. Each issue should be determined on its own merits. *Id.* Therefore, we address separately whether the trial court's entry of summary judgment for Miller on the indemnity claim affects a substantial right. We determine there exist no common factual issues in the claim determined and the claim remaining since indemnity is not an issue in Britt's claim against AmHoist. *See Cook v. Export Leaf Tobacco Co.*, 47 N.C. App. 187, 266 S.E.2d 754 (1980) (appeal of indemnity issue does not ripen until conclusion of underlying action).

II

[2] We must now determine whether summary judgment was properly granted on the issue of Miller's negligence. AmHoist argues that evidence was forecast from which a jury could find Miller either engaged in a negligent act causing the incident at issue or may be found liable as a result of negligence imputed to it from Goodyear. The burden of establishing the lack of a genuine issue of material fact lies upon the movant. *Boyce v. Meade*, 71 N.C. App. 592, 593, 322 S.E.2d 605, 607 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E.2d 390 (1985). The movant, Miller, produced evidence tending to show that the incident could have been caused

by the negligence of either AmHoist employee Alden, the plaintiff, or by another of Goodyear's employees. Furthermore, Miller produced evidence tending to show that none of Miller's employees were in the vicinity at the time of the incident or affected the incident in any manner. Miller also showed that it did not train Britt and that it was not involved in directing Goodyear's operations. Since "movant's forecast, considered alone . . . [is] such as to establish his right to judgment as a matter of law," *Caldwell v. Deese*, 288 N.C. 375, 379, 218 S.E.2d 379, 381-82 (1975), the non-moving party "must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980). Since AmHoist produced no evidence of any negligent act or omission of Miller, summary judgment for Miller as to Miller's actual negligence was properly granted.

[3] Summary judgment was also properly granted as to potential liability of Miller imputed by law. As a matter of law, Miller cannot be held liable for the negligence of an employee of its subcontractor Goodyear, if there is no evidence of Miller's control of Goodyear's operations. *See Rivenbark v. Atlantic States Const. Co.*, 14 N.C. App. 609, 188 S.E.2d 747, *cert. denied*, 281 N.C. 623, 190 S.E.2d 471 (1972). Here Miller produced evidence that it was not in control of the subcontractor's activities, and thus the subcontractor was independent. Since AmHoist did not come forward with evidence tending to prove that Miller controlled Goodyear and its employees, the negligence of Goodyear or its employees could not be imputed to Miller.

The appeal as to the enforceability of the indemnity clause is dismissed, and the summary judgment on Miller's negligence is affirmed.

Affirmed in part, dismissed in part.

Judges EAGLES and PARKER concur.

WILLIAM Z. McCABE, EXECUTOR OF THE ESTATE OF LOLA B. McCABE, DECEASED v. DONALD M. DAWKINS AND PITTMAN, PITTMAN AND DAWKINS, P.A.

No. 883SC1377

(Filed 20 February 1990)

Election of Remedies § 1.1 (NCI3d)— declaratory judgment action to construe will—malpractice action against attorney—no election of remedies

Settlement of a declaratory judgment action to construe a will was not an election of remedies, and plaintiff could therefore sue an attorney for negligent will drafting.

Am Jur 2d, Attorneys at Law § 236; Election of Remedies §§ 19, 25.

APPEAL by plaintiff from order entered 30 August 1988 by *Judge Richard D. Boner* in CARTERET County Superior Court. Heard in the Court of Appeals 23 August 1989.

McLeod, Senter & Winesette, P.A., by William L. Senter, for plaintiff-appellant.

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

GREENE, Judge.

Plaintiff-executor appeals the trial court's grant of summary judgment for defendants in his action against defendants for legal malpractice. Plaintiff is the executor of a will which individual defendant attorney Donald M. Dawkins ("Dawkins") drafted. The will purported to create a trust, but omitted a granting clause to fund the trust. If the trust were valid, the trust would distribute assets to a group of beneficiaries which would include unborn and unnamed beneficiaries who are different from the group of beneficiaries who would take if the trust were not valid. Both groups of beneficiaries claimed assets included in the will. To determine validity of the trust and distribution of property, plaintiff brought a declaratory judgment action in which potential beneficiaries were named as parties. The potential beneficiaries settled the dispute and entered a consent judgment to distribute the assets. Plaintiff then brought this suit against individual defendant and his law

firm, alleging legal malpractice in drafting. Plaintiff sought damages for expenses incurred in bringing the declaratory judgment action, and for attorneys fees in the malpractice action. Defendants answered plaintiff's complaint, asserting the doctrine of election of remedies as a defense to plaintiff's claim. Defendants moved for summary judgment, and the trial court granted judgment for defendants based on the settlement agreement and consent judgment to distribute the assets.

The sole issue presented on appeal is whether settlement of a declaratory judgment action to construe a will is an election of remedies so that plaintiff cannot sue an attorney for negligent will drafting.

Although the court granted summary judgment for defendants, the parties do not argue that any issue of fact is in dispute in this case. Our only inquiry is whether defendants are entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983).

Generally, a plaintiff is deemed to have made an election of remedies and therefore estopped from suing a second defendant only if he has sought and obtained final judgment against a first defendant *and* the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action. *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687-88 (1989). The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong. *Lamb*, at 685, 375 S.E.2d at 687 (citation omitted). Accordingly, we must determine whether the resolution of the declaratory judgment action granted plaintiff relief which is inconsistent with the malpractice action against these defendants. Settlement of or judgment on the first action is inconsistent with suit in the second action when the relief demanded in the second action is a continuation of relief sought in the first action, *Stewart v. Herring*, 80 N.C. App. 529, 531, 342 S.E.2d 566, 567 (1986); *Douglas v. Parks*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 86, *review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984); *Davis v. Hargett*, 244 N.C. 157, 163, 92 S.E.2d 782, 786 (1956), or if relief sought in the first action can redress the damage claimed in the second action. *Pritchard v. Williams*, 175 N.C. 319, 322, 95 S.E. 570, 571 (1918) (the court's power to determine the existence and terms of a testamentary trust for remaindermen in the first action does not include the authority or power to award possession of the trust property, as requested in the second action). A second

action is a continuation of the first action when plaintiff seeks to recover some alleged deficiency in the settlement or judgment of the first action. *Stewart*, at 531, 342 S.E.2d at 567; *Douglas*, at 498-99, 315 S.E.2d at 86; *Davis*, at 163, 92 S.E.2d at 786. If plaintiff accepts settlement, or judgment is rendered on his demand in the first action, such acceptance or judgment is a *final* redress of that action, regardless of whether the amount of relief is what plaintiff requested. *Stewart*, at 531, 342 S.E.2d at 567, *Douglas*, *Davis*, at 163, 92 S.E.2d at 786.

Relief rendered by a record court in a declaratory judgment action has the "force and effect of a final judgment . . ." N.C.G.S. § 1-253 (1983). The nature of the relief is a declaration of "rights, status, and other legal relations [regardless of], whether . . . further relief is or could be claimed." *Id.* Declaratory judgment affords the appropriate procedure to "alleviat[e] uncertainty in the interpretation of written instruments" and to clarify litigation associated with an actual controversy. *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, 61 N.C. App. 544, 547, 300 S.E.2d 877, 879, *aff'd*, 310 N.C. 471, 312 S.E.2d 426 (1984). The essential distinction between a declaratory judgment action and any other action for relief is that a declaratory judgment action may be maintained without actual wrong or loss as its basis. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 494, 163 S.E.2d 279, 282 (citation omitted), *reversed on other grounds*, 275 N.C. 189, 166 S.E.2d 63 (1969). A declaratory judgment cause of action did not exist at common law because common law only redressed private wrongs and crimes. *Id.*, at 495, 163 S.E.2d at 282.

The tort of professional malpractice provides monetary relief for negligent rendering of professional services, in this case, legal services, which proximately causes damage to a client. *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). Damage claimed may take the form of attorney's fees incurred in a previous action, if the damages result from a tortious act of the present defendant-attorney. *See* 22 Am. Jur. 2d §§ 618-620 (2d ed. 1988); *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F.Supp. 64, 110 (D.C.S.C.), *aff'd without opinion*, 644 F.2d 877 (1981).

The relief from ambiguity that the estate received in the declaratory judgment, a clarification of the will, is consistent with the relief requested in this malpractice action against the attorney alleged to be negligent in drafting the very agreement on which

plaintiff had to bring a declaratory judgment action. In fact, the expenses which the estate incurred in obtaining the declaratory relief, the sole relief sought in the malpractice action, could not be recovered from the attorneys by the estate in the declaratory judgment action. The expenses can be recovered, if at all, only in this malpractice action. It is consistent first to allow the parties interested in the will to resolve the declaratory judgment action and then to allow the estate to pursue reimbursement for the expenses caused by that action.

Therefore, we conclude defendant was not entitled to summary judgment and plaintiff is free to pursue his malpractice claim against defendant on behalf of the estate.

Vacated and remanded.

Judges JOHNSON and EAGLES concur.

PHYLLIS JOHNSON, ADMINISTRATRIX OF THE ESTATE OF FREDERIC NORMAN JOHNSON, PLAINTIFF v. RAYFIELD SMITH, DEFENDANT

No. 8914SC292

(Filed 20 February 1990)

Judgments § 36 (NCI3d)— defensive pleading of collateral estoppel— mutuality of estoppel not required

The trial court in a wrongful death action properly found that the pleading of collateral estoppel in bar of plaintiff's claims was a defensive use, and mutuality of estoppel was therefore not required where defendant was a party in the prior action, but plaintiff took a voluntary dismissal without prejudice as to him; though defendant was technically not a party when the judgment in the first action was rendered, his negligence was a critical issue in that lawsuit; likewise, the issue of plaintiff's intestate's contributory negligence was critical to a determination of the automobile accident's proximate cause; both of those issues were fully litigated; both were decided by a jury; no appeal from the judgment in the first action was perfected, and it constituted a final judgment on the liability of defendant and, derivatively, of his em-

ployers; and plaintiff attempted to reopen exactly the issues which were closed by the prior action.

Am Jur 2d, Judgments §§ 521-523.

APPEAL by plaintiff from Order of *Judge Howard E. Manning, Jr.*, entered 2 December 1988 in DURHAM County Superior Court. Heard in the Court of Appeals 21 September 1989.

Michael E. Mauney; and Charles Darsie for plaintiff appellant.

Newsom, Graham, Hedrick, Bryson and Kennon, by E. C. Bryson, Jr., Joel M. Craig and Mark E. Anderson, for defendant appellee.

COZORT, Judge.

Plaintiff appeals from an Order granting defendant's motion for summary judgment and denying plaintiff's motion for judgment on the pleadings or, in the alternative, partial summary judgment. We affirm the trial court's order.

The case below involves two legal actions. In both, the plaintiff alleged that defendant Rayfield Smith caused the wrongful death of plaintiff's intestate, Frederick Johnson.

In the first action, No. 85CVS1790, plaintiff sued Rayfield Smith, J. M. Tull Industries, Inc., and Ryder Truck Rentals, Inc. Smith was the driver of an eighteen-wheel truck (owned by Ryder and leased for use by J. M. Tull) that collided with a car driven by plaintiff's intestate. Plaintiff alleged that Smith's negligent operation of the truck caused the accident. In their answer the defendants pleaded contributory negligence as a bar to plaintiff's recovery of damages.

During trial the plaintiff took a voluntary dismissal without prejudice as to defendant Rayfield Smith. The judge submitted three issues to the jury and instructed them as follows:

> Issue 1. Was the death of Fredrick Norman Johnson proximately caused by the negligence of the driver, Rayfield Smith and the defendants J. M. Tull Industries Incorporated and Ryder Truck Rental Incorporated[?] In other words, should you find negligence on the part of Rayfield Smith, that negligence, as a matter of law, will be laid at the door of the defendants J. M. Tull Industries and Ryder Truck Rental Incorporated. . . . [Issue 2] Did Fredrick Norman Johnson by

> his own negligence contribute to his death[?]. . . . [Issue 3] [W]hat amount of damages is Phyllis Johnson, as the Administratrix of the Estate of Fredrick Norman Johnson the deceased, [entitled to recover] by reason of the death of Fredrick Norman Johnson[?]

The judge further instructed the jurors that an answer of yes to the first and second issues "would become your verdict and would end the lawsuit and you would not consider the third issue." The jury found Smith negligent and Johnson contributorily negligent.

On 20 May 1988, plaintiff initiated the second legal action (No. 88CVS1708), the case below. Rayfield Smith was named as the sole defendant; the allegations in the second action are otherwise virtually identical to those in the first. In his answer the defendant pleaded the judgment in case No. 85CVS1790 as a bar to plaintiff's claims.

On 3 October 1988, the plaintiff moved for judgment on the pleadings or for partial summary judgment. On 19 October 1988, the defendant moved for summary judgment. During the hearing on those motions, the trial court received amended pleadings, briefs, arguments from counsel, and affidavits submitted by the defendant. After the hearing, the court considered additional written arguments. On 2 December 1988, in granting summary judgment, the court found "specifically that the pleading of collateral estoppel in bar of the plaintiff's claims . . . is a defensive use as contemplated by the *McInnis v. Hall* decision."

The sole question presented on appeal is whether the trial court erred in its application of collateral estoppel.

Collateral estoppel, also known as issue preclusion, is rooted in respect for the finality of judgments and the need for judicial economy. Collateral estoppel is not concerned with whether an issue was correctly decided. It is appropriately applied when the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). Where a litigant seeks to assert collateral estoppel defensively, North Carolina no longer requires mutuality of estoppel. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). In other words, the litigant invoking collateral estoppel need not have been a party to or in privity with a party in the first lawsuit "as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action." *Id.* at 432, 349 S.E.2d at 559.

The plaintiff contends that the defendant seeks to put collateral estoppel to an offensive use and that "to allow the defendant Smith to use collateral estoppel on an issue, contributory negligence, on which he has the burden of pleading and the burden of proof" would be contrary to *McInnis*. We find no support for plaintiff's argument in the procedural facts of the case below.

Defensive use of collateral estoppel "means that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense." Annotation, *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R. 3d 1044, 1048 (1970). While defendant Rayfield Smith was not, in a technical sense, a party when the judgment in the first action was rendered, his negligence was a critical issue in that lawsuit. Likewise, the issue of Norman Johnson's contributory negligence was critical to a determination of the accident's proximate cause. Both of those issues were fully litigated; both were decided by a jury. No appeal from the judgment in the first action was perfected. It constituted a final judgment on the liability of Smith and, derivatively, of his employers.

In the case below the plaintiff attempted to reopen exactly the issues that were closed by case No. 85CVS1790. To bar the plaintiff's claims the defendant set up collateral estoppel, an affirmative defense which must be pleaded or lost. In these circumstances, the defendant's use of collateral estoppel was both defensive and dispositive.

The trial court's order of 2 December 1988 is

Affirmed.

Judges PHILLIPS and LEWIS concur.

DOROTHY L. M. POTTER v. THE HOMESTEAD PRESERVATION ASSOCIATION, HERMAN I. BRETAN, AND WILLIAM BRETAN

No. 8924SC494

(Filed 6 March 1990)

1. **Limitation of Actions § 4.3 (NCI3d)— breach of contract action—time of accrual—action not barred by statute of limitations**

Plaintiff's action for breach of contract was not barred by the three-year statute of limitations where the evidence showed without contradiction that it was not until 27 August 1984 that plaintiff was notified by one defendant that her association with defendants had been terminated; this suit was filed on 26 August 1987; and plaintiff's cause of action did not accrue on 31 December 1983 when she refused to accept one defendant's undocumented "accounting" of the sale proceeds from a tract of land belonging to the parties' partnership.

Am Jur 2d, Limitation of Actions §§ 126, 127.

2. **Contracts § 29.2 (NCI3d)— breach of contract—lost profits from sale of land—sufficiency of evidence**

The evidence in an action for breach of contract was sufficient to support an award of $12,500 for lost profits from the sale of a tract of land where the evidence tended to show that plaintiff and defendants were to split profits from the sale evenly; the property was sold for $260,000; a profit of at least $30,000 remained for division if all of the deductions claimed were authorized; and there was evidence that $93,000 in expenses was not authorized.

Am Jur 2d, Damages § 913.

3. Quasi Contracts and Restitution § 1 (NCI3d)— real estate management services rendered—sufficiency of evidence to support award

Evidence was sufficient to support an award of $110,000 for services rendered by plaintiff in managing, supervising, looking after, improving, and promoting a 700-acre tract of land and defendant association for six or seven months each year for thirteen years.

Am Jur 2d, Damages §§ 32, 56; Restitution and Implied Contracts § 166.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiff and defendants from judgment entered 22 December 1988 by *Briggs, Judge*, in YANCEY County Superior Court. Heard in the Court of Appeals 8 November 1989.

Plaintiff, a seventy-six-year-old widow, brought this action to recover of the individual defendants (and the corporate defendant, which they allegedly controlled and acted through) for breaching their contract to buy and develop as equal partners two tracts of real property in Yancey County. Several theories for recovery were alleged, including *quantum meruit*, for the value of her services in discovering, managing and developing the two tracts. Following a trial in which only the plaintiff offered evidence and defendant The Homestead Preservation Association, the legal titleholder of one tract, was eliminated by a directed verdict, the jury answered the issues against the individual defendants as follows:

1. Did the plaintiff, Dorothy L. M. Potter, and the defendants, William Bretan and Herman Bretan, enter into a contract whereby plaintiff Dorothy L. M. Potter was to receive one-fourth (¼) of the net profits from the sale of the 400-acre tract of land?

   ANSWER: Yes

2. Did the defendants Herman Bretan and William Bretan breach said contract?

   ANSWER: Yes

3. What amount is plaintiff, Dorothy L. M. Potter, entitled to receive from defendants William Bretan and Herman Bretan for said breach?

   ANSWER: $12,500

4. Did the plaintiff, Dorothy L. M. Potter, render valuable services to the defendants, William Bretan and Herman Bretan relative to the 700-acre tract of land?

   ANSWER: Yes

5. What amount is the plaintiff, Dorothy L. M. Potter, entitled to recover from the defendants William Bretan and Herman Bretan?

   ANSWER: $200,000.00

Except for reducing the damages awarded by Issue 5 to $110,000, the trial court denied defendants' motions concerning the verdict and entered judgment thereon.

Plaintiff's evidence, the sufficiency of which is determinative of the appeal, was to the following effect: Plaintiff, a Florida real estate agent, has spent the summers in Yancey County since 1956. Herman Bretan, a Florida lawyer and friend who had handled her late husband's estate, prepared her will, and visited in her home asked her to let him know if she found any good property in Yancey County for sale. In the fall of 1970 plaintiff discovered two tracts of land in Yancey County that were for sale; one tract of about 400 acres was relatively level, the other, about 700 acres, was rough and hilly. Plaintiff negotiated a price of $80,000 for the larger tract and $85,000 for the smaller one and notified Herman Bretan. A few months later she, Herman Bretan, William Bretan—his brother and a Florida real estate agent and businessman—and Milton Wind, a Florida investor obtained by Herman Bretan, agreed to purchase and develop both tracts on a partnership basis with each having a one-fourth interest in the property and the profits from its sale. Each partner had separate responsibilities: Mr. Wind was to put up the money needed; Herman Bretan was to handle "the legal part"; William Bretan was to use his sales force to locate prospective buyers of lots or memberships; and plaintiff was to look after the property, maintain, improve and show it, and interest people in buying lots or memberships. When the purchase was made on 15 April 1971, the deeds were put in the name of the Caisse

Corporation, a Florida company defendant Herman Bretan said was his "holding corporation."

In regard to the 400-acre tract plaintiff generally looked after it, kept people from cutting timber or digging roots on it, and cut out some home sites. The tract was damaged by a flood in November 1977 and plaintiff supervised its restoration. According to William Bretan, the tract was sold in 1983 for $260,000, though earlier he had obtained a $400,000 offer that fell through when the financing it was contingent upon was not granted. In a meeting with plaintiff and Wind on 31 December 1983 he produced a hand-written slip of paper that undertook to account for the $260,000 sale proceeds as follows:

Mortgage Payoff	$52,000
Repayment to Herman Bretan	$68,000
Restoration of Guest House	$35,000
Timber Cruise	$10,000
Finders Fee to William Bretan	$25,000
War Chest (Slush Fund)	$40,000

Neither plaintiff nor Wind accepted this undocumented and unexplained accounting, because Herman Bretan, though expected, was not there and they wanted him to explain, *inter alia*, the "repayment" to him, since they knew of no payment that he had made; whether the repayment included his share of the profit; the "finders fee" paid William Bretan and the war chest or slush fund disbursement. Plaintiff attempted to contact Herman Bretan several times during the following months but without success and he never explained any of the deductions or accounted to her for any of the disbursements.

The 700-acre tract was handled differently. In 1971 Herman Bretan formed a non-profit North Carolina corporation, The Homestead Preservation Association, and the property was deeded to it by the Caisse Corporation. They agreed to divide the tract into 100 single acre circular lots and leave the rest of the property for roads and common ground. Proceeds from the sale of lots and memberships were to be deposited into an account denominated the "Dorothy Potter Trust Account." Plaintiff was made president of the corporation, Herman Bretan secretary, and William Bretan treasurer. The Bretans controlled the Association; all of its affairs, including the trust account, were handled out of Herman Bretan's office. After the association between plaintiff and defendants ter-

minated, plaintiff and Wind learned of several irregularities in the handling of those funds: One was that a mortgage on the other tract was paid out of membership payments that were supposed to be used in developing this tract; another was that William Bretan offset bills his business owed certain suppliers against what the suppliers owed the Association on lots or memberships they had bought. Defendants admitted that forty memberships were sold for prices ranging between $5,000 and $15,000 each for which the buyer received a one acre lot; but many of the memberships and lots had been bought back by the Association. The property in this tract still held by the Association is worth $784,600. Plaintiff spent six to seven months every spring and summer for thirteen years showing and developing the tract and promoting the property and the Association. *Inter alia*, she worked on houses, landscaped building sites, cooked for and entertained workers and prospective investors, supervised the move of a church building onto the property, and otherwise worked to improve the property. On 20 June 1984 in a letter to the Bretans plaintiff, as president of the Association, requested that a meeting be called and held on the property and a *full* accounting given of its property and funds. Receiving no response, on 24 August 1984 she again wrote defendant Herman Bretan asking for a list of the Association members and their mailing addresses, and stating that as president she was calling for the annual meeting to be held the Friday after Thanksgiving at the Hannum house on the 700-acre tract. Herman Bretan responded by a letter dated 27 August 1984 advising her that she had been relieved of the office of president of the Association by the board of directors, and that she had been removed as a director by action of the membership. Plaintiff has not been paid anything under the partnership agreement either from profits, for services rendered, or for her interest in either tract; and no accounting of the Association's funds, property or activities has been made to plaintiff by either the Association or the individual defendants.

Moore, Lindsay & True, by Stephen P. Lindsay, for plaintiff appellant-appellee.

Norris and Peterson, by Allen J. Peterson and Staunton Norris, for defendant appellees-appellants.

PHILLIPS, Judge.

In orally arguing this appeal the individual defendants contended for the first time that the verdict on Issues 4 and 5 cannot stand because any services plaintiff performed in regard to the 700-acre tract were necessarily for the benefit of the owner, The Homestead Preservation Association, which is no longer in the case. This issue was not raised by exception at trial, nor is it the subject of an assignment of error. Rule 10(b), N.C. Rules of Appellate Procedure. The closest that defendants came to raising the question was when Issue 4, as to whether plaintiff rendered "valuable services to the defendants, William Bretan and Herman Bretan relative to the 700-acre tract of land," was objected to during the charge conference; but in doing so counsel stated, "Our objection specifically is putting them together." This meant, of course, only that defendants wanted a separate issue for each defendant; it did not mean, as now argued, that their position was that no services of benefit to them were indicated by the evidence. Having tried the case on that basis, the appeal must follow the same course. *Walker v. Walker*, 238 N.C. 299, 77 S.E.2d 715 (1953). But the contention is baseless in any event. For plaintiff alleged that she agreed to manage the tracts in return for one-fourth interest in the tracts and the profits derived from their sale—an allegation essentially admitted by defendants who asserted in their counterclaim that "[p]laintiff agreed with the Defendants to oversee and manage the [two tracts] . . . for which she was to receive twenty-five percent (25%) of the profits" from their sale; and she specifically asserted that defendants dominated the corporation, operated it as their personal business, controlled and misappropriated its assets, failed to have meetings and account for its property, and that her services were for their benefit. These allegations that the Association in effect was but the tool or *alter ego* of the defendants were supported by evidence that though plaintiff had been named its president, defendants handled the corporation's business, refused to account for its funds, spent them without consulting her, and summarily removed her from both office and the Association when she undertook to call a meeting and request an accounting. The Association's servient status as understood by the parties and the court is further indicated by the fact that in getting the personal judgment against them stayed pending the appeal the defendants were permitted to give bond "with the 700-acre tract of land owned by the Defendant Homestead Preservation

Association." And, of course, the evidence that the parties were partners or joint venturers in buying and developing the tract and that the defendants now treat it as their own is also evidence that plaintiff's services in regard to the property benefited them.

Defendants' arguments made in their brief can be consolidated into three contentions—that an issue as to the three-year statute of limitations barring the claim should have been submitted; and that the evidence does not support either of the damages awards approved by the court. Neither contention has merit and each can be effectively answered by merely stating the evidence bearing thereon.

[1] First, as to the three-year statute of limitations contention, the evidence shows without contradiction that it was not until 27 August 1984 that plaintiff was notified by Herman Bretan that her association with the defendants had been terminated, and this suit was filed on 26 August 1987. The argument that her cause of action accrued on 31 December 1983 when she did not accept William Bretan's undocumented "accounting" of the sale proceeds from the 400-acre tract has no basis. For the evidence is without contradiction that after that meeting, except for plaintiff's effort to obtain Herman Bretan's explanation of William Bretan's accounting of the 400-acre sale proceeds and to call a meeting and obtain an accounting in regard to the 700-acre tract, the relationship of the parties and plaintiff's services continued as before and that she was in Yancey County looking after the property and receiving complaints from Association members when Herman Bretan's letter was received. Nothing in the evidence indicates that before then she had reason to know that the unexplained matters involving the 400-acre tract would not be satisfactorily explained and adjusted if appropriate, or that the agreement as to the other tract would not be complied with or that their relationship had been or would be terminated. The only support for defendants' argument is that William Bretan's purported accounting and Herman Bretan's failure to contact her caused her to suspect that defendants were not going to abide by the agreement; but legal actions accrue upon fact, not suspicion.

[2] Second, as to the contention concerning the $12,500 verdict for lost profits from the sale of the 400-acre tract, the evidence not only supports that award, it would support one much higher. For William Bretan's report that the property was sold for

$260,000 and the expenses and obligations amounted to $230,000 is evidence that a profit of at least $30,000 remained for division if all of the deductions claimed were authorized; and the agreement testified to is evidence that neither the $25,000 finders fee retained by William Bretan nor the $68,000 "repayment" to Herman Bretan were authorized since under it William Bretan's duty was to make sales, and Wind was required to supply all the money needed for the venture, and testified that he did so.

[3] The main thrust of defendants' final argument—that the evidence does not tend to show that the services plaintiff rendered in regard to the 700-acre tract are worth $110,000—is that neither plaintiff nor anyone else put a dollar value on the services and that she could not estimate the number of days or hours that she worked. The evidence, though, is not that she performed random errands or services on an hourly or daily basis. The evidence is that the agreement of the parties required her to manage, supervise, look after, improve and promote the tract and the Association for six or seven months each year for thirteen years, that she was there on the property "seven days a week for . . . many, many times," and was "always available" to do whatever was required of her in looking after and improving the property and in dealing with Association members, prospects and others. Thus, her services and responsibilities were limited only by the calender and should be paid for on that basis. The law does not require courts or jurors to be oblivious to what is commonly known by others, and it is a matter of common knowledge that the nation has a minimum wage law; that virtually no one, including the unskilled, works for less than that; that any kind of regular service performed over a long period of time has substantial value; and that reliable managerial, caretaking and promotional services requiring constancy, initiative, judgment, and the ability to deal with and direct others is several times more valuable still. The $110,000 award that the court reduced the verdict to is well supported by the evidence and these matters of common knowledge; for it is less than $8,500 for each of the thirteen six or seven month periods that, according to the evidence, this experienced real estate manager spent looking after, improving and promoting a large and valuable tract of land, and it is little if any more than the cost of an unskilled custodian's or night watchman's services for a like period. Whether the evidence also supports the jury's evaluation of the services, as plaintiff argues, is not before us and will not

be determined since her appeal from the reduction of the award was not perfected.

Thus, in the trial as conducted no error prejudicial to the defendants has been made to appear. And we note that if the issue as to the 700-acre tract had been tried on the joint venture contract theory as the court might have directed, instead of *quantum meruit*, that the result could have been less satisfactory to the defendants still. For though *quantum meruit* is appropriate where one has benefited from another's services under circumstances that in good conscience call for payment, *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E.2d 140, 143 (1954), *citing Sanders v. Ragan*, 172 N.C. 612, 90 S.E. 777 (1916), the relief is limited to the value of services rendered and it is usually resorted to because the parties had no enforceable contract. In this case an apparently enforceable contract was pleaded and testified to and if the trial had been on that basis the value of plaintiff's services would have been immaterial, the property might have been subjected to a trust for the benefit of the contracting parties, and its value could have been a major issue. *Fortune v. First Union National Bank*, 323 N.C. 146, 371 S.E.2d 483 (1988); *Newby v. Atlantic Coast Realty Co.*, 182 N.C. 34, 108 S.E. 323 (1921). Why the trial was not on that basis does not appear and is not our concern since neither party assigned it as error.

No error.

Judge BECTON concurs.

Judge GREENE concurs in part and dissents in part.

(Former Judge BECTON concurred in the result reached in this case prior to 9 February 1990.)

Judge GREENE concurring in part and dissenting in part.

I disagree with the majority's conclusion of no error in the trial court's presentation of the *quantum meruit* issue to the jury. "Under a contract implied in law, the measure of recovery is *quantum meruit*, the reasonable value of materials and services rendered by the plaintiff that are 'accepted and appropriated by the defendant.' " *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 647, 312 S.E.2d 215, 218 (1984) (quoting *Thormer v.*

Lexington Mail Order Co., 241 N.C. 249, 252, 85 S.E.2d 140, 143 (1954)). " 'The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for [the] assessment [of reasonable value of services rendered and accepted], according to some definite and legal rule.' " *Cline v. Cline*, 258 N.C. 295, 300, 128 S.E.2d 401, 404 (1962) (quoting *Lieb v. Mayer*, 244 N.C. 613, 616, 94 S.E.2d 658, 660 (1956)). The plaintiff must produce evidence showing reasonable value or worth " 'based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances. . . .' " *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 134, 306 S.E.2d 527, 530 (1983) (quoting *Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940)). "The reasonable value of services rendered is an objective measure and 'is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed.' " *Hood v. Faulkner*, 47 N.C. App. 611, 617, 267 S.E.2d 704, 707 (1980) (quoting 66 Am.Jur. 2d *Restitution and Implied Contracts* § 28, at 973 (1973)).

The plaintiff's evidence of reasonable value of the services rendered consisted of extremely general statements about the nature of the services and of a time period during which they allegedly occurred. The plaintiff offered no evidence as to the actual time spent, her level of skill or knowledge, or the customary rate of pay for such services. Thus the jury did not have sufficient evidence before it to determine the reasonable value of any services provided by the plaintiff. The majority in asserting that the reasonable value of plaintiff's services was proven by the "common knowledge that the nation has a minimum wage law . . ." creates new law in North Carolina, and I do not find it to be consistent with previous statements of this court or the Supreme Court. In addition, the majority's assumption that the plaintiff provided "reliable managerial, care taking and promotional services [which required] constancy, initiative, judgment, and the ability to deal with and direct others . . ." is a mere conclusion and is unsupported by the evidence.

Furthermore, the plaintiff provided no evidence as to the extent her services were "accepted and appropriated" by the defendants. Thus, even if the plaintiff had proven the reasonable value of her services, the jury would have no evidence to determine whether she merited compensation under the *quantum meruit* theory.

I join the majority in finding no error in all issues other than *quantum meruit*. I would reverse the award of damages based on *quantum meruit* and remand for a granting of nominal damages on this issue. *See Paxton*, 64 N.C. App. at 134, 306 S.E.2d at 530.

STATE OF NORTH CAROLINA v. EDWIN WAYNE JOYCE

No. 8919SC225

(Filed 6 March 1990)

1. **Constitutional Law § 30 (NCI3d)— taking indecent liberties with child—reexamination of children by doctor—no right of defendant to demand**

In a prosecution of defendant for first degree sexual offense and taking indecent liberties with a child, the trial court did not err in denying defendant's motion to have the children, who were four and six at the time of the offense, reexamined by a physician.

Am Jur 2d, Criminal Law §§ 955, 1006.

2. **Indictment and Warrant § 13.1 (NCI3d)— date alleged in indictment—defendant not entitled to bill of particulars**

The trial court did not err in denying defendant's motion for a bill of particulars as to the date and place the alleged sexual offenses were committed, since the bills of indictment stated the date the offense occurred as "on or about" February 5, which should have put defendant on notice that there could be some slight variation, especially since the alleged victims were young children; defendant did not argue that he was unable to present any prospective alibi witness for February 4, the date the victims' mother testified the incidents took place, because of the date stated in the indictments; and there was sufficient evidence that defendant committed all the essential elements of the offenses charged.

Am Jur 2d, Indictments and Informations §§ 166, 169.

3. Criminal Law § 87.1 (NCI3d)— taking indecent liberties with child—leading questions asked of six-year-old—no error

In a prosecution of defendant for first degree sexual offense and taking indecent liberties with a child, the trial court did not err in allowing the six-year-old prosecuting witness to answer a leading question, since the witness had difficulty in understanding the question because of immaturity, and the inquiry was into a subject of delicate nature.

Am Jur 2d, Witnesses §§ 429, 430.

4. Criminal Law § 89.2 (NCI3d)— corroborating testimony given before witness's testimony—no error

The trial court did not err in allowing a witness from DSS to testify over objection as to when the mother of sexual abuse victims knew of the alleged sexual assaults on her children, since the court could properly allow the testimony for the purpose of corroborating the mother's testimony, and it was immaterial in what order the witness and the mother testified.

Am Jur 2d, Witnesses §§ 642, 643.

5. Criminal Law § 376 (NCI4th)— judge's comments to and about defense counsel—no expression of opinion

There was no merit to defendant's contention that the trial judge erred in making certain adverse comments to and about defense counsel which amounted to the expression of an opinion about the case, since several of the comments objected to by defendant were made outside the presence of the jury, and other challenged remarks were generally innocuous and were made for the purpose of controlling the course of trial and examination of witnesses.

Am Jur 2d, Trial §§ 97, 116.

6. Rape and Allied Offenses § 7 (NCI3d)— first degree sexual offense—mandatory life sentence—no cruel and unusual punishment

The mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law §§ 626, 629, 630.

APPEAL by defendant from judgment entered 20 October 1988 by *Judge William Z. Wood* in RANDOLPH County Superior Court. Heard in the Court of Appeals 10 October 1989.

Defendant was indicted and convicted of two counts of first-degree sexual offense and two counts of taking indecent liberties with a child. The first count of both these charges involved defendant's alleged actions with a six-year-old girl. The second counts involved similar acts with the girl's four-year-old sister. The trial court held that the taking indecent liberties convictions merged into their respective first-degree sexual offense convictions. From pronouncement of mandatory life sentences for the two first-degree sexual offense convictions, defendant appealed in open court.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angelina M. Maletto, for the State.

Hammond & Hammond, by L. T. Hammond, Jr., for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: The two sisters, who were six and four years of age at the time of the alleged incidents, both testified that they were frequently in defendant's mobile home. Each of the girls testified that sometime in 1987 defendant "[s]tuck his hand" on or in their "private part[s]," that it hurt, and that defendant had done it before. The girls also stated that defendant threatened to shoot or kill them if they told anyone.

Bill McCaskill of the Department of Social Services, who had investigated a report of neglect involving the sisters, testified that the girls also told him that defendant was inserting his fingers in their private parts, and threatened them if they told anyone. McCaskill stated that while interviewing the girls separately he provided them with anatomically correct dolls to demonstrate their stories. The older girl used the dolls to demonstrate her story, but the younger child, who appeared to be shy, refused to do so.

The girls' mother, their Sunday School teacher, and the family practitioner who examined the girls for sexual abuse, all testified that the girls had told them that defendant had inserted his fingers into their private parts. The family practitioner stated that the vaginal examinations she conducted indicated sexual fondling.

The girls' mother also testified that defendant is her husband's uncle and that at the time of the alleged incidents she and her family were living in a trailer located in a trailer park owned by defendant. She also stated that in February of 1987 the girls told her that defendant had been touching their private parts and she testified that this touching occurred on 4 February 1987.

Defendant's evidence was that the girls were lying and that any sexual abuse was done by their older brother. He also stated that he was in Greensboro on 5 February 1987, the date shown on the bills of indictment. Defendant's nephew testified that he was with defendant in Greensboro on that date. Defendant's mother who lived with defendant in January and February of 1987 stated that defendant was never alone with the two girls.

In rebuttal, the girls' older brother, who was in the sixth grade at the time of trial, testified that he had never touched his sisters in their private areas or hurt them. The boy also stated that defendant offered to give him a target pistol if he would testify against his mother in court. Defendant denied making the offer.

By his first Assignment of Error, defendant urges that the Court erred in denying his motion to have the victims re-examined by a physician. Defendant had not had access to the girls since May of 1988 when they moved out of state. Defendant requested the examination on the theory that continued signs of abuse would tend to show that the girls' brother (with whom the girls still lived) was the abuser rather than defendant.

[1] A criminal defendant has no right of discovery at common law. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972). Our Supreme Court has also recently held that, absent a statutory right, a criminal defendant does not have the right to make a prosecuting witness submit to examination by a psychologist. *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988). We are unable to distinguish the substance of the request for physical examination in the instant case from the situation in *State v. Fletcher*, and therefore find we are bound by the holding of *Fletcher*. In fact, submitting to a physical examination may well be an even greater invasion of a witness's privacy than a psychological evaluation. Although we are mindful of the magnitude of the sentences imposed on defendant in this case, we cannot conclude that the trial court abused its

discretion in denying defendant's motion. This assignment is overruled.

[2] Second, defendant contends that the trial court erred in denying his motion for a bill of particulars as to the date and place the alleged offenses were committed. The four bills of indictment stated that the alleged offenses occurred "on or about" 5 February 1987.

Our Supreme Court has spoken to the issue of an inaccurate date in an indictment:

> Statutory and case law both reflect the policy of this jurisdiction that an inaccurate statement of the date of the offense charged in an indictment is of negligible importance except under certain circumstances. N.C.G.S. 15-155 explicitly provides that no judgment shall be reversed or stayed because an indictment omits stating "the time at which the offense was committed in any case where time is not of the essence of the offense, nor [because it states] the time imperfectly. . . ." This Court has repeatedly noted that "a child's uncertainty as to the time or particular day the offense charged was committed" shall not be grounds for nonsuit "where there is sufficient evidence that the defendant committed each essential act of the offense." *State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983); *see also State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962); *State v. Tessnear*, 254 N.C. 211, 118 S.E.2d 393 (1961).
>
> This policy of leniency as to the time of the offenses stated in an indictment governs so long as the defendant is not thereby deprived of his defense. *See, e.g., State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984).

State v. Hicks, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987).

In applying these standards to the instant case we conclude that defendant has failed to carry his burden of establishing prejudice. The bills of indictment stated the date the offense occurred as "on or about" February 5 which should have put the defendant on notice that there could be some slight variation, especially since the alleged victims were young children. Also, defendant does not argue, nor does the record reflect, that he was unable to present any prospective alibi witness for February 4 because of the date stated in the indictments. *State v. Effler, supra* at 750, 309

S.E.2d at 208. Moreover, there is sufficient evidence that defendant committed all the essential elements of the offenses charged. *Id.* at 749, 309 S.E.2d at 207. This assignment is overruled.

[3] Third, defendant contends that the trial court erred in allowing the six-year-old prosecuting witness to answer a leading question posed to her by the State's attorney. The following exchange occurred:

Q. Okay. Did Mr. Joyce do anything to you in 1987?

MR. HAMMOND: Object to the leading.

COURT: Overruled. [Defendant's Exception No. 3]

Q. Did he do anything to you?

A. Yeah.

Q. What, if anything, did he do to you?

A. He—

Q. Nina, did he do anything to you?

A. Yeah.

Q. What did he do to you?

A. Stuck his hand in my private part.

Defendant concedes that trial court rulings on the use of leading questions are discretionary and will be reversed on appeal only for abuse of discretion. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10 (1976). In *State v. Smith*, our Supreme Court enumerated eight situations in which leading questions are permissible on direct examination. Two of those categories are applicable to the question quoted above: "[C]ounsel should be allowed to lead his witness on direct examination when the witness . . . has difficulty in understanding the question because of immaturity, . . . or where . . . the inquiry is into a subject of delicate nature such as sexual matters. . . ." *Id.* at 161, 226 S.E.2d at 18, *quoting State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974). Both of these factors were present in the above exchange and the judge was well within his discretion in overruling defendant's objection.

[4] Fourth, defendant argues that the trial court erred in allowing witness Bill McCaskill to testify over objection to when the prosecuting witnesses' mother knew of the alleged sexual assaults on

on her children. ("Q. Did she [Brenda Dwyer] say she knew about it prior to March 3rd?") After defendant's objection, the judge asked the State's attorney whether Brenda Dwyer would be called to testify. The State's attorney responded affirmatively and the court determined that witness McCaskill could answer the question "for the purpose of corroborating the mother's testimony here at this trial later when she's put under [o]ath to testify." Brenda Dwyer did later testify and responded substantially the same as witness McCaskill, that she was told about the sexual abuse by her daughters about a month before March 3. The response of witness McCaskill was for the purpose of corroborating Brenda Dwyer's testimony rather than for establishing the truth of the matter asserted. Therefore, it was not hearsay. N.C. Rules of Evidence, G.S. sec. 8C-1, Rule 801(c); *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E.2d 753 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). Further, the fact that Dwyer testified later in the trial is immaterial. *Bridges v. Graham*, 246 N.C. 371, 98 S.E.2d 492 (1957); *State v. Smith*, 218 N.C. 334, 11 S.E.2d 165 (1940). The trial court has discretion regarding the order of evidence. 1 Brandis on North Carolina Evidence sec. 24 (3d ed. 1988). Defendant complains that the court gave no limiting instruction as to McCaskill's statement. Defendant, however, failed to request the instruction, and has therefore waived the point on appeal. *State v. Lankford*, 31 N.C. App. 13, 228 S.E.2d 641 (1976). This assignment is overruled.

[5] Fifth, defendant contends the trial judge erred in making certain adverse comments to and about defense counsel which amounted to the expression of an opinion about the case. We disagree.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." G.S. sec. 15A-1222; *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983). Whether a judge's statements constitute reversible error is to be determined "in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (citations omitted). Also, a court is not generally expressing an opinion when making ordinary rulings in the course of a trial. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988).

Turning to the instant case, we first note that three of the judge's comments raised by defendant were made outside the presence of the jury. G.S. sec. 15A-1222 is not applicable to statements made out of the jury's presence. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986). Therefore, those statements are not relevant to our inquiry. Of the remaining statements, six were related to relevance and three concerned control of witnesses.

It is the trial court's duty to control examination of witnesses, *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971), and to control the course of a trial to insure fairness to all parties. *State v. Blackstock, supra.* After carefully reviewing the transcript, we find that the challenged remarks were generally innocuous and were made for the purpose of controlling the course of trial and examination of witnesses. Two examples cited by defendant are these:

> THE COURT: I'm trying to give you alot of leeway, but I'm going to ask you to stay with that which is relevant.
>
> [and]
>
> THE COURT: How in the heck can that be relevant to this case?

Even in their totality, we do not think such comments would have caused a reasonable juror to infer that the judge was expressing an opinion on a factual issue to be decided by the jury. *Id.* This argument is overruled.

Sixth, defendant urges that the court erred in refusing to allow defense witness Missy Stacy to testify to what an older brother of the prosecuting witnesses told her regarding witness Stacy's effect on him sexually. Even though this statement had some relevance to show that the brother was sexually mature and therefore could have been the person abusing the young girls, as defendant argues, it must be excluded as hearsay. It was an out-of-court statement offered to prove the truth of the matter asserted therein, G.S. sec. 8C-1, Rule 801(c), and does not fall within any exceptions to the rule. This assignment is overruled.

By his seventh argument, defendant contends that the trial court erred in failing to rule on numerous objections of defendant. Defendant, however, failed to object to the lack of a ruling and also did not move to strike the testimony. Further, defendant has failed to demonstrate that any prejudice inured to him as a result

of admission of the challenged testimony. G.S. sec. 15A-1443(a); *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988).

[6] Lastly, defendant contends that imposition of a mandatory life sentence for first-degree sexual offense constitutes, in this case, cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Our Supreme Court has previously addressed this question and held that the mandatory life sentence for first-degree sexual offense does not constitute cruel and unusual punishment. *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985); *State v. Shane*, 309 N.C. 438, 306 S.E.2d 765 (1983); *see also State v. Cooke*, 318 N.C. 674, 351 S.E.2d 290 (1987) (refusal to re-examine the Eighth Amendment holding of *Higginbottom*). We, therefore, hold that the sentence imposed is not so disproportionate as to be in violation of the Eighth Amendment and decline to reconsider this issue in light of the facts of the instant case.

For all the reasons stated herein, we find no error in defendant's trial and sentence.

No error.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE BAILEY

No. 8918SC807

(Filed 6 March 1990)

1. Indictment and Warrant § 12 (NCI3d)— victim's name changed in indictments—no amendment

A change in indictments to reflect the proper name of the victim was not an amendment within the meaning of N.C.G.S. § 15A-923(e), since the charge set forth in the indictment was not altered, and defendant could not have been misled or surprised as to the nature of the charges against him.

Am Jur 2d, Indictments and Informations §§ 129, 174, 178, 190.

2. Criminal Law § 544 (NCI4th)— prosecutor's questions about another offense—no substantial and irreparable prejudice

In a prosecution of defendant for first degree kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in denying defendant's motion for mistrial based on his contention that the prosecutor's questions as to whether defendant shot out the windows of his girlfriend's house shortly before the charged crimes were committed resulted in substantial and irreparable prejudice to his case because they improperly suggested to the jury that he was in possession of the gun prior to the events in question, thus bolstering the victim's testimony that defendant first used the gun.

Am Jur 2d, Evidence §§ 320, 333.

3. Criminal Law § 34 (NCI4th)— defense of duress—insufficiency of evidence

In a kidnapping, robbery, and assault prosecution the trial court did not err in refusing to instruct the jury on the defense of duress, since defendant testified that, during the struggle with the victim, he gained control of the gun, demanded and received the victim's wallet, and then shot him in the back of the head, and this testimony plainly negated a defense of duress.

Am Jur 2d, Criminal Law § 148.

4. Assault and Battery § 15.5 (NCI3d)— aggressor unable to claim self-defense—instruction proper

It was not error for the trial court to instruct that one who is an aggressor cannot claim self-defense where the victim testified that, when he stopped his truck to let defendant out, defendant without provocation pulled a gun, uttered a profane threat to kill him, and then placed the muzzle of the gun against his head.

Am Jur 2d, Assault and Battery § 69.

5. Kidnapping § 1.3 (NCI3d)— basis for first degree kidnapping charge—improper instruction—plain error

Defendant was entitled to a new trial on the kidnapping charge where the trial court committed plain error by instructing the jury on serious bodily injury under N.C.G.S. § 14-39(b),

while the indictment alleged as the basis for first degree kidnapping that the victim was not released in a safe place.

Am Jur 2d, Abduction and Kidnapping §§ 13, 18.

APPEAL by defendant from judgments entered 23 February 1989 in GUILFORD County Superior Court by *Rousseau, Julius A., Judge*. Heard in the Court of Appeals 13 February 1990.

Defendant was convicted of first-degree kidnapping, armed robbery, and assault with a deadly weapon with intent to kill, inflicting serious injury. The State's evidence tended to establish that at approximately 2:00 a.m. on 13 June 1988 the victim, Cebron Pettress, was stopped at a convenience store to purchase gas for his pickup truck. When he returned from paying, he found defendant, a stranger, standing next to the truck on the passenger side. Defendant requested a ride. Pettress obliged. After driving a short distance, Pettress reached his turn-off and pulled over to let defendant out. Defendant remained in the truck, pulled out a gun, and uttered a profane threat to kill Pettress. Defendant ordered Pettress to get out of the truck and lie face down in the road. Pettress, leaving the motor running, obeyed. Defendant then ordered him to get up from the road and lie face down in a ditch alongside the road. Again he obeyed. A third time, defendant ordered Pettress to get up, forcing him into the woods. There, defendant once more made him lie face down. As Pettress pleaded for his life, defendant put the gun against his head and demanded his money. Pettress complied. Defendant pulled the trigger.

Pettress testified that he felt an explosion hit his head, jumped up, and told defendant, "You shot me." He struggled with defendant, causing him to drop the gun. Pettress picked up the gun and shot defendant twice in the chest. He then beat defendant's face with the gun. Pettress further testified that defendant broke free, ran to the truck, and drove away. Pettress walked to the road and hailed a passing police car.

Both men were admitted shortly thereafter to the emergency room of a nearby hospital. Pettress was treated for a gunshot wound to his head. Defendant was treated for two gunshot wounds to his chest and injuries to his face. Pettress' wallet was discovered by hospital personnel in the pocket of defendant's trousers.

Defendant testified that it was Pettress who first pulled the gun, robbed defendant of his wallet, and then shot defendant in the chest. Defendant also testified that

> we was [sic] wrestling, and we both fell and hit the ground, and I landed on top of him, and I managed to get the gun from him. . . . And then I told him to give me my wallet back, and he give [sic] me my wallet. And in the process I told him to give me his wallet. . . . Then he give [sic] me the wallets and I stuck them in my back pocket, and then I shot him in the back of the head and I took off running.

From the judgments entered on the jury's verdicts of guilty, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns as error the trial court's allowing the State's motion to correct the indictments to properly reflect the name of the victim. Defendant argues that this correction constitutes an impermissible amendment to the indictments. We disagree.

N.C. Gen. Stat. § 15A-923(e) provides that "[a] bill of indictment may not be amended." An amendment within the meaning of this statute is "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988) (quoting *State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984)). In *Marshall*, this Court held that a change to one of four indictments, reconciling an inconsistency respecting the victim's surname, did not constitute an amendment within G.S. § 15A-923(e) where the variance in the indictment was inadvertent and the defendant was neither misled nor surprised as to the nature of the charges.

In the present case, the three indictments before us state the victim's name as Pettress Cebron. The trial court allowed the State's motion to change the indictments to correctly reflect the victim's name as Cebron Pettress. No additional changes were made,

and the indictments are correct in all other respects. The error in the indictments was inadvertent. We discern no manner in which defendant could have been misled or surprised as to the nature of the charges against him. We conclude that the change to the indictments in this case is not an amendment within the meaning of G.S. § 15A-923(e), and the trial court properly allowed the State's motion. This assignment of error is overruled.

[2] By his third assignment of error, defendant challenges the trial court's denial of his motion for mistrial. To place this issue in the appropriate context, the record reflects that defendant testified on direct examination that he went to his girlfriend's apartment, located near the scene of the crime, at approximately 1:30 a.m., about one-half hour before the shooting. The prosecutor cross-examined defendant as follows:

Q. Did you actually go over to [your girlfriend's] house?

A. Yes[.]

Q. You know that her house was broken into that night, don't you?

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

Q. Well, did you break into her house?

[DEFENSE COUNSEL]: Objection.

COURT: Sustained.

[DEFENSE COUNSEL]: Make a motion, Judge.

COURT: Motion denied.

Q. Did you shoot—

[DEFENSE COUNSEL]: Like [sic] to have it on the record at the appropriate time.

Q. Did you shoot her windows out at her house?

COURT: Sustained.

[DEFENSE COUNSEL]: Motion for mistrial.

COURT: Motion denied.

Defendant requested no curative instruction. At the close of the evidence and out of the jury's presence, the trial court heard argument on the admissibility of the evidence sought by this last question and on defendant's motion for mistrial, which was renewed at this time. The court again sustained the objection to the question and again denied the motion for mistrial. Defendant at this time also failed to request a curative instruction.

In support of this assignment of error, defendant contends that the prosecutor's questions resulted in substantial and irreparable prejudice to his case because they improperly suggested to the jury that he was in possession of the gun prior to the events in question, thus bolstering the victim's testimony that defendant first used the gun. Defendant also contends that the prosecutor's repeated use of this line of questioning, despite the trial court's rulings, and the trial court's failure to give a curative instruction *ex mero motu* contributed to the prejudicial effect of the questions. We find no error.

A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061. It is well established, however, that the decision as to whether such prejudice has occurred within the meaning of the statute is addressed to the sound discretion of the trial judge. *State v. Green*, 95 N.C. App. 558, 383 S.E.2d 419 (1989) (and cases cited therein). Consequently, a trial court's ruling on a motion for mistrial is not reviewable on appeal absent the appearance of a manifest abuse of that discretion. *Id.* Applying these standards to the issue before us, we conclude that no abuse of discretion appears, and therefore we overrule this assignment of error.

By three related assignments of error defendant challenges the trial court's jury instructions. Defendant advances arguments going to the trial court's refusal to give an instruction on duress and to the trial court's instructions given on self-defense and first-degree kidnapping. We address these in turn.

[3] First, defendant contends that the trial court erred in refusing to instruct the jury on the defense of duress in connection with the charge of armed robbery. To be entitled to an instruction on the defense of duress, defendant must have presented evidence sufficient to invoke the benefit of that doctrine. *State v. Henderson*,

64 N.C. App. 536, 307 S.E.2d 846 (1983). Defendant, however, testified that during the struggle he gained control of the gun, demanded and received from Pettress Pettress' wallet, and then shot him in the back of the head. This testimony plainly negates a defense of duress, and the trial court did not err in refusing to give the requested jury instruction.

[4] Second, defendant challenges as plain error the trial court's instruction to the jury that self-defense was an excuse only if he was not the aggressor. 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). It is not error for the trial court to instruct that one who is an aggressor cannot claim self-defense where the evidence in the record supports such an instruction. *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89, *aff'd*, 318 N.C. 390, 348 S.E.2d 788 (1985). Pettress testified that when he stopped his truck to let defendant out, defendant, without provocation, pulled a gun, uttered a profane threat to kill him, and then placed the muzzle of the gun against his head. This evidence is clearly sufficient to support the challenged instruction, and a plain error analysis is consequently inapplicable. *Johnson*, *supra*.

[5] Lastly, defendant contends that he is entitled to a new trial on the first-degree kidnapping charge because the trial court instructed the jury on serious bodily injury under G.S. § 14-39(b) while the indictment alleged as the basis for first-degree kidnapping that the victim was not released in a safe place. Defendant did not object at trial to this aspect of the jury instructions. Instead, he argues that this variance between the instruction and the indictment constitutes plain error. We agree and award defendant a new trial on the kidnapping charge.

This Court addressed the same issue in *State v. Mitchell*, 77 N.C. App. 663, 335 S.E.2d 793 (1985), *cert. denied*, 315 N.C. 594, 341 S.E.2d 35 (1986). We stated in that case:

> In *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), involving a similar variance in a kidnapping indictment and the jury instruction, our Supreme Court held that a new trial was required. As in this case, the defendant in *Brown* did not object at trial to the instruction . . . but the Court held that the

'plain error' rule adopted in *State v. Odum*, 307 N.C. 655, 300 S.E.2d 375 (1983) was applicable to allow consideration of such an asserted error. While we view *Brown* as a significant extension and liberalization of the 'plain error' standards set out in *Odum*, we conclude that *Brown* requires us to grant a new trial on the kidnapping charge in this case.

Likewise, *Brown* and *Mitchell* require that defendant in this case be awarded a new trial on the charge of first-degree kidnapping. *Accord State v. McClain*, 86 N.C. App. 219, 356 S.E.2d 826 (1987).

Defendant's remaining assignments of error are deemed waived pursuant to N.C. R. App. P., Rule 28(a).

The results are:

In case No. 88CRS41544,

New trial.

In cases Nos. 88CRS41545-46,

No error.

Judges COZORT and LEWIS concur.

ELECTRIC SUPPLY CO. OF DURHAM, INC., PLAINTIFF v. SWAIN ELECTRICAL CO., INC., DAVIDSON AND JONES CONSTRUCTION COMPANY, AND WINSTONS VENTURE I, A NORTH CAROLINA PARTNERSHIP, DEFENDANTS

No. 8914SC597

(Filed 6 March 1990)

Laborers' and Materialmen's Liens § 3 (NCI3d)— second tier subcontractor—right to mechanic's lien—money owed to general contractor but not first tier subcontractor

A second tier subcontractor has a right to a mechanic's lien against the owner's property when the first tier subcontractor has been fully paid but the owner still owes money to the general contractor. N.C.G.S. § 44A-18; N.C.G.S. § 44A-23.

Am Jur 2d, Mechanics' Liens §§ 67, 70.

APPEAL by plaintiff from judgment in favor of defendants Davidson and Jones Construction Company and Winstons Venture I entered 23 February 1989 in DURHAM County Superior Court by *Judge F. Gordon Battle*. Heard in the Court of Appeals 14 November 1989.

Winstons Venture I, a partnership, was at all relevant times the owner of a tract of land at 1818 Hillandale Road in Durham. In 1986 the owner hired Davidson & Jones Construction Company of Raleigh to be the general contractor on a project at this site. Davidson & Jones in turn hired Swain Electric Company, Inc., on 5 September 1986, as a subcontractor to install electrical systems in the project. Swain Electric Company, Inc., subcontracted with the plaintiff, Electric Supply Company of Durham, Inc., to supply electrical materials to the job site for incorporation into the construction project. Electric Supply Company of Durham, Inc., the plaintiff and appellant in this case, thus became a second tier subcontractor under G.S. § 44A-1 *et seq.*; Swain Electric Company, Inc. (Swain), the first tier subcontractor; Davidson & Jones, the contractor; and Winstons Venture I, the owner.

From 9 December 1986 to 5 May 1987, the plaintiff supplied Twenty Thousand Seven Hundred Eighteen and 11/100 Dollars ($20,718.11) of materials to Swain for which payment was not received from any party. On 18 May 1987, Electric Supply Company of Durham, Inc., properly filed and served on all defendants a Notice of Claim of Lien and a Claim of Lien securing an interest in funds sufficient to pay for the delivered materials.

Work continued on the construction project for months after 18 May 1987, and the owner continued to make payments to the general contractor for the work in progress during this time. On 30 September 1987, within one hundred eighty (180) days of the last furnishing of materials to the job site, Electric Supply, the plaintiff-appellant, filed this action to enforce payment of its lien. On 18 September 1987, the general contractor posted a bond pursuant to G.S. § 44A-16(6), cancelling a lien upon funds in its hands which might be owed to Swain Electric Company, Inc.

After receipt of the Notice of Claim of Lien and Claim of Lien, the owner released no payment to Swain (the first tier subcontractor) but did release payment to the contractor in an amount greater than the plaintiff's lien claim.

The trial court, ruling that the plaintiff's lien was limited to any amount owing to the first tier subcontractor Swain from the defendants-appellees at the time of the receipt of the lien notice, denied plaintiff any relief.

Pulley, Watson, King & Hofler, P.A., by R. Hayes Hofler, III and Michael J. O'Foghludha, for plaintiff-appellant.

Manning, Fulton & Skinner, by John I. Mabe, Jr., for defendants-appellees.

LEWIS, Judge.

The sole issue on this appeal is whether a second tier subcontractor has a right to a mechanic's lien against the owner's property when the first tier subcontractor has been fully paid but the owner still owes money to the general contractor. The lien rights claimed by plaintiff are governed by Chapter 44A. G.S. 44A-18, "Grant of lien; subrogation; perfection" provides in pertinent part:

> A second tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) and shall be entitled to perfect it by notice to the extent of his claim.

G.S. 44A-18(2).

Under this statute, a subcontractor's direct lien rights are limited to the amount owing to the entity above him in the construction chain. *Id.* Thus, if nothing is owing to the first tier subcontractor at the time of the filing of the lien claim, the second tier subcontractor has no right to enforce this lien under the plain language of the statute. *Mace v. Construction Co.*, 48 N.C. App. 297, 304, 269 S.E.2d 191, 195 (1980).

The trial court found as fact that after receipt of the notice of claim of lien, no funds were owing to the first tier subcontractor by reason of the work performed by the latter on the job site. Plaintiff concedes that based on these circumstances, it has no

lien rights under G.S. 44A-18. Instead, plaintiff argues that it may assert its lien under G.S. 44A-23. G.S. 44A-23 provides:

> Contractor's Lien; Subrogation Rights Of Subcontractor.
>
> A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. . . . Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

Plaintiff argues that this statute affords a separate lien option to tiered subcontractors. Asserting that it is the lien rights of the contractor (Davidson & Jones) that are at issue in 44A-23, not the lien rights of the first tier subcontractor, payment of the first tier subcontractor is irrelevant when considering the rights of the second tier to assert his claim against the owner. As long as the contractor had lien rights based on its contract with the owner on or after the receipt of the plaintiff's notice, the argument is that the owner should have paid the plaintiff's claim, as the plaintiff was subrogated to the rights of the contractor under 44A-23. The defendants protest this construction, arguing instead that 44A-23 only allows a second tier subcontractor to enforce his lien "to the extent of his *claim*"; his claim being limited by 44A-18, which restricts the extent of the subcontractor's lien to that of the party above him. We disagree with the defendants' position and reverse.

A basic rule of construction is that statutes dealing with the same subject matters must be construed *in pari materia* as together constituting one law, and harmonized to give effect to each other. *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). "The act must be considered as a whole and none of its provisions shall be deemed useless or redundant if they can be reasonably considered as adding something to the act which is in harmony with its purpose." *Id.*

Applying the stated rules, Chapter 44A must be construed *in pari materia*. These statutes are based upon equitable principles intended to benefit a general class of persons supplying labor and materials for the improvement of realty. *Miller v. Lemon Tree Inn of Wilmington, Inc.*, 39 N.C. App. 133, 140, 249 S.E.2d 836, 841 (1978).

> The purpose of the materialman's lien statute is to protect the interest of the supplier and the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value.

Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 229, 324 S.E.2d 626, 629, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

While it is true that G.S. 44A-23 does expressly limit the tiered subcontractor's lien only "to the extent of his claim," we do not read this language to mean "to the extent of his claim as permitted by G.S. 44A-18." G.S. 44A-23 expressly preserves the rights of a first, second or third tier subcontractor to enforce the lien of the general contractor. This construction is further supported by the inclusion of the language that upon filing of the notice and claim of lien "no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." This language, not found in G.S. 44A-18, indicates that the legislature intended for the subcontractor to be secured by a mechanic's lien to the full extent of his claim.

It is also significant to note that although the rights of subcontractors of the first and second tier are governed by a number of different strictures, none distinguishes between these two classes of claimants. Significantly, under 44A-21 claims on the lienable funds are to be apportioned *pro rata* among all subcontractors without regard to their rank. Furthermore, in all of the reported cases in which subrogation was used to defeat a mechanic's lien claim, it was the *general* contractor who had no surviving right to which the claimant could be subrogated. *See Builders Supply v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199 (1977); *Mace v. Bryant Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980). In order to protect the owner from double payment, the statutes provide and case law confirms that the subrogation theory limits subcontractors to the unpaid claims of the general contractor. Prior payment to intermediary first tier subcontractors does not bar the claims of second tier subcontractors.

Defendants argue that it is inequitable to force the owner to pay twice for the same work. However, the owner has the benefit of the improvement of his real property and can fully protect himself by requiring performance bonds. The inequity to the

second tier contractor, who would receive nothing is far greater and is contrary to the purpose of Chapter 44A.

Plaintiff substantially complied with the notice and filing provisions of Chapter 44A. The trial court erred in denying plaintiff's claim and we remand this case to the trial court for consideration of plaintiff's mechanic's lien rights under 44A-23 in conformity with this opinion.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

TOWN OF CARY, PLAINTIFF v. MYRTLE O. STALLINGS, DEFENDANT v. VIC REALTY

No. 8910DC404

(Filed 6 March 1990)

1. **Municipal Corporations § 28 (NCI3d)— special assessment foreclosure sale—judgment subsequently set aside—effect on title to property purchased in good faith**

The provisions of N.C.G.S. § 1-108 did not prohibit the trial court from setting aside an order of confirmation and a commissioner's deed in a special assessment foreclosure sale when the court determined that the municipality's foreclosure judgment was void because the property owner did not receive proper service of process.

Am Jur 2d, State and Local Taxation §§ 866, 897.

2. **Municipal Corporations § 28 (NCI3d)— failure to pay curb and gutter assessment—judgment obtained without notice—effect on good faith purchaser**

Where plaintiff municipality obtained a judgment against defendant for failure to pay a curb and gutter assessment without having given her proper notice, the trial court correct-

ly determined that the judgment was void and properly set it aside.

Am Jur 2d, State and Local Taxation §§ 866, 897.

Judge WELLS concurring.

APPEAL by third-party defendant Vic Realty from order entered 7 March 1988 by *Judge Fred Morelock* in WAKE County District Court. Heard in the Court of Appeals on 18 October 1989.

Third-party defendant appeals in this civil action from the trial court's order granting defendant's motion to set aside the Judgment, Order of Confirmation of Sale and the Commissioner's Deed.

Dan Lynn for defendant-appellee.

Young, Moore, Henderson & Alvis, P.A., by David R. Shearon and Knox Proctor, for third-party defendant-appellant.

JOHNSON, Judge.

Plaintiff, Town of Cary, made certain curb and gutter improvements in front of defendant Myrtle O. Stallings' property on 9 December 1976. In accordance with the statute, plaintiff assessed the cost of such improvements to defendant in the amount of $1,011.56. Defendant never paid the debt and plaintiff thereafter claimed a lien against the property.

In September 1984, plaintiff filed suit to foreclose on its assessment lien. No answer was filed on behalf of defendant. Partial payments were, however, subsequently made on the debt. A judgment for plaintiff was entered on 4 December 1985.

On 14 January 1986, a notice was issued to plaintiff's attorney for failure to submit a judgment. At such time, plaintiff had to either file its judgment or be subject to having the case dismissed. An order was entered dismissing the case without prejudice on 19 March 1986.

Upon showing good cause, an order setting aside the dismissal was entered on 15 April 1986. Plaintiff was also allowed to file its judgment on the same day. Thereafter, the Town of Cary was entitled to collect the indebtedness. A commissioner was appointed to sell the property described in the complaint and such proceeds

were to be used to pay the assessment, taxes, penalties, interests and costs.

Following the filing of a notice of sale, Vic Realty purchased defendant's property and was subsequently delivered a Commissioner's Deed to such property. A Motion of Confirmation of the sale was thereafter filed by plaintiff's attorney and an Order of Confirmation was signed by the Wake County Clerk of Superior Court.

Defendant filed a motion to set aside the Judgment, Order of Confirmation and Commissioner's Deed on 15 September 1987. The motion alleged that: (1) defendant had not been served with a copy of the summons and complaint; (2) defendant did not reside at the address in which all correspondences were sent; (3) plaintiff knew that defendant did not reside at the property when the summons and complaint was issued; (4) defendant had a meritorious defense in that some payments had been made on the debt; (5) an Order of Dismissal of the case had been filed on 19 March 1986; (6) the judgment entered by the court on 15 April 1986 was improper; (7) defendant had never received notice of a hearing, and (8) the judgment had not been docketed.

After a hearing, the court set aside the Judgment, Order of Confirmation and Commissioner's Deed and allowed plaintiff to file an answer.

In December 1988, the case came on to be heard once again. The court ordered that plaintiff be allowed to execute its tax lien upon defendant's property and a commissioner was appointed to sell the property. Prior to the entry of judgment, but after notice of appeal was given, defendant paid $507.28. This amount represented the balance of the unpaid debt. The second sale ordered by the court never took place. Vic Realty appealed in apt time.

[1] By its first Assignment of Error, Vic Realty contends that the trial court erred in (1) setting aside the Order of Confirmation of Sale; (2) declaring the Commissioner's Deed null and void, and (3) concluding that defendant owned the subject property. Vic Realty argues that it purchased defendant's property in good faith and received title to the property through a Commissioner's Deed and, as such, the trial court's decision to set aside plaintiff's judgment against defendant should not have affected the purchase. We disagree.

We note at the outset that this Court has not had the occasion to address the effects of a special assessment foreclosure sale. We have, however, addressed the effects of a tax foreclosure sale and will therefore use this as a guideline.

G.S. sec. 1-108 provides that:

> [i]f a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution *may be* compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. (Emphasis added.)

Vic Realty has interpreted this statute as being one which unquestionably prevents the disturbance of a transfer of title to property sold pursuant to a judgment when such judgment was subsequently set aside. This, however, is not an accurate interpretation. Our reading of this statute provides that the conveyance of title to such property, as acquired in good faith, is not *automatically* affected, but, title to such property *may* in fact be affected if the court deems it necessary in the interest of justice.

The trial court determined that defendant did not receive proper service of process and that: (1) setting aside the Order of Confirmation of Sale; (2) declaring the Commissioner's Deed null and void, and (3) concluding that defendant owned the subject property was in the interest of justice. We find no evidence to indicate the converse and therefore this Assignment of Error is overruled.

[2] Assignment of Error number two challenges the trial court's order setting aside the Judgment of 15 April 1986.

G.S. sec. 105-375(c) provides that a "tax collector . . . shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to the listing taxpayer at his last known address . . . stating that the judgment will be docketed and that execution will be issued."

In the case *sub judice*, defendant asserted as a defense lack of personal service. Defendant also asserted that she did not reside at the address in which most correspondences were sent and that plaintiff knew of her subsequent change of name and address. Vic Realty, on the other hand, asserted that irrespective of the fact that plaintiff acquired a judgment against defendant without prop-

er notification, title to the property was acquired pursuant to such judgment and therefore the Commissioner's Deed given to Vic Realty, as a purchaser in good faith, must not be affected.

We must reject Vic Realty's argument since the evidence clearly shows that there was no personal service upon the defendant and that plaintiff knew that defendant no longer resided at the record address. Assuming *arguendo* that plaintiff was not notified of defendant's name and address change at the time the complaint was filed, plaintiff was nevertheless placed on notice of such changes when it received a check dated 26 December 1984 as partial payment for the unpaid debt. Such payment indicated defendant's married name and current address. As an additional factual consideration, plaintiff mailed a letter to defendant advising her that there remained an unpaid balance on the curb and gutter debt. Such letter cannot go unnoticed when it was dated 27 December 1986 and was addressed as follows:

Myrtle Atkinson
Rt. 1 Box 95-A
Morrisville, NC 27560

With all of these factors in mind, the trial court unerringly ruled that the judgment entered in the action was void. In its sound discretion, pursuant to G.S. sec. 60(b)(4), which permits a judgment that is void to be set aside, the trial court also properly set aside the judgment.

For the foregoing reasons, the judgment of the trial court granting defendant's motion to set aside the Judgment, Order of Confirmation of Sale and Commissioner's Deed is

Affirmed.

Judges WELLS and ORR concur.

Judge WELLS concurring.

In the foreclosure proceedings, the attempted service of process on defendant Stallings was insufficient to confer jurisdiction on the court to enter judgment against her and the judgment against her is therefore void—a legal nullity. *See Marketing Systems v. Realty Co.*, 277 N.C. 230, 176 S.E.2d 775 (1970); *Board of Health v. Brown*, 271 N.C. 401, 156 S.E.2d 708 (1967). The provisions of

G.S. 1-108 cannot have the effect of validating any aspect of the void judgment in this case or of validating any consequences flowing from that judgment adverse to defendant Stallings.

IN THE MATTER OF THE ESTATE OF HARRY BROWNE FINCH

No. 8922SC168

(Filed 6 March 1990)

Wills § 61 (NCI3d)— value placed on life estate in trust—dissent from will as matter of law not allowed

A surviving spouse is not entitled to dissent from the will of her deceased spouse, as a matter of law, on the ground that a trust in which the surviving spouse is given a life estate only without a general power of appointment cannot be valued for the purposes of N.C.G.S. § 30-2, since the life interest can be valued.

Am Jur 2d, Wills §§ 1651, 1652, 1653, 1654, 1655.

Judge PHILLIPS dissenting.

APPEAL by Executor and Trustee from Judgment of *Judge Ralph A. Walker* entered 21 December 1988 in DAVIDSON County Superior Court. Heard in the Court of Appeals 12 July 1989.

Wyatt, Early, Harris, Wheeler & Hauser, by A. Doyle Early, Jr., for appellant Wachovia Bank and Trust Company, N.A., Executor and Trustee of the Estate of Harry Browne Finch.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley, for dissenter appellee.

COZORT, Judge.

The sole question before us is whether a surviving spouse is entitled to dissent from the will of her deceased spouse, as a matter of law, on the ground that a trust in which the surviving spouse is given a life estate only without a general power of appointment cannot be valued for the purposes of N.C. Gen. Stat. § 30-1. We hold that the life interest can be valued, and we therefore

reverse the trial court's order of summary judgment, which had upheld the surviving spouse's right to dissent.

Harry Browne Finch died testate on 19 January 1988. He was survived by his wife, Helen Crowder Finch, and three children. His will, dated 16 July 1986, named Wachovia Bank and Trust Company, N.A., as Executor of the estate and was admitted to probate on 21 January 1988. In his will, decedent made several specific bequests to individuals, left 15% of his net estate to designated charities, and provided for the residue of the estate to "pour over" into an inter vivos trust dated 28 November 1978. Under the terms of the inter vivos trust, as amended, Trustee Wachovia Bank was to establish two separate trusts, a Marital Deduction Trust A and a Residuary Trust B for his children. Trust A provided, in part, as follows:

MARITAL DEDUCTION TRUST—TRUST A

> If the Grantor is survived by his spouse and they are legally married at the date of his death, the Trustee shall set aside for the benefit of said spouse from the trust assets a sum sufficient when held under the terms and conditions as set out herein in relation to the share, to satisfy the requirements of the North Carolina General Statutes and case law so as to prevent the Grantor's spouse from being able to dissent from his will. Any assets passing to the said spouse by right of survivorship, contract, or otherwise in such a manner as to reduce the amount to which she would be entitled under this paragraph shall be taken into consideration by the Trustee in determining the amount. If the initial amount estimated by the Trustee and so set aside is determined to be insufficient or excessive, the Trustee shall make such adjustments as may be necessary relating back to the date of the Grantor's death in order to satisfy the requirement of the North Carolina law as stated herein.

The net income from Trust A was to be paid to Mrs. Finch for life, and upon her death, the remainder was to be disposed of as provided in Trust B, the children's trust. Trust A also provided that the Trustee could invade so much of the principal of Trust A as the Trustee, "in its sole discretion, shall from time to time deem requisite or desirable to meet the reasonable needs of my wife—even to the full extent of the entire principal of this trust."

On 30 March 1988, Mrs. Finch filed a dissent from the will and thereafter filed a motion for summary judgment. The Clerk of Superior Court of Davidson County found that she was entitled to dissent. The Trustee appealed, and the Superior Court of Davidson County granted Mrs. Finch's motion for summary judgment and decreed that she was entitled to dissent from the will and receive her intestate share of her husband's estate. The Trustee appeals. We reverse.

Under N.C. Gen. Stat. § 30-1, Mrs. Finch may dissent from her husband's will only if the aggregate value of property passing to her under the will and outside the will as a result of her husband's death is less than her intestate share as provided by Chapter 29 of the General Statutes. In her affidavit filed with her motion for summary judgment, Mrs. Finch stated that she received $24,974.97 as beneficiary of an insurance policy on her husband's life and $14,607.85 under her husband's will (excluding the marital trust), and that the gross value of her husband's estate was approximately $2,821,878.46. The Trustee's affidavit stated that Mrs. Finch received, in addition to the life estate in the marital trust, $10,500.00 in personal property under the will and a year's allowance of $45,000.00 by agreement. The Trustee estimated the net estate to be $2,088,504.00. The record, however, discloses no stipulation by the parties or finding by the clerk or trial court as to these values. *See* N.C. Gen. Stat. § 30-1(c). Rather, Mrs. Finch contends and the trial court specifically ruled that Trust A is insufficient as a matter of law to defeat her right of dissent because "[a] trust which provides only for the pay[m]ent of income to the surviving spouse with the right to invade the corpus limited to the discretion of the trustee and granting no power of appointment to the surviving spouse cannot be compared with or equated to the value of the unrestricted ownership of a one-third share of the estate of the deceased . . . ." We disagree.

Although Mrs. Finch might prefer to receive an outright bequest rather than a life income interest in a trust, her right to elect the former is not an absolute right. N.C. Gen. Stat. § 30-1(b) provides "by way of illustration and not of limitation" that the value of certain interests, including the following, be considered in determining the right of dissent:

(1) The value of a legal or equitable life estate for the life of the surviving spouse;

(2) The value of the proceeds of an annuity for the life of the surviving spouse.

Therefore, a testator can prevent his will from being upset by giving his surviving spouse the minimum provision required by the statute, which may be satisfied in whole or in part by a life estate or life income interest. Under the terms of Trust A, the Trustee is required to fund the trust with assets which would give Mrs. Finch a life income the value of which (when added to the value of other assets passing to Mrs. Finch under and outside the will) will be equal to her intestate share. There is no allegation or evidence that the assets of the estate are insufficient to meet this requirement. Whether the Trustee will in fact appropriately fund the trust is not a question before us.

We hold that the marital trust established for Mrs. Finch is not insufficient, as a matter of law, to defeat her right of dissent. We therefore reverse the order of summary judgment and remand.

This Court has received notice that a caveat to the will has been filed, thereby causing a stay in the proceedings below. Although a successful caveat would render the issue raised herein moot, we have elected to consider the merits of this appeal.

Reversed.

Judge LEWIS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion Judge Walker correctly found and based his judgment upon the following:

> A trust which provides only for the payment of income to the surviving spouse with the right to invade the corpus limited to the discretion of the trustee and granting no power of appointment to the surviving spouse cannot be compared with or equated to the value of the unrestricted ownership of a one-third share of the estate of the deceased, considering the intent and purpose of G.S. 30-1.

The intent and purpose of G.S. 30-1, as I read it, is to give the surviving spouse the option of taking an intestate share unless

a substantially equal share is devised by the will. The statute does not permit a testator to restrict his spouse to what he wants her to have and subject to the control of a trustee. Mrs. Finch prefers to control her own money and in my view the statute gives her the right to do so.

LAWRENCE A. JOHNSON, EMPLOYEE, PLAINTIFF v. IBM, INCORPORATED; EMPLOYER AND LIBERTY MUTUAL INSURANCE CO., COMPENSATION CARRIER; DEFENDANTS

No. 8810IC627

(Filed 6 March 1990)

Master and Servant § 69 (NCI3d)— payments under employer's medical disability plan—deduction from workers' compensation award proper

The Industrial Commission did not err in deducting from plaintiff's workers' compensation award the payments he received under the employer's medical disability plan while his claim for further compensation was being processed, since the payments deducted were not due and payable under the Workers' Compensation Act when they were made. N.C.G.S. § 97-42.

Am Jur 2d, Workmen's Compensation §§ 364, 365.

APPEAL by plaintiff from opinion and award filed 25 January 1988 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 January 1989.

The facts pertinent to the appeal of this workers' compensation case follow: On 8 November 1982, with the approval of the North Carolina Industrial Commission, the parties agreed that because of an on-the-job injury during the preceding November plaintiff employee had a twenty-five percent permanent partial disability of the back for which compensation totaling $15,463.50 over the next 75 weeks was due under our Workers' Compensation Act. In May 1984, thirteen months after the last monthly payment under that agreement was made, plaintiff applied to the Commission for a review of the earlier award on the ground that his condition had substantially changed for the worse, his back had required

additional surgery, and he was then totally and permanently disabled. Though defendants conceded that plaintiff was totally disabled they opposed the application, contending that his condition had not substantially changed since the prior award and therefore no further compensation was due. During the long period while plaintiff's application was being processed he received various payments under the employer's medical disability plan, which provided for the disability of all IBM employees without regard to cause. Under the plan plaintiff received his full salary from 25 February 1983 until December 1984, 75% of his salary for the next eighteen months, and a lesser percentage thereafter. When the requested review was eventually concluded on 10 June 1987 Deputy Commissioner Allen determined in pertinent part that: (1) After the prior award establishing plaintiff's permanent disability as twenty-five percent of the back was entered his condition substantially changed, he became totally and permanently disabled on 25 February 1983, and was entitled to be compensated therefor in weekly payments from that date onward; (2) the employer was entitled to deduct from the award the payments made to plaintiff under its medical disability plan between 25 February 1983 and that date. Following an appeal by both parties to the Full Commission all the Deputy Commissioner's findings, conclusions and determinations were affirmed.

Spears, Barnes, Baker, Hoof & Wainio, by Alexander H. Barnes, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Paul L. Cranfill and Samuel H. Poole, Jr., for defendant appellees.

PHILLIPS, Judge.

Plaintiff's appeal questions only the legality of deducting from his award the payments he received under the employer's medical disability plan while his claim for further compensation was being processed. The following portion of G.S. 97-42 is the Commission's only authority under the Workers' Compensation Act for making deductions from an employee's compensation award:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial

Commission be deducted from the amount to be paid as compensation.

This provision permits, but does not require, the Commission to deduct from a compensation award to an injured employee any payments made by the employer before the employee's right to compensation under the terms of the Workers' Compensation Act was established. *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986). Thus, whether the payments deducted were due and payable under the Act when made determines the appeal; if they were "due and payable when made" they may not be deducted; if they were not then due and payable the Commission had authority in its discretion to deduct them, and no abuse is indicated or contended.

Plaintiff's argument, in substance, is that the payments involved were due and payable when made, and therefore not deductible under G.S. 97-42, because the agreement entered into on 8 November 1982 established that the employee's injury was compensable under the Workers' Compensation Act, and the payments followed that determination. The argument has no merit. That agreement, when approved by the Commission, was a binding award, *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d 588 (1971); it established that the permanent consequences of plaintiff's injury was a twenty-five percent disability of the back and settled the claim for the amount stated in the absence of a substantial change of condition being found under the provisions of G.S. 97-47. *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E.2d 27 (1960). Thus, no further payment of any kind was due plaintiff under the Workers' Compensation Act until the Commission completed its review of plaintiff's situation and determined that his condition had substantially changed and he was totally disabled; the payments made by the employer's medical plan before then were not due and payable under the Workers' Compensation Act "when made" and the deduction was authorized by G.S. 97-42. Upon similar facts our Supreme Court reached the same conclusion in *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987).

Affirmed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. DANNY K. BULLARD AND STATE OF NORTH CAROLINA v. DAVID ALTON BULLARD

No. 8813SC1246

(Filed 6 March 1990)

Rape and Allied Offenses § 6.1 (NCI3d)— first degree sexual offense—submission of lesser offense not required

In a prosecution of defendants for first degree sexual offense, the trial court did not err in failing to submit to the jury, as defendants requested, an issue as to the lesser-included offense of second degree sexual offense, since the case was tried on an all or nothing basis; the State's evidence was not in conflict; and defendants presented no evidence as to the crime.

Am Jur 2d, Trial §§ 878, 880.

APPEAL by defendants from judgments entered 9 June 1988 by *Lake, Judge*, in BRUNSWICK County Superior Court. Heard in the Court of Appeals 19 April 1989.

Attorney General Thornburg, by Associate Attorney General Richard A. Love, for the State.

Fairley, Jess & Isenberg, by Ray H. Walton and William F. Fairley, for defendant appellants.

PHILLIPS, Judge.

Each defendant was convicted of first-degree sexual offense in violation of G.S. 14-27.4. The only question presented by this appeal is whether the court erred in failing to submit to the jury, as defendants requested, an issue as to the lesser included offense of second-degree sexual offense. Under G.S. 14-27.5(a)(1), engaging in a sexual act with another person "[b]y force and against the will of the other person" is a second-degree sexual offense; that identical conduct when "aided and abetted by one or more other persons" is made a first-degree sexual offense by G.S. 14-27.4(a)(2)c. The first-degree sexual offense that each defendant was charged with was engaging in a sexual act with Shelby Willetts by force and against her will and aided and abetted by the other. Defendants' request was denied after the District Attorney insisted that

the verdict alternatives should be guilty or not guilty of first-degree sexual offense.

The evidence, all by the State, tends to show that: During the night of 2 July 1987 after Shelby Willetts' automobile ran off the highway and turned over into a ditch, defendants came along in a car driven by Danny Bullard and offered to drive her to the nearby home of a friend who had a wrecker. After she got in the car Danny Bullard drove to an isolated area, stopped the car, stated that he had to use the bathroom, and went out of her sight. David Bullard then told her to perform fellatio on him or he would kill her, that both defendants had just been released from prison, and that Danny had been in prison for killing his father. A struggle ensued; she blew the car horn, turned on the lights, and tried to start the car; David grabbed the keys and threw them out of the car; she then jumped out of the car, but David caught her, slammed her against the car, and forced her to perform fellatio on him. She asked David where Danny was and he said he did not know, but a moment later Danny Bullard was there and David was gone. Danny asked her if she had performed fellatio on David and when she said no he called her a liar, slapped her to the ground, and then forced her to perform fellatio on him. She did not know where Danny was while the sexual act with David occurred, or where David was when the sexual act with Danny occurred.

That this evidence would support a verdict of guilty of the lesser included offense of second-degree sexual offense is obvious since it supports their convictions of the greater offense and the whole necessarily includes its parts. Based upon this fact defendants contend that the trial judge was required to submit the issue requested under the following rule:

> [T]he trial judge, when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings. (Citations omitted.)

State v. Hicks, 241 N.C. 156, 160, 84 S.E.2d 545, 548 (1954). Though this clear and unambiguous statement has been reiterated in substance in many decisions, including *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984); *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 427, *cert. denied*, 451 U.S. 970, 68 L.Ed.2d

349, 101 S.Ct. 2048 (1981), and *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), it does not apply to this case, as defendants understandably but mistakenly argue. Because the decision quoted from and many others establish that the statement does not quite mean what it says; that when the State seeks a conviction of only the greater offense and the case is tried on that all or nothing basis, the State's evidence is not regarded as evidence of the lesser included offense unless it is conflicting; and that the lesser included offense must be submitted only when a defendant presents evidence thereof or when the State's evidence is conflicting. Holdings to that effect include *State v. Wilson*, 315 N.C. 157, 337 S.E.2d 470 (1985); *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985); *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983); *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981), and *State v. Hicks*, *supra*. Since the case was tried on an all or nothing basis, the State's evidence is not in conflict and defendants presented no evidence as to the crime, we are obliged to hold that the court was not required to charge on the lesser included offense and defendants' assignment of error is overruled.

Though permitting cases like this to be tried on an all or nothing basis has long been approved and is in keeping with the sporting concept of justice that used to prevail, it has obvious drawbacks that merit legislative consideration, in our opinion. In all such instances the possibility exists of a defendant being acquitted of all offenses because of doubt only as to an enhancing element; and of the jury's knowledge that the defendant will be released unless they vote for the greater offense being a determining factor in that vote being made. For example, in this case the jury, though believing all the State's evidence, could have acquitted the defendants of all charges by merely doubting, as they easily could have, that the evidence established that either defendant needed or expected the other's help. It seems plain to us that a practice under which a defendant can be acquitted of lesser included charges about which there is no doubt because doubt exists as to an enhancing element is an outmoded absurdity and detrimental to the public safety; a practice that encourages jurors to convict a defendant of a greater offense by not permitting them to consider its lesser elements is unfair and inconsistent with the precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit.

No error.

Judges PARKER and COZORT concur.

CLAYTON E. HILL v. LINDA L. HILL

No. 8917DC947

(Filed 6 March 1990)

Judgments § 21.1 (NCI3d)— distribution of marital assets—consent judgment—lack of consent—judgment void

A consent judgment entered into by the parties for distribution of their marital assets was void, and the trial court erred in denying plaintiff's motion to be relieved from the judgment where plaintiff was not present or represented by counsel when the judge signed the consent judgment; the court had earlier signed an order allowing plaintiff's counsel to withdraw; in the motion filed by the attorney to be allowed to withdraw, he stated that plaintiff failed to understand his responsibilities in the lawsuit and was unwilling to have the court adjudicate the issue of equitable distribution; the judgment was signed by plaintiff and his attorney before it was sent to defendant's attorney, who made some alterations with defendant's approval but not with plaintiff's; and these circumstances were clearly sufficient to put the judge on notice that plaintiff's consent did not exist at the time the court approved the agreement of the parties and promulgated it as a judgment.

Am Jur 2d, Judgments § 1083.

APPEAL by plaintiff from *Martin (Jerry Cash), Judge*. Judgment entered 24 April 1989 in District Court, SURRY County. Heard in the Court of Appeals 16 February 1990.

The underlying civil action in this case is one for divorce and equitable distribution, during the course of which plaintiff has employed three different attorneys. A consent judgment was entered on 13 February 1989 and plaintiff has appealed from the denial of his motion to set it aside.

The record discloses that plaintiff, through his first attorney, filed a complaint for divorce based on one year's separation on 1 August 1988. Defendant answered and asserted a claim for equitable distribution. Judgment of divorce was entered on 26 September 1988, by which time plaintiff had retained a second attorney. The equitable distribution issue was retained for further proceedings.

Through counsel, plaintiff and defendant attempted to negotiate a property settlement, and in November 1988, plaintiff's attorney advised the court that an agreement had been reached. In January of 1989, the agreement was prepared, signed by plaintiff and his attorney, Carroll F. Gardner, and sent to defendant's attorney, Anne Rhys Long. She and defendant consented to the proposed judgment; however, some changes were made in the proposed consent judgment by deleting therefrom some of the personal property involved in the settlement. On 3 February 1989, plaintiff requested a final bill from Mr. Gardner, and on 8 February 1989, Mr. Gardner filed a motion to be permitted to withdraw as plaintiff's counsel. On the same day, Judge Clarence Carter allowed Mr. Gardner's motion to withdraw as plaintiff's counsel.

On 13 February 1989, the purported consent judgment was tendered to the court. Relying on the signatures on the agreement, the court signed and entered the consent judgment on 13 February 1989. On 21 February 1989, plaintiff through his third attorney moved to be relieved from the consent judgment. On 24 April 1989, the court made findings of fact and concluded:

> That the Consent Judgment should not be set aside by reason of mistake, inadvertence, surprise or excusable neglect pursuant to Rule 60(b)(1) of the North Carolina Rules of Civil Procedure.

Plaintiff's Rule 60(b) motion was therefore denied, and plaintiff appealed.

Terry L. Collins and Larry Bowman for plaintiff, appellant.

Long & Long, by Anne Rhys Long, for defendant, appellee.

HEDRICK, Chief Judge.

On appeal, plaintiff argues Judge Martin erred in denying his motion to be relieved from the "consent judgment." We agree.

The authority of a court to sign and enter a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. *Lynch v. Lynch*, 74 N.C. App. 540, 329 S.E.2d 415 (1985); *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963). In *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981), we said:

> We believe that it is beyond question that, absent any circumstances to put the court on notice that one of the parties does not actually consent thereto, a judge may properly rely upon the signatures of the parties as evidence of consent to a judgment.

In the present case, the record is replete with evidence of circumstances which should have put the court on notice that it could not rely on the signatures of plaintiff and his attorney, Carroll F. Gardner, as evidence that plaintiff did in fact consent to the judgment the court signed on 13 February 1989. Plaintiff was not present, nor was he represented by counsel when the judge signed the consent judgment. The court had earlier signed an order allowing plaintiff's counsel to withdraw. In the motion filed by Mr. Gardner to be allowed to withdraw as counsel for plaintiff appears the following statement: ". . . [T]he plaintiff fails to understand and to appreciate his responsibilities to the lawsuit instituted by him and is unwilling to have the court adjudicate the issue of equitable distribution."

The court was surely aware of the fact that plaintiff did not wish to have the court enter the consent judgment settling the equitable distribution claim. The proposed consent judgment does not indicate when plaintiff and Mr. Gardner signed the same, but the record does disclose that it had been signed by plaintiff and Mr. Gardner before it was sent to defendant's attorney. While it was in the hands of defendant's attorney, the proposed consent judgment was altered by defendant's attorney with defendant's approval. The record, likewise, discloses that plaintiff did not approve these changes.

These circumstances were clearly sufficient to put the judge on notice that plaintiff's consent did not exist at the time the court "approved the agreement of the parties and promulgated it as a judgment." Thus, the proposed consent judgment is void,

and the cause will be remanded to the District Court, Surry County, for the entry of an order vacating the proposed consent judgment entered on 13 February 1989, and for an order for further proceedings in the district court with respect to the claim for equitable distribution.

Reversed and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JOSEPH CLEMMONS

No. 8922SC892

(Filed 6 March 1990)

Criminal Law § 1532 (NCI4th)— preliminary hearing for probation violation—11 day lapse—defendant not prejudiced

Although defendant was held for a period of eleven working days without a preliminary hearing on his violation of probation pursuant to N.C.G.S. § 15A-1345(c), defendant was not prejudiced by the lack of the preliminary hearing, since he was arrested in Virginia, which was prima facie evidence of a probation violation; defendant did not deny that he violated the conditions of his probation; and there was no need for a preliminary hearing to determine whether there was probable cause to believe he had violated a condition of his probation.

Am Jur 2d, Criminal Law §§ 579, 653.

Judge WELLS concurring.

Judge COZORT concurring.

APPEAL by defendant from judgment entered 9 June 1989 by *Judge James C. Davis* in Superior Court, IREDELL County. Heard in the Court of Appeals 15 February 1990.

On 5 February 1985, defendant-appellant was convicted of breaking and entering, larceny, and three counts of uttering a forged paper. He received a four year sentence, suspended for four years.

On 13 March 1985, defendant was convicted of feloniously obtaining property by false pretense. He received a two year sentence, suspended for five years. As part of his condition of probation, defendant was ordered to remain within the jurisdiction of the Court unless granted written permission by the Court or the probation officer to leave; to report to the Court or the probation officer at reasonable times and places; and in a reasonable manner permit the probation officer to visit him at reasonable times; to notify the officer of any change in address or employment.

On 1 February 1989, defendant's probation officer filed a violation report which stated that the defendant had left his current residence in violation of the conditions of probation and moved to an unknown address. An order of arrest was issued that same day. The order of arrest was returned 27 February 1989 unserved because the Sheriff's department was unable to locate defendant in Iredell County.

On 18 May 1989, the defendant was arrested at the county jail in Christiansburg, Virginia. He was returned to North Carolina. The magistrate ordered on 18 May 1989 that defendant be held without bond and that he be held for the U.S. Marshals Service. The magistrate ordered defendant to appear in Iredell County Superior Court on 5 June 1989.

Counsel was appointed for defendant on 5 June 1989 and he appeared for hearing on 9 June 1989. Defendant admitted that he had violated probation. Judge Davis revoked defendant's probation in both cases and activated both sentences. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angelina M. Maletto, for the State.

Hazel L. Sherrill for the defendant.

LEWIS, Judge.

Defendant assigns as error the fact that the trial court failed to hold a preliminary hearing on defendant's violation of probation pursuant to G.S. § 15A-1345(c). This statute requires a preliminary hearing within seven working days of an arrest of a probationer unless the probationer waives his right to a hearing. Defendant did not waive his right to a preliminary hearing, and asserts that

the trial court's failure to conduct a preliminary hearing violated the statute and his right to due process of law.

Defendant was arrested out-of-state on Thursday, 18 May 1989; his revocation hearing was set for Monday, 5 June 1989. Defendant was held for a period of eleven working days (Monday, 29 May being a holiday) without a preliminary hearing. Although we find that the Court failed to comply with the provisions of G.S. § 15A-1345(c), we hold that the defendant was not prejudiced by the lack of a preliminary hearing. The defendant was arrested in Virginia. This is prima facie evidence of a parole violation. He does not deny that he violated the conditions of his parole. There was no need for a preliminary hearing to determine whether there was probable cause to believe he had violated a condition of his probation.

Defendant received a fair hearing, free of prejudicial error.

No error.

Judges WELLS and COZORT concur.

Judge WELLS concurring.

At his hearing, defendant admitted his violations of the conditions of his probation. On appeal, he does not contend that he did not violate those conditions nor that his violations should for any reason be excused. His sole contention is that he was denied a preliminary hearing. Under these circumstances, I agree that the failure to give defendant a preliminary hearing has not prejudiced him in any way.

Judge COZORT concurring.

At the revocation hearing held on 5 June 1989, the defendant did not contest the alleged violation, nor did he raise the issue of his not having had a preliminary hearing prior to the revocation hearing. I find the defendant's failure to do either to constitute a waiver of the right to a preliminary hearing, and I vote to affirm on that basis.

LAURA A. BOWMAN AND VICTOR H. MESSICK, PLAINTIFFS v. TRACY DRUM AND WIFE, IRENE DRUM, DEFENDANTS

No. 8925DC180

(Filed 6 March 1990)

Landlord and Tenant § 13 (NCI3d)— inadequate insurance obtained by lessee—material provision of lease breached

Plaintiff tenants' suit to restrain defendant landlords from interfering with the leased premises cannot succeed, since plaintiffs were required to insure defendants' premises in the amount of $500,000; this was a material provision of the lease; and plaintiffs breached the provision by providing only $300,000 in coverage.

Am Jur 2d, Landlord and Tenant § 274.

APPEAL by plaintiffs from order entered 14 September 1988 by *Kincaid, Judge*, in CATAWBA County District Court. Heard in the Court of Appeals 19 September 1989.

Beverly T. Beal and Victoria J. McGee for plaintiff appellants.

No brief filed for defendant appellees.

PHILLIPS, Judge.

Plaintiffs, who leased certain premises from defendants upon which they operated a child care center, brought this action to restrain defendants from interfering with their enjoyment of the premises under the lease. In answering and counterclaiming defendants asserted, in gist, that they entered the premises at the request of plaintiffs' agent because Duke Power was going to cut the power off and leave the children without electricity; because the rent was past due; and because plaintiffs had breached the lease by providing liability insurance for the premises with limits of only $300,000, whereas the lease required coverage with limits of $500,000. Following a hearing the court dismissed plaintiffs' action upon affidavits and other materials which show without contradiction that plaintiffs had insured the premises with liability limits of $300,000, though the lease required limits of $500,000.

The decision is correct and we affirm it. The provision requiring plaintiffs to insure defendants' premises in the amount of

$500,000 is a material provision of the lease, as the trial judge concluded; and plaintiffs having breached the provision it follows as a matter of law that their suit to restrain defendants from interfering with the leased premises cannot succeed. For it is fundamental in our jurisprudence that one who breaches a material provision of a contract may not ask a court of equity to enforce the rest of the agreement. *Combined Insurance Company of America v. McDonald*, 36 N.C. App. 179, 243 S.E.2d 817 (1978). Those who seek equity must do equity is not just a precept for moral observance, it is an enforceable rule of law. 5 Strong's N.C. Index 3d, *Equity* Sec. 1.1, p. 623 (1977). Since plaintiffs' action for injunctive relief must fail, their argument that under Chapter 42 of the General Statutes defendants had no right to take possession of the premises need not be determined.

Affirmed.

Judges COZORT and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 FEBRUARY 1990

BOSKIND v. MOORE No. 8828SC1233	Buncombe (86CVS3575)	Affirmed
HOFFMAN v. COMPUTER TEXTUAL SERVICES, INC. No. 8915SC311	Orange (86CVS869)	Affirmed
JOHNSON v. PEOPLES BANK AND TRUST CO. No. 8910SC235	Wake (88CVS3192)	Affirmed
MILLS v. CHARLOTTE MEMORIAL HOSPITAL No. 8910IC139	Ind. Comm. (643792)	Affirmed
MORGAN v. LINN-CORRIHER No. 8910IC670	Ind. Comm. (550723)	Affirmed
STATE v. BARRINGTON No. 891SC459	Pasquotank (88CRS2598)	New Trial
STATE v. CAREY No. 8917SC524	Surry (88CRS1956)	No Error
STATE v. DAVIS No. 8919SC380	Randolph (88CRS3249)	No Error
STATE v. INMAN No. 8926SC379	Mecklenburg (88CRS16398) (88CRS25520)	No prejudicial error
STATE v. LYLES No. 8918SC482	Guilford (88CRS41840) (88CRS41841)	No Error
STATE v. MILLS No. 896SC202	Halifax (88CRS2504) (88CRS2505) (88CRS2506)	No Error
STATE v. MOORE No. 8927SC704	Gaston (85CRS028563) (86CRS593) (86CRS9439)	No Error
STATE v. NEWSOME No. 892SC229	Martin (88CRS1689)	No Error

STATE v. YELTON No. 8827SC1328	Cleveland (86CVS2817) (86CVS4757) (86CVS4759) (superseded) (86CRS1050) (superseded)	No prejudicial error
THOMAS v. HARRELL No. 8913SC328	Guilford (87CVS6174)	Reversed

FILED 6 MARCH 1990

BROWNING-FERRIS INDUSTRIES v. LOWE'S OF GREENSBORO No. 8918DC971	Guiford (88CVD6055)	Affirmed
CITY OF GASTONIA v. HOLLAND No. 8927SC1152	Gaston (89CVS679)	Dismissed
FIRST UNION NATIONAL BANK v. CURRENT No. 8922DC921	Iredell (87CVD1351)	Affirmed
KEPLEY v. KEPLEY No. 8922DC903	Iredell (88CVD247)	No Error
KIMREY v. AUSTIN No. 8918DC789	Gulford (88CVD976)	Affirmed
McDOWELL v. McDOWELL No. 8927DC624	Cleveland (88CVD825)	Affirmed
McNAMES v. MARYLAND CASUALTY CO. No. 8921SC300	Forsyth (87CVS192)	Remanded for entry of summary judgment for plaintiffs.
MECHANICS AND FARMERS BANK v. HIGGINS No. 8921DC547	Forsyth (87CVD4096)	Affirmed
MERCER v. PREFERRED MUTUAL INS. No. 8926SC1002	Mecklenburg (88CVS2123)	No Error
NORMAN v. ACOSTA No. 8918DC861	Guilford (83CVD692)	Reversed & remanded in part
SALSI v. JONES No. 8918SC938	Guilford (88CVS5094)	Affirmed

STATE v. ANDERSON No. 897SC576	Wilson (88CRS3153)	Affirmed
STATE v. BRADSHAW No. 898SC1065	Lenoir (88CRS8396)	No Error
STATE v. EVANS No. 8918SC911	Guilford (89CRS20287) (89CRS20289) (89CRS25694)	No Error
STATE v. GREEN No. 8927SC900	Gaston (88CRS16962) (88CRS16905) (88CRS16906) (88CRS16907) (88CRS16909) (88CRS25324) (88CRS25323)	No Error
STATE v. HUSKEY No. 8927SC1064	Gaston (86CRS15913)	Dismissed
STATE v. JACKSON No. 8920SC883	Richmond (88CRS4249) (88CRS5715)	Vacated & Remanded
STATE v. JOEL No. 8926SC841	Mecklenburg (88CRS82800)	No Error
STATE v. JOHNSON No. 8926SC984	Mecklenburg (88CRS87919) (88CRS87922)	No Error
STATE v. JONES No. 8927SC910	Gaston (89CRS2212) (89CRS2213) (89CRS2215) (89CRS2216) (89CRS2285) (89CRS2287) (89CRS2289) (89IFS1200) (89IFS1201) (89IFS1202) (89IFS1203) (89IFS1204)	No Error
STATE v. LANCE No. 8829SC1360	Transylvania (86CRS1347)	No Error
STATE v. LOVE No. 8926SC570	Mecklenburg (88CRS52535)	No Error

STATE v. McCOMBS No. 8918SC787	Guilford (88CRS15085)	Affirmed
STATE v. MERRILL No. 8930SC820	Macon (88CRS742)	No Error
STATE v. ODELL No. 8918SC654	Guilford (88CRS20494) (88CRS20495)	Affirmed
STATE v. PAUL No. 8926SC568	Mecklenburg (88CRS46877)	No Error
STATE v. ROBERTS No. 895SC554	New Hanover (88CRS17490) (88CRS17491) (88CRS17492) (88CRS17493)	No Error
STATE v. ROBINSON No. 8926SC1012	Mecklenburg (88CRS84530)	No Error
STATE v. SIMMONS No. 893SC558	Craven (88CRS6323) (88CRS6324) (88CRS6325)	No Error
STATE v. WILEY No. 8926SC1036	Mecklenburg (88CRS64697)	No Error
STATE v. WILSON No. 8926SC1096	Mecklenburg (87CRS26863)	Affirmed
WEST v. OLIVEY No. 8918SC361	Guilford (87CVS6336)	Affirmed in part, reversed in part & remanded

MOSLEY & MOSLEY BUILDERS, INC. v. LANDIN LTD., AND CARL W. JOHNSON

No. 8918SC198

(Filed 20 March 1990)

1. **Rules of Civil Procedure § 15.1 (NCI3d)— amendment of complaint after remand—no abuse of discretion**

The trial court did not abuse its discretion by granting plaintiff's motion to amend his complaint prior to a second trial where plaintiff filed an original action for damages resulting from breach of a lease; a verdict for plaintiff was remanded for a new trial; and the trial court allowed plaintiff to amend the complaint and assert claims for punitive damages and unfair and deceptive trade practices. Defendants have shown no prejudice resulting from granting the motion to amend and the sufficiency of the complaint in stating grounds for relief is not the standard utilized in determining a motion to amend pleadings.

Am Jur 2d, New Trial §§ 64, 587.

2. **Unfair Competition § 1 (NCI3d)— breach of lease—unfair and deceptive trade practice**

The trial court did not err in an action arising from a breach of a lease by permitting evidence on a claim for unfair and deceptive trade practices or by submitting that issue to the jury. *Marshall v. Miller*, 302 N.C. 539, did not limit N.C.G.S. § 75-16 only to those situations where small monetary damages were involved; the rental of commercial properties satisfies the commerce requirement of N.C.G.S. § 75-1.1; plaintiff alleged conduct by defendants which would have a tendency to mislead or deceive; and there was competent evidence justifying the submission of each issue to the jury.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

3. **Damages § 17.7 (NCI3d)— breach of lease—punitive damages**

An assignment of error regarding punitive damages in an action arising from the breach of a lease was moot where the jury awarded punitive damages but plaintiff elected to

accept compensatory damages which were then trebled pursuant to N.C.G.S. § 75-16.

Am Jur 2d, Damages § 817.

4. **Landlord and Tenant § 4 (NCI3d)— sale of leased property—action for breach of lease against new landlord—conversations occurring during original lease negotiations**

The trial court did not err in an action arising from the breach of a lease by a new landlord by admitting conversations occurring during the original lease negotiations where there was evidence that defendants were made aware of the lease at the time of their purchase of the mall and the trial court merely allowed the introduction of extrinsic evidence to explain the meaning of ambiguous provisions in the lease. Moreover, plaintiff's allegations of fraud do not rest on the lease negotiations but are based on defendant's behavior in leading plaintiff on with false assurances while negotiating with another for a new lease of the already leased premises.

Am Jur 2d, Landlord and Tenant §§ 38, 39.

5. **Damages § 3.5 (NCI3d)— breach of lease—lost profits—evidence admissible**

The trial court did not err in an action arising from the breach of a lease by admitting testimony on the issue of prospective lost profits using calculations based on the sales of the successor tenant where the action was being heard after a remand on appeal; the issue was disposed of in the first appeal adversely to defendant; and the differences in the two businesses relate only to the weight to be given the evidence.

Am Jur 2d, Landlord and Tenant §§ 183, 187.

6. **Landlord and Tenant § 4 (NCI3d)— sale of leased property—breach of lease by new landlord—conversations concerning original written agreement**

The trial court did not err in an action arising from a breach of a lease by a successor landlord by admitting conversations concerning the original written agreement before defendants purchased the mall where the matter was being heard on remand following appeal and the first appeal determined

that the conversations were admissible to determine the meaning of ambiguous provisions.

Am Jur 2d, Landlord and Tenant §§ 95, 103; Vendor and Purchaser § 660.

7. **Landlord and Tenant § 4 (NCI3d)— sale of leased property—breach of lease by new landlord—instructions**

The trial court did not err in an action arising from the breach of a lease by a successor landlord by instructing the jury that the lease could be construed against the party who drafted the instrument even though defendants did not in fact draft the agreement. Defendants, as purchasers of the leased property, were subject to the same rights and obligations as the original landlord, which drafted the lease.

Am Jur 2d, Landlord and Tenant §§ 95, 103; Vendor and Purchaser § 660.

8. **Evidence § 15.2 (NCI3d)— breach of lease—evidence of plaintiff's emotions and future—admissible**

The trial court did not err in an action arising from the breach of a lease by admitting evidence of plaintiff's (lessee's) emotions and future where his testimony concerning his reaction to the news that his property had been removed from the mall was relevant and not unfairly prejudicial, the court did not abuse its discretion by admitting testimony concerning plaintiff's future intentions, and the trial court's comments were explanations of its evidentiary rulings.

Am Jur 2d, Landlord and Tenant § 327.

9. **Trial § 15 (NCI3d)— breach of lease—control of cross-examination—no abuse of discretion**

The trial court did not abuse its discretion in an action arising from the breach of a lease by failing to control the allegedly voluminous objections by plaintiff's counsel during defendant's cross-examination of witnesses. N.C.G.S. § 8C-1, Rule 611.

Am Jur 2d, Trial § 192.

APPEAL by defendants from judgment entered 24 August 1988 by *Judge James M. Long* in GUILFORD County Superior Court. Heard in the Court of Appeals 11 October 1989.

This is an appeal from an action for damages allegedly resulting from breach of a lease. On 16 February 1981, plaintiff executed a lease agreement with defendants' predecessors in interest, Pomona Associates, for space in Pomona Factory Outlet Mall d/b/a Greensboro Outlet Mall. Plaintiff entered the lease to operate a retail store, "Nuts 'N Such," to sell nuts, candies, and drinks. The space leased by plaintiff was on the first floor of Building I and was designated on Exhibits A-1 and A-2 which were attached to the lease. The lease agreement referred to the project as Pomona Factory Outlet Mall, Phase I.

On 27 July 1981, defendants purchased the project and all leases then outstanding, including plaintiff's lease. Plaintiff continued to operate his business in the mall. On 29 June 1983, plaintiff received a letter from Jim Stutts, the mall director, indicating that plaintiff's business would be moved to the "galley gardens" section of the mall. Shortly before receiving this letter, plaintiff had received a letter from defendants wishing him continued success and another profitable year. In the 29 June 1983 letter, Stutts indicated that he was authorized to relocate plaintiff pursuant to paragraph 28 of the lease agreement which provided that

> [l]andlord shall have the right to relocate Tenant, at Landlord's cost and expense, within Pomona Factory Outlet Mall, Phase I, upon sixty (60) days notice to Tenant, which relocation shall in no way affect the obligations and duties of either party hereunder. In the event Tenant refuses to accept the new location designated by Landlord, Landlord at its option may cancel and terminate this Lease by an additional thirty (30) days written notice to tenant.

Plaintiff's counsel, Lawrence McGee, replied to the 29 June 1983 letter, informing the mall director that the contemplated new site was not within Phase I of the project as required by paragraph 28 of the lease. Plaintiff's counsel's letter stated that he had contacted the architect for the project who had advised him that Phase I of the project included only the main floor of the building where plaintiff was currently located.

At trial, plaintiff testified that during the initial negotiations to lease the mall space, he was told by Bobby Slate, a leasing agent for Pomona Associates, that Phase I, which was currently being developed, consisted of the main floor of buildings one and two and the connecting corridor which contained restrooms. In

the lease, paragraph 7 stated that the project consisted of 130,000 square feet which included the "galley garden" area. However, the site plan that was attached to the lease and designated as Phase I provided that there was 78,760 square feet of building area and that other areas were reserved for future development. The lease provided that areas not included in the lease were not contemplated by the lease.

Plaintiff refused to relocate his shop to the "galley garden" area. Defendant Carl Johnson then wrote plaintiff to disagree with plaintiff's counsel's interpretation of the lease. Defendant Johnson's letter stated that he disagreed with McGee's statement that " 'unfortunately, the specific areas of the mall within Phase I of the project are not defined in the lease or demarcated on any of the exhibits.' " Defendant Johnson's letter then gave notice of termination if plaintiff would not vacate the main floor area. During this period, plaintiff learned that defendants intended to lease the area that he currently occupied to a nationally owned franchise named "Peanut Shack."

On 4 October 1983, defendants' agents physically removed plaintiff's store from the Greensboro Outlet Mall. Plaintiff then negotiated for and obtained a space in Durham, North Carolina.

Plaintiff then brought this action for damages. At trial, the jury returned a verdict in favor of plaintiff for $120,000. Both parties entered timely notice of appeal from that judgment. This court reversed the lower court and remanded the action for a new trial because the trial court's instructions on the issue of defendants' breach were incomplete and because plaintiff had been prevented from presenting competent evidence of all of its damages. At the retrial judgment was again entered for the plaintiff. Defendants appeal.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss and Trudy A. Ennis, for plaintiff-appellee.

Floyd, Greeson, Allen and Jacobs, by Jack W. Floyd and Constance F. Jacobs, for defendant-appellants.

EAGLES, Judge.

I.

[1] Defendants contend that the trial court committed prejudicial error when it allowed plaintiff on remand from this court to amend

the complaint and assert claims for punitive damages and unfair and deceptive trade practices, received evidence on those claims and submitted those issues to the jury. Defendants argue that the allegations of the amended complaint do not state a claim for punitive damages or for unfair trade practices when considered with the lease provisions. We disagree.

"A motion to amend is directed to the discretion of the trial court." *Development Enterprises v. Ortiz*, 86 N.C. App. 191, 195, 356 S.E.2d 922, 925 (1987), *disc. rev. denied*, 320 N.C. 630, 360 S.E.2d 84, citing *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982). "The exercise of the court's discretion is not reviewable absent a clear showing of abuse." *Id.* "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* citing *Martin v. Hare*, 78 N.C. App. 358, 337 S.E.2d 632 (1985). "The burden is upon the opposing party to establish that that party would be prejudiced by the amendment." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986), citing *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E.2d 721 (1972).

Here, defendants have shown no prejudice resulting from the granting of plaintiff's motion to amend his complaint to assert claims for punitive damages and unfair and deceptive trade practices. The motion to amend was made after remand from this court but prior to the new trial. While this court previously determined that the trial court had not abused its discretion in denying plaintiff's motion to amend at the close of all evidence in the first trial to assert claims for punitive damages and unfair and deceptive trade practices, we note that plaintiff's counsel had stated during the first trial that plaintiff was not seeking treble damages. Here, before the second trial began, those concerns were not present. Defendants argue that the complaint was insufficient to support the additional claims since their actions were based upon their interpretation of the lease. The sufficiency of the complaint in stating grounds for relief is not the standard utilized in determining a motion to amend pleadings. Accordingly, the trial court did not abuse its discretion in granting plaintiff's motion to amend his complaint prior to the second trial.

A. Unfair and Deceptive Trade Practices

[2] Defendants next contend that the trial court erred in permitting evidence on the claim of unfair and deceptive trade practices

and erred in submitting this issue to the jury. Defendants contend that *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), dictates a finding that no unfair trade practice occurred since the acts complained of may be adequately compensated by money damages and that there was virtually no impact on commerce. We disagree.

In *Marshall, supra*, our Supreme Court stated that:

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. *Id.* at 262-63, 266 S.E.2d at 621. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Id.* at 263, 266 S.E.2d at 621. As also noted in *Johnson*, under Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. *Id.* at 265, 266 S.E.2d at 622; *Trans World Accounts, Inc. v. Federal Trade Commission*, 594 F. 2d 212 (9th Cir. 1979); *Resort Car Rental System, Inc. v. Federal Trade Commission*, 518 F. 2d 962 (9th Cir.), *cert. denied sub nom. MacKenzie v. United States*, 423 U.S. 827 (1975). Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act. *Johnson v. Insurance Co.*, 300 N.C. 247, 265-66, 266 S.E.2d 610, 622 (1980); Annot. 89 ALR 3d 449, 465; *see Leaffer v. Lipson, supra* at 535 and the numerous cases cited in n. 87.
>
> If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Consequently, good faith is not a defense to an alleged violation of G.S. 75-1.1.

Id. at 548, 276 S.E.2d at 403.

"As an essential element of a cause of action under G.S. 75-16, plaintiff must prove not only that defendants violated G.S. 75-1.1, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentation." *Bailey v. LeBeau*, 79 N.C.

App. 345, 352, 339 S.E.2d 460, 464 (1986), *decision affirmed as modified* by 318 N.C. 411, 348 S.E.2d 524 (1986), citing *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980). A mere breach of contract does not constitute an unfair or deceptive trade practice. *Coble v. Richardson*, 71 N.C. App. 511, 322 S.E.2d 817 (1984). The conduct must be fraudulent or deceptive. *Id.* " '[A] party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position.' " *Id. quoting Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 700, 303 S.E.2d 565, 569, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

Defendants contend that if adequate money damages are available, the *Marshall* court implies there is no need to treble those damages. The Supreme Court in *obiter dictum* stated that one of the purposes of the provision for treble damages was to make "more economically feasible the bringing of an action where the possible money damages [were] limited." *Id.* at 549, 276 S.E.2d at 404. Contrary to defendants' contentions, by that language the *Marshall* court did not restrict G.S. 75-16 to apply only to situations where small monetary damages were involved.

Defendants also contend that plaintiff's alleged injury does not impact on commerce. We disagree. We have previously held that the rental of commercial property satisfies the commerce requirement of G.S. 75-1.1. *Kent v. Humphries*, 50 N.C. App. 580, 589, 275 S.E.2d 176, 183 (1981), *aff'd and modified*, 303 N.C. 675, 281 S.E.2d 43 (1981).

In *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), this court addressed whether trespass and conversion of property by a landlord could constitute unfair and deceptive trade practices under G.S. 75-1.1. *Love* arose under the pre-1977 version of G.S. 75-1.1 which was more narrow in scope than the current statute. In *Love*, the jury found that the defendant or his agent trespassed upon plaintiffs' premises and converted plaintiffs' personal property by refusing to return the property upon demand. There, the parties stipulated that defendant had not evicted plaintiffs from the premises pursuant to any judicial process. This court stated that the purpose of G.S. 75-1.1(b) was to provide "means of maintaining 'ethical standards of dealings . . . between persons engaged in business and the consuming public' and to promote 'good faith and fair dealings

between buyers and sellers. . . .' " *Id.* at 517, 239 S.E.2d at 583. We held that defendant's conduct in *Love* constituted unfair or deceptive acts or practices in violation of G.S. 75-1.1 and affirmed the treble damages award.

Here plaintiff alleged conduct by defendants which would have a tendency to mislead and deceive. On 15 June 1983 (just two weeks prior to the defendants' 29 June 1983 relocation letter), defendants wrote plaintiff stating: "[w]e look forward to another profitable year at The Greensboro Outlet Mall and wish you every success!" Plaintiff's other evidence was that defendants attempted to relocate him to an area not contemplated by the lease and without a reasonable belief cited his violation of the terms of the lease as grounds for relocating plaintiff. In addition, there was evidence that even while the 15 June 1983 "good wishes" letter was being sent, defendants were negotiating for lease of plaintiff's space to a national franchise with a similar retail sales operation. Plaintiff alleged that because of his forced relocation, his business was injured and he suffered lost profits.

Like the defendant in *Love, supra,* the defendants here wrongfully entered plaintiff's premises relying on defendants' interpretation of ambiguous provisions of the lease. Defendants were aware of plaintiff's disagreement with their interpretation of the ambiguous sections of the lease, but elected to physically remove his merchandise and property in the early morning hours to a truck rented for that purpose. At the time of his eviction and removal of his property, plaintiff was rightfully on the premises. A jury has since found that defendants breached the lease agreement. These actions were sufficient to support a claim for unfair and deceptive trade practices.

Defendants also argue that the courts have generally held that where the alleged wrongdoings occurred after a contract's execution, the subsequent action does not fall within the scope of Chapter 75. They rely on *American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.*, 575 F. Supp. 816 (W.D.N.C. 1983), as authority. Since defendants' conduct could be considered unfair and deceptive under the rationale of *Love*, 34 N.C. App. 503, 239 S.E.2d 574, we find this contention unpersuasive.

Defendants contend that the trial court erred in submitting issues of unfair and deceptive trade practices to the jury because

there was insufficient evidence of the conduct alleged. The trial court submitted the following issues to the jury:

> (1) Do you find by the greater weight of the evidence that any breach of contract by the defendants was intentional and for the purpose of causing the plaintiff's business to move out of the mall;
>
> (2) Did either defendant or an agent of either defendant intentionally require plaintiff to relocate outside "Phase I" Mall space because he knew the plaintiff's business could not succeed there;
>
> (3) Did either defendant or an agent of either defendant represent to the plaintiff his approval of plaintiff's business operations while defendants were actually negotiating with another possible tenant for the same space then occupied by plaintiff;
>
> (4) Did either defendant or an agent of either defendant require the plaintiff, under the alleged authority of their lease agreement, to move to a space such defendant or agent knew was not within "Phase I" of the mall and thereafter cause the plaintiff's merchandise and fixtures to be removed from the mall because plaintiff failed to comply with the requirement?

"To justify the submission of an issue it must not only arise on the pleadings, but must be supported by competent evidence." *Morris Speizman Company, Inc. v. Williamson*, 12 N.C. App. 297, 304, 183 S.E.2d 248, 252, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971), citing *Gunter v. Winders*, 256 N.C. 263, 123 S.E.2d 475 (1962). "The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court." *Moseley v. Atlantic Coast Line R.R. Co.*, 197 N.C. 628, 636, 150 S.E. 184, 188 (1929).

Here, there was competent evidence justifying the submission of each issue to the jury. On the first issue, the plaintiff introduced testimony from defendant Carl Johnson who stated that the Celido Corporation lease would produce more rental income than the plaintiff's lease. Defendant Johnson even testified that he was replacing plaintiff's store with the Peanut Shack "because they [sic] were going to pay more rent, bring a better image to the mall, be better for merchants in the mall and help his [plaintiff's] operation when he moved it to another location." Finally, plaintiff testified that

defendant admitted that plaintiff would not break even in the basement. Plaintiff testified that the defendant said if he had known that plaintiff would pay more rent for the original space and that plaintiff had had an increase in sales, he would not have negotiated the lease with Peanut Shack. Accordingly, the trial court properly submitted the first issue.

On the second issue, there was also adequate competent evidence. Defendant Johnson testified that he thought plaintiff would survive in the basement, but admitted that he knew that it was not in plaintiff's best interest to move to the basement and that it would hurt plaintiff's sales in the beginning. He testified that when making the initial decision to move plaintiff, he was "not even thinking in terms of Phase I." This testimony was sufficient to justify the submission of the second issue.

On the third issue, plaintiff introduced a letter in which defendants indicated approval of plaintiff's business just two weeks before their letter giving notice of their intention to relocate plaintiff. Plaintiff also introduced evidence that even before sending the 13 June 1983 congratulatory letter to plaintiff, defendants were negotiating with Celido Corporation to lease the same space plaintiff then occupied. This evidence is sufficient to justify submitting the third issue.

On the fourth issue, plaintiff introduced evidence that defendant Johnson moved his business pursuant to defendants' interpretation of the lease. Defendant Johnson testified that he evicted plaintiff from the mall after considering and discussing the disputed lease provisions with people in the industry to see if he was correct in his interpretation of a lease that plaintiff and not defendant negotiated. When replying to defendants' relocation letter, plaintiff's counsel pointed out their different interpretation of the lease. The fourth issue was properly submitted.

B. Punitive Damages

[3] Defendants next contend that the trial court erred in allowing plaintiff on remand from this court to amend the complaint and inject a claim for punitive damages, receiving "voluminous" evidence on this claim and submitting it to the jury. Defendants argue that there was no aggravating tort in addition to breach of contract justifying an award of punitive damages. We disagree.

At the outset, we note that while the jury awarded punitive damages, in lieu of punitive damages, plaintiff elected to accept compensatory damages which were then trebled pursuant to G.S. 75-16. Since the judgment did not award plaintiff punitive damages, defendants' appeal on this issue is moot and this assignment of error is overruled.

C. The Evidence

[4] Defendants finally argue that since they had nothing to do with the negotiation and execution of the lease, they cannot be held responsible for conversations occurring during the original lease negotiations. They argue that they did not mislead plaintiff about his rights and duties under the lease prior to its execution. Defendants cite *Herring v. Volume Merchandise, Inc.*, 249 N.C. 221, 106 S.E.2d 197 (1958), for the proposition that a lease is not binding on purchasers of leased property who are not made aware of it. We disagree.

Herring was a statute of frauds case which addressed the issue of whether a parol offer to surrender a lease having more than three years to run was binding on plaintiffs who were not parties to the lease. Here, there is evidence that defendants were in fact made aware of the lease at the time of their purchase of the mall since they purchased all outstanding leases. The trial court merely allowed the introduction of extrinsic evidence to explain the meaning of ambiguous provisions in the lease. Defendants' contention is without merit especially in view of the fact that plaintiff's allegations of fraud do not rest on the lease negotiations but are based on defendants' behavior in "leading plaintiff on" with false assurances while negotiating with another for a new lease of the already leased premises.

II.

[5] Defendants next assign as error the trial court's admission of evidence and instruction to the jury on the issue of lost profits. Defendants argue that the trial court erred in allowing detailed testimony on the issue of prospective lost profits using calculations based on the sales of their successor tenant, the Peanut Shack. Defendant contends there is no evidence that the businesses were comparable. We disagree.

> [A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings,

> the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-2 (1956). "The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power." *Id.* at 537, 91 S.E.2d at 682.

Defendants argued in the first trial that because plaintiff's marketing and management practices differed substantially from the Peanut Shack, it was unreasonably speculative to use Peanut Shack's sales as a basis for determining plaintiff's profits. This court disposed of the issue in the first appeal adversely to defendant. *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988).

> Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E.2d 634 (1953). To prove lost profits, the injured party "must prove as part of his case both the amount and cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of loss must be shown with reasonable certainty." *Cary v. Harris*, 178 N.C. 624, 628, 101 S.E. 486, 488 (*1919*), *quoting Nance v. Western Union Tel. Co.*, 177 N.C. 313, 98 S.E. 838 (1919). If an established business is wrongfully interrupted, the damages can be proved by showing the profitability of the business for a reasonable time before the wrongful act. *Id.* It is only "when prospective profits are conjectural, remote, or speculative, they are not recoverable." *Perkins v. Langdon, supra*, at 173, 74 S.E.2d at 645. *Accord Weyerhaeuser Co. v. Godwin Building Supply Co., Inc.*, 292 N.C. 557, 234 S.E.2d 605 (1977).
>
> Evidence that plaintiff's Nuts N' Such store had been profitable up until the time of the alleged breach, and that its sales had increased as new stores had opened in the mall, showed that the business "had been successfully conducted

> for such length of time that the profits thereof were reasonably ascertainable." *Perkins v. Langdon, supra*, at 174, 74 S.E.2d at 646. Peanut Shack and Nuts N' Such sold similar merchandise; evidence of Peanut Shack's sales from plaintiff's former location was relevant to show the sales which plaintiff might reasonably have expected to make had it not been evicted. Differences in marketing techniques between the two stores went only to the weight to be given such evidence by the jury; these differences were not such as to render the evidence unreasonably remote or speculative upon the issue of plaintiff's opportunity to make future profits had it not been evicted.

Id. at 446, 361 S.E.2d at 613.

In our opinion in the first appeal we stated that if plaintiff is entitled to recover, he may recover "all damages actually and proximately resulting from the breach, including lost profits for the entire unexpired term of the lease, irrespective of whether it continued to operate its store at another location." *Id.* at 447, 361 S.E.2d at 614. In the second trial, plaintiff was allowed to present evidence of projected sales and profits using past operations and the Peanut Shack's operation as a basis. In the first opinion, we stated that such evidence "was not unreasonably speculative or remote and provided a basis for the measurement of plaintiff's damages with sufficient certainty as to be competent and admissible." *Id.*

Defendants argue that the evidence introduced at the subsequent trial established drastic differences in the two business opertions, products and premises. As we previously held, these differences only relate to the weight to be given to the evidence. *Mosley & Mosley Builders v. Landin Ltd., supra.* This assignment of error must also fail.

III.

[6] Defendants next contend that the trial court erred by placing them in the same position as the original lessor and that evidence about conversations concerning the written agreement before defendants purchased the mall was improperly admitted. Defendants now argue that the conversations were oral modifications, amendments or explanation of the written lease that the purchasers Landin and Johnson did not know about and to which they were not privy. We disagree.

In the first appeal we determined that these conversations were admissible to determine the meaning of ambiguous provisions. Based on this prior determination of admissibility, we will not now require exclusion of these conversations.

[7] Defendants also contend that the trial court erred in instructing the jury that the lease should be construed against the party who drafted the instrument when they did not in fact draft the lease agreement. We disagree.

> [O]rdinarily the owner of leased property may sell it during the term of a lease, and in the absence of a covenant to the contrary the lessee cannot prevent the landlord from selling the premises subject to the lease or resist a change of landlords, or ground a cause of action on such transfer and change of landlords. . . . [T]ransfer of the reversion, subject to the lease, neither terminates the leasehold estate nor deprives the tenant of any of his rights in the land.

Perkins v. Langdon, 237 N.C. 159, 164, 74 S.E.2d 634, 639 (1953) (citations omitted).

Defendants, as purchasers of the leased property from Pomona Associates (who drafted the lease), were subject to the same rights and obligations as Pomona. Accordingly, the trial court did not err in its instruction.

IV.

[8] Defendants next assign as error the admission of irrelevant or prejudicial evidence and the trial court's expression of opinion during the trial proceedings. Defendants contend that the trial court erred in admitting plaintiff's testimony about his emotions and future because it was either irrelevant or prejudicial. We disagree.

G.S. 8C-1, Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Evidence which is not relevant is not admissible under Rule 403. Whether or not to exclude evidence under this rule is within the

sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986).

Defendants first contend that the trial judge should not have allowed plaintiff to testify about his state of emotions when he found out that he had been evicted from the mall. After careful review, we find that plaintiff's testimony concerning his reaction to the news that his property had been removed from the mall was relevant and not unfairly prejudicial.

Secondly, defendants contend that the trial court should not have allowed plaintiff to testify about his future intentions since they were highly speculative. On this record we hold the trial court did not abuse its discretion.

Thirdly, defendants contend that they were prejudiced by the trial court's comments. The record shows that the trial court's comments were explanations of its evidentiary rulings. On this record we conclude that defendants were not prejudiced by the trial court's comments.

V.

[9] Defendants finally assign as error the trial court's restriction of the scope of cross-examination by its failure to control the allegedly "voluminous" objections by plaintiff's counsel during defendants' cross-examination of witnesses. Defendants contend that "[t]he trial court in this case completely destroyed the Landlord's right to fully and effectively cross-examine the witnesses by sustaining unfounded objections and failing to limit endless unfounded objections whose purpose was solely to disrupt the flow of testimony and confuse the jury; a purpose quite successfully accomplished." We disagree.

G.S. 8C, Rule 611 provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." On cross-examination much latitude is given counsel in testing for consistency and plausibility matters related by a witness on direct examination. *Maddox v. Brown*, 233 N.C. 519, 524, 64 S.E.2d 864, 867 (1951). "Finally, the legitimate bounds of cross-examination are largely within the discretion of the trial judge." *State v. Burgin*, 313 N.C. 404, 407, 329 S.E.2d 653, 656 (1985); *State v. Cox*, 296 N.C. 388, 250 S.E.2d 259 (1979). "Its rulings should not be disturbed except when prejudicial error is disclosed."

Id. citing *State v. Ross*, 275 N.C. 550, 553, 169 S.E.2d 875, 878 (1969), *cert. denied*, 397 U.S. 1050, 90 S.Ct. 1387, 25 L.Ed. 2d 665 (1970).

Defendants' exceptions pertain to their cross-examination of plaintiff and plaintiff's accountant. Defendants contend that their cross-examination efforts were hindered by the voluminous objections offered by plaintiff's counsel.

After careful review of the record, we find no abuse of discretion.

Because defendants failed to brief assignment of error numbers 5, 10, and 11, these assignments of error are deemed abandoned. Rule 28, Rules of App. Procedure.

For the reasons stated, we find no error.

No error.

Judges PARKER and GREENE concur.

DR. ALVIS L. CORUM, PLAINTIFF-APPELLEE v. UNIVERSITY OF NORTH CAROLINA THROUGH ITS BOARD OF GOVERNORS; C. D. SPANGLER, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA IN HIS OFFICIAL CAPACITY; APPALACHIAN STATE UNIVERSITY; AND JOHN THOMAS, CHANCELLOR OF APPALACHIAN STATE UNIVERSITY, AND HARVEY DURHAM, DEFENDANTS

No. 8924SC120

(Filed 20 March 1990)

1. **Appeal and Error § 6.8 (NCI3d)— denial of summary judgment —sovereign and qualified immunity—immediate appeal**

The denial of defendants' motion for summary judgment made on grounds of sovereign and qualified immunity affected a substantial right and was immediately appealable.

Am Jur 2d, Appeal and Review § 104; Municipal, County, School, and State Tort Liability § 651.

2. **Constitutional Law § 17 (NCI3d); State § 4 (NCI3d)— civil rights action against UNC and ASU—sovereign immunity**

Plaintiff's 42 U.S.C. § 1983 action against the University of North Carolina and Appalachian State University based

upon an alleged violation of his constitutional rights by his removal as Dean of Learning Resources at Appalachian State University was barred by the doctrine of sovereign immunity.

Am Jur 2d, Civil Rights §§ 268, 269.

3. **Constitutional Law § 17 (NCI3d); State § 4.1 (NCI3d)— civil rights claims—university officials—official capacities—sovereign immunity**

Plaintiff's 42 U.S.C. § 1983 claims for money damages against the President of the University of North Carolina and the Chancellor and a Vice Chancellor of Appalachian State University in their official capacities were barred by the doctrine of sovereign immunity. However, plaintiff's § 1983 claims for prospective injunctive relief against those three defendants in their official capacities were not barred by sovereign immunity.

Am Jur 2d, Civil Rights §§ 268, 269.

4. **Constitutional Law § 17 (NCI3d); Public Officers § 9 (NCI3d)— civil rights claims—violation of free speech—university officials—individual capacities—qualified privilege**

Summary judgment was properly entered in favor of the Chancellor and a Vice Chancellor of Appalachian State University on the ground of qualified privilege in plaintiff's 42 U.S.C. § 1983 claims to recover monetary damages from them in their individual capacities based upon allegations that his constitutional right to free speech was violated when he was removed as Dean of Learning Resources at Appalachian State University because of statements he made at a staff meeting in which he proposed an alternative to an announced plan for the relocation of a collection of books, manuscripts and artifacts, even if it is assumed that the relocation of the collection was an issue of public interest and that plaintiff was removed to prevent him from raising public concerns about the move rather than for insubordination as defendants assert, where it is apparent that when defendants acted they were not violating a "clearly established" right of which a reasonable person would have known.

Am Jur 2d, Civil Rights § 19; Colleges and Universities §§ 39, 41; Public Officers and Employees § 359.

5. Public Officers § 9 (NCI3d); State § 4.1 (NCI3d)— violation of state constitutional right—university officials—official capacities—sovereign immunity

The doctrine of sovereign immunity barred plaintiff's claims for money damages against the University of North Carolina, Appalachian State University, and the President of the University of North Carolina, the Chancellor of Appalachian State University and a Vice Chancellor of Appalachian State University in their official capacities based on alleged violations of plaintiff's right to free speech guaranteed by the N. C. Constitution. Art. I, §§ 14, 19, and 35 of the N. C. Constitution.

Am Jur 2d, Civil Rights § 19; Colleges and Universities §§ 39, 41; Public Officers and Employees § 359.

6. Public Officers § 9 (NCI3d); State § 4.1 (NCI3d)— violation of state constitutional right—university officials—individual capacities—no immunity

The Chancellor and a Vice Chancellor of Appalachian State University did not have immunity from plaintiff's claim against them for money damages in their individual capacities based on allegations that they violated plaintiff's right to free speech under the N. C. Constitution and thus acted outside the scope of their duties in removing plaintiff as Dean of Learning Resources at Appalachian State University.

Am Jur 2d, Civil Rights § 19; Colleges and Universities §§ 39, 41; Public Officers and Employees § 359.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendants from order entered 21 October 1988 by *Judge Marvin K. Gray* in WATAUGA County Superior Court. Heard in the Court of Appeals 13 September 1989.

This is a civil action in which plaintiff seeks injunctive relief and compensatory damages from defendants for allegedly violating his constitutionally guaranteed right to freedom of speech in relieving him of his duties as Dean of Learning Resources at Appalachian State University. Defendants moved for summary judgment based on various legal theories including sovereign immunity and qualified immunity. After hearing arguments of counsel and reviewing documents submitted, the trial court entered an order denying

defendants' motion for summary judgment. From this order, defendants appealed in apt time.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Laura E. Crumpler and Thomas J. Ziko, for defendant-appellants.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, for plaintiff-appellee.

JOHNSON, Judge.

Viewing the evidence in the light most favorable to plaintiff (the nonmoving party) as we are required to do, the evidence tends to show the following: For approximately fourteen years prior to June of 1984, plaintiff, Dr. Alvis Corum, held the position of Dean of Learning Resources at Appalachian State University ("ASU"). His duties included supervision of a diversified collection of books, manuscripts, and artifacts known as the Appalachian Collection (the "Collection"). In 1983, various ASU administrators began discussing the possibility of relocating the Collection from its present location in Dougherty Library because of the need to use that space for other purposes. The move was the subject of faculty debate and received attention in the campus newspaper. ASU Vice Chancellor for Academic Affairs Harvey Durham, a defendant in this action, was ultimately responsible for deciding where the Collection would be housed. Plaintiff, along with some other persons involved, felt strongly that the Collection should not be split in two, with the artifacts being separated from the written materials. He expressed this view to defendant Durham on occasion. During a meeting on 21 June 1984, defendant Durham informed plaintiff that the Collection would be moved immediately to University Hall and that responsibility for the Collection would be transferred to another department.

Plaintiff accepted the decision and set up a meeting, as requested by defendant Durham, to work out details of the move. This meeting, which occurred on 25 June, was attended by plaintiff, two ASU librarians, and Dr. Clinton Parker, Associate Vice Chancellor of Academic Affairs who attended as defendant Durham's representative.

Dr. Parker announced at the meeting that the artifacts and written materials would be moved to two separate ASU locations.

The next day a second meeting was held. Exactly what took place at this meeting is somewhat in dispute. It appears, however, that plaintiff proposed an alternative relocation plan in which the entire Collection would be housed in one location. Dr. Parker stated that he did not have the authority to entertain an alternative proposal, but agreed to relay the plan to defendant Durham.

Dr. Parker relayed the proposal to defendant Durham by telephone that evening. The following morning defendant Durham removed plaintiff from his position as Dean of Learning Resources. Plaintiff retained his position as a tenured faculty member.

[1] Before turning to the merits of this case, we are obliged to address a threshold issue not raised in the briefs of either party, namely, the appealability of the denial of a summary judgment motion. Generally, the denial of summary judgment does not affect a substantial right and is not appealable. *Hill v. Smith*, 38 N.C. App. 625, 248 S.E.2d 455 (1978); *Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E.2d 882 (1977). In the instant case, however, we hold that the denial of summary judgment affected a substantial right and is subject to review. We reach this conclusion in light of the holding of the United States Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411 (1985), a case in which the defendant federal official's summary judgment motions, on the grounds of absolute and qualified immunity, had been denied in District Court. In *Mitchell*, the Supreme Court held that "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525, 86 L.Ed.2d at 424 (citations omitted). Similarly, the Court concluded that denial of a public official's claim of qualified immunity from suit, to the extent that it turns on the legal questions of whether the conduct complained of violated "clearly established law" (a standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982)), is also appealable as a "final decision" within the meaning of 28 U.S.C. sec. 1291. In so holding, the Court stated that

> entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute im-

> munity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.
>
> An appealable interlocutory decision must satisfy two additional criteria: it must "conclusively determine the disputed question," *Coopers & Lybrand v. Livesay*, 437 US 463, 468, 57 LEd2d 351, 98 S.Ct 2454 (1978), and that question must involve a "clai[m] of right separable from, and collateral to, rights asserted in the action," [*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949).] The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements.

472 U.S. at 526-27, 86 L.Ed.2d at 425-26.

In the case *sub judice*, the defendants advance a substantial claim of absolute immunity as well as qualified immunity as grounds for their summary judgment motion. Further, the qualified immunity argument turns on the issue of whether "clearly established law" has been violated. *Harlow, supra.* In accord with *Mitchell v. Forsyth*, these contentions, if successful, entitle defendants to "immunity from suit rather than a mere defense to liability." *Mitchell, supra.* They could not, therefore, be vindicated after a trial and are appealable at this stage. We do not find it distinguishable that the defendants in the instant case are asserting state rather than federal immunities. We therefore hold that denial of defendants' summary judgment motion on the grounds of sovereign and qualified immunity is immediately appealable.

We first address defendants' assignment of error that the trial court erred in denying their summary judgment motion on grounds of sovereign immunity. Plaintiff's complaint alleges that defendants violated 42 U.S.C. sec. 1983 and that they violated plaintiff's right to freedom of speech as guaranteed by the North Carolina Constitution. In addition to defendants UNC and ASU, named in plaintiff's complaint, defendant Spangler has been sued in his official capacity only, while defendants Thomas and Durham have been sued in both their official and individual capacities.

We find that many of the issues raised in this assignment of error have previously been addressed by this Court in *Truesdale*

v. University of North Carolina, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), and we are bound by the holding of *Truesdale*.

[2] The doctrine of sovereign immunity prevents the State or its agencies from being sued without its consent. *Id.* The *Truesdale* Court observed that G.S. sec. 116-3 allows UNC and its constituent institutions to sue and be sued, but only as specifically provided by law. It further concluded that the action brought pursuant to 42 U.S.C. sec. 1983 against UNC and Winston-Salem State University was barred by the doctrine of sovereign immunity. We find this holding applicable to the facts of the instant case and hold that the trial court erred in denying defendants' motion for summary judgment as to defendants UNC and ASU regarding the 42 U.S.C. sec. 1983 cause of action.

We are unpersuaded that the case *sub judice* is controlled by *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), in which our Supreme Court abolished the defense of sovereign immunity in breach of contract actions. Plaintiff's action is based upon defendants' alleged violations of his constitutional rights. Plaintiff's complaint makes no reference to any employment contract or allegation that one was breached. We do not believe that statements in plaintiff's brief that he served as Dean pursuant to a contract is sufficient to bring this case under the rule of *Smith v. State* when the action is clearly based on alleged constitutional violations and plaintiff's complaint makes no mention of a contract.

[3] We turn now to the issue of whether plaintiff's claim for monetary damages, including back pay, against *individual* defendants Spangler, Thomas and Durham, named in their *official capacities*, is barred by sovereign immunity. Again, pursuant to *Truesdale*, *supra*, we hold that this action is barred. The rationale for this is that an action against a State employee in his official capacity for monetary damages would actually be an award against the State since the award would be paid from the State treasury. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E.2d 619 (1940); *Truesdale*, *supra*, at 193, 371 S.E.2d at 507.

As to these same three defendants in their official capacities, however, plaintiff's section 1983 claim, as it relates to prospective injunctive relief, is not barred by sovereign immunity. *Id.* at 194-95, 371 S.E.2d at 508. In this situation, sovereign immunity is preempted by federal law, *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d

123 (1988), so that the outcomes of section 1983 actions will not vary predictably with whether the action was brought in state or federal court. *Id.* This issue is more fully treated in *Truesdale* and need not be repeated here.

[4] We turn now to the issue of denial of summary judgment concerning monetary awards against defendants Thomas and Durham named in their individual capacities. It is recognized that governmental officials sued in their individual capacities under section 1983 may be liable for damages. *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114 (1985). Such officials may, however, raise the defense of *qualified immunity. Harlow v. Fitzgerald, supra.* The United States Supreme Court has stated 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. [Citations omitted.]
>
> . . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was *clearly established* at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 818, 73 L.Ed.2d at 410-11 (emphasis added).

The Court has further described a "clearly established" right by stating that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell [v. Forsyth]*, 472 U.S. 511, 535 n. 12, 86 L.Ed.2d 411, 105 S. Ct. 2806; *but it is to say that in light of pre-existing law the unlawfulness must be apparent.*

Anderson v. Creighton, 483 U.S. 635, 640, 97 L.Ed.2d 523, 531 (1987) (emphasis added).

In the case *sub judice*, plaintiff alleges that he was relieved of his duties as Dean because of the statements he made at the 26 June 1984 staff meeting in which he proposed an alternative relocation plan. He asserts that this discharge violated his guaranteed right of free speech. To determine whether defendants violated a "clearly established" right of which a reasonable person would have known, we examine the substantive law applicable to plaintiff's claim. The Supreme Court has set forth the necessary elements for a state employee's section 1983 action for violation of freedom of speech in *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708 (1983). In that case, the Court stated that the first issue is whether "an employee's speech addresses a matter of public concern" and this must be "determined by the content, form, and context" of the statement in question. *Id.* at 147, 75 L.Ed.2d at 720. If the speech does comment on a matter of public concern, then the court must balance the employee's interest as a citizen in commenting on the public issue against "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150, 75 L.Ed.2d at 722; *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811 (1968).

It is unnecessary to the disposition of the qualified immunity issue before us to fully apply the criteria of *Connick* to the instant case and we decline to do so. We shall, however, examine the process sufficiently to determine whether qualified immunity exists.

On review of denial of defendants' summary judgment motion, we are obliged to view the record in the light most favorable to the nonmoving party, the plaintiff, giving him the benefit of all reasonable inferences. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E.2d 908 (1983). In doing this, we conclude, for purposes of evaluating the summary judgment motion only, that the relocation of the Appalachian Collection was an issue of some public interest to the local community. Further, for purposes of this analysis only, we may resolve the conflicting allegations of the parties and conclude that plaintiff was discharged in order to prevent him from raising public concerns about the move, rather than for insubordination as defendants assert.

Upon concluding that plaintiff's comments addressed a public issue, we turn to the second prong of the *Connick* test, whether plaintiff's interest in commenting on the relocation of the Collection is outweighed by the State's interest in the efficient provision

of services to the public. The Court in *Connick* listed several factors to be considered in balancing the complex interests in a given case. These include the manner, time and place in which the statement is made; the context in which the dispute arose; and whether the employee's speech could reasonably be viewed by the supervisor as threatening his authority to run the office. *Connick, supra.* In the instant case, plaintiff's statement was made in a small faculty meeting rather than in a forum in which the general public would hear his statement. It was also made after plans for the move had been going on for months and the move itself was imminent. On the other hand, plaintiff asserts that the final decision to divide the Collection had purposely been concealed until the eleventh hour in hopes of avoiding the type of statement plaintiff made. In fact, a memo circulated by defendant Durham just prior to the announcement (believed by plaintiff to be a final decision) stated the Collection would remain intact.

These and other factors must weigh in the balance to determine whether plaintiff's right to speak out was outweighed by ASU's need for efficient provision of service to the public. Although we decline to reach a final balance of interests under *Connick, supra*, we believe the recitation of some of the factors involved shows the complexity of balancing the interests to determine whether plaintiff's rights were violated. It is apparent to us that when defendants acted they were not violating a "clearly established" right of which a reasonable person would have known. Therefore, the trial court erred in denying defendants' motion for summary judgment as it concerns possible monetary awards against defendants Thomas and Durham named in their individual capacities pursuant to 42 U.S.C. sec. 1983.

[5] Last, we address the denial of defendants' summary judgment motion as it concerns plaintiff's claims for violations of his right to free speech as protected by Article I, sections 14, 19 and 35 of the North Carolina Constitution. Defendants contend that this action is barred by sovereign immunity. Our Supreme Court found it unnecessary to reach a state constitutional issue in the recent case of *Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990), in which the plaintiff had stated a claim for relief under 42 U.S.C. sec. 1983. We believe the case before us is distinguishable from *Harwood* since plaintiff Corum has at least the possibility of obtaining a different type of relief, namely monetary damages, under

our State Constitution than he may be entitled to under our analysis of his section 1983 claim.

The doctrine of sovereign immunity—that the State may not be sued without its consent—is firmly rooted in the jurisprudence of North Carolina. *Harwood v. Johnson, supra; Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972); *Electric Co. v. Turner*, 275 N.C. 493, 168 S.E.2d 385 (1969); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949). Also, an action brought against individual state officers or employees in their official capacities is considered to be an action against the State for purposes of applying the doctrine of sovereign immunity. *Insurance Co. v. Unemployment Compensation Com., supra.* Therefore, we must conclude that plaintiff can seek no relief of any kind from UNC, ASU, or the three individual defendants named in their official capacities, and we reverse that part of the trial court order.

[6] We turn now to the question of whether the two defendants named in their individual capacities are protected from plaintiff's state action for monetary damages.

> [Our Supreme] Court said in *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952), "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable *unless it be alleged and proved* that his act, or failure to act, was corrupt or malicious (cites omitted), or that he acted outside of and beyond the scope of his duties." (Emphasis added.) As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. *Carpenter v. Atlanta & C.A.L. Ry.*, 184 N.C. 400, 406, 114 S.E. 693, 696 (1922). As to the personal liability of a governor, see 28 Am. Jur. 2d *Governor* [sec.] 11 (1968).

Smith v. State, supra, at 331, 222 S.E.2d at 430; *see also Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E.2d 529, *disc. rev. denied*, 291 N.C. 323, 230 S.E.2d 676 (1976).

In the instant case, plaintiff has alleged and come forward with some evidence that the two defendants acted in violation of law, and therefore outside the scope of their duties in discharging plaintiff. The defendants have failed to disprove plaintiff's claim as a matter of law. We express no opinion whatsoever as to whose version of events and motivation is correct. However, viewing the record in the light most favorable to plaintiff as we must in this posture, we cannot say, as a matter of law, that plaintiff would be unable at trial to prove a set of facts which would entitle him to relief from defendants. We therefore hold that the two individually named defendants are not immune from a suit for monetary damages.

In summary, we hold that concerning plaintiff's 42 U.S.C. sec. 1983 claim, the trial court erred in denying defendants' summary judgment motion except as it pertained to plaintiff's claim against individual defendants Spangler, Thomas, and Durham named in their official capacities, for prospective injunctive relief only. As to plaintiff's State Constitutional claim, the trial court erred in failing to grant defendants' motion as to UNC, ASU, and the three individual defendants in their official capacities as to all relief. The motion was properly denied as it concerned plaintiff's claims for monetary damages against the two individually named defendants for violation of plaintiff's State Constitutional rights.

Affirmed in part; reversed in part and remanded.

Judge EAGLES concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

On the § 1983 claims, for the reasons hereafter asserted in Part I, I agree with the majority that plaintiff should be allowed to proceed to trial only on his claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief and that summary judgment should be entered for defendants on the remaining § 1983 claims. On the state constitutional claims, I agree with the majority that the plaintiff should be allowed to proceed to trial on his claims against Thomas and Durham in their individual capacities for monetary relief. With the exception of the plaintiff's claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief, I also agree with

the majority that summary judgment should be entered for defendants on the remaining claims asserted pursuant to the state constitution. As to the claims against Spangler, Thomas and Durham in their official capacities for prospective injunctive relief, I disagree with the majority and am of the opinion that those claims should not be dismissed for the reasons hereafter asserted in Part II.

I

Section 1983 Claims

The § 1983 action against UNC and Appalachian State University, and the § 1983 action against Spangler, Thomas and Durham in their official capacities for monetary relief, must be dismissed as they are not "persons" within the meaning of § 1983 and therefore are not subject to § 1983 liability. *Will v. Michigan Dept. of State Police*, 491 U.S. ---, 105 L.Ed.2d 45, 58 (1989). However, Spangler, Thomas and Durham, sued in their official capacities, are "persons" within the meaning of § 1983 to the extent that injunctive relief is sought, since "official-capacity actions for prospective relief are not treated as actions against the state." *Will*, 491 U.S. at ---, 105 L.Ed.2d at 58, n.10. Furthermore, the § 1983 state action against Spangler, Thomas and Durham in their official capacities for injunctive relief is not barred by either the Eleventh Amendment, S. Steinglass, *Litigation in State Courts* § 15.3(b), at 15-30 (Eleventh Amendment is "a subject matter jurisdictional limitation on the power of the *federal courts*" (emphasis added)) or by state sovereign immunity. *Martinez v. California*, 444 U.S. 277, 283, 62 L.Ed.2d 481, 488, *rehearing denied*, 445 U.S. 920, 63 L.Ed.2d 606 (1980) (state created immunities cannot be used to limit liability in § 1983 actions filed in state courts).

A § 1983 action against Thomas and Durham in their individual capacities could be asserted for monetary damages, subject however to their qualified immunity that was pled by the defendants, as defined in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982). While *Harlow* arose from a § 1983 action filed in federal court, that same standard should nonetheless apply in a § 1983 action filed in state court. To hold otherwise would result in the possibility of fifty different standards for qualified immunity for § 1983 actions filed in state courts. *See Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 138 (1988) ("state law is pre-empted when the § 1983 action is brought in state court," as outcome should not depend on whether action is filed in state or federal court). The *Harlow* standard is

one of "objective reasonableness." *Harlow*, 457 U.S. at 818, 73 L.Ed.2d at 410. The official conduct is immunized if the "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* While the plaintiff's constitutional right of free speech, allegedly infringed upon by the defendants, is in a general sense "clearly established," that right of free speech, requiring application of a balancing test, *Connick v. Myers*, 461 U.S. 138, 150-51, 75 L.Ed.2d 708, 722 (1983), is not "clearly established" in a "more particularized . . . sense" as required by *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L.Ed.2d 523, 531 (1987).

II

N.C. Constitutional Claims

In plaintiff's second claim, he asserts a private right of action under the North Carolina Constitution. While North Carolina does not have an enabling statute similar to § 1983 authorizing remedies for the violation of the North Carolina Constitution by state officials acting under color of state law, such private actions are generally recognized as a constitutional tort giving rise to common law remedies. *See Bevins v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619 (1971); *Figueroa v. State*, 604 P.2d 1198 (Hawaii 1988). To deny such a claim would deny the plaintiff the "very essence of civil liberty" which entitles "every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60, 69 (1803). However, such private actions for monetary relief against the state or its officials acting in their official capacities are barred by sovereign immunity. *See Lewis v. White*, 287 N.C. 625, 642-43, 216 S.E.2d 134, 145-46 (1975). Nonetheless, in this *Bevins*-type action, which is similar to § 1983 actions, injunctive relief is allowed against state officials sued in their official capacities who, acting under color of state law, "invade the personal or property rights of citizens *in disregard of law*." *Id.* To hold otherwise would permit unlawful action by state officials and relegate the plaintiff to the possibility of only a monetary judgment against an individual. *See Lewis*, 287 N.C. at 644, 216 S.E.2d at 146-47 (injunction permitted to restrain state officials from making illegal diversion of public funds); *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (monetary relief available against officials acting under color of state law

and sued in their individual capacity if acting with corrupt purposes, with malice or outside of or beyond the scope of their duties).

III

As our Rules of Civil Procedure permit parties to assert inconsistent and alternative pleadings and claims, plaintiff should not be required to elect at this stage of the proceeding between his § 1983 claims and his state constitutional claims, even to the extent that they seek the same remedies. *See Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 344, 201 S.E.2d 503, 506, *cert. denied*, 285 N.C. 85, 203 S.E.2d 57 (1974); *see also* N.C.G.S. § 1A-1, Rule 18(a) ("A party asserting a claim for relief as an original claim . . . may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party."); N.C.G.S. § 1A-1, Rule 8(e)(2) (1983) (alternative and inconsistent pleadings permitted).

AMERICAN ALUMINUM PRODUCTS, INC. v. JOHN RICHARD POLLARD AND CALVIN W. MORRISON

No. 8910SC433

(Filed 20 March 1990)

1. **Appeal and Error § 16.1 (NCI3d)— motion for new trial after appeal notice—no jurisdiction in trial court**

The trial court did not err by denying defendant's motion for a new trial where judgment was rendered in open court on 2 August 1988, defendants gave oral notice of appeal at that time, and defendants moved for a new trial on 9 August 1988. The trial court was without jurisdiction to hear the motion.

Am Jur 2d, New Trial §§ 17, 18, 19, 20.

2. **Contracts § 34 (NCI3d)— malicious interference with contract—aluminum products salesmen—evidence sufficient**

There was sufficient evidence of interference with contractual relations where the trial judge properly found the existence of a contract and that the parties agreed to have plaintiff complete the work and for the contractor to pay agreed upon costs for completion of the work; there were mutual

promises sufficient to support the existence of a contract in that plaintiff agreed to sell aluminum products and the contractors agreed to purchase those products; there was evidence that defendants had intentionally induced third parties not to perform the alleged agreements with plaintiff in that defendants had previously approached the contractors as representatives of plaintiff and then sought to undercut plaintiff's business with the contractors by inducing the contractors to terminate the contracts; and recent cases have held that one need not be an outsider in order to be held liable for malicious interference with the contract.

Am Jur 2d, Interference § 41.

3. **Unfair Competition § 1 (NCI3d)— malicious interference with the contract—unfair or deceptive trade practice—double recovery not allowed**

There was no error in an action for malicious interference with contract and unfair or deceptive trade practices where the court calculated lost profits and then trebled that amount, so that damages for both tortious interference with contract and violation of N.C.G.S. § 75-1.1(a) were not allowed.

Am Jur 2d, Damages § 35; Interference §§ 57, 58, 61.

4. **Judgments § 10 (NCI3d)— consent order—preliminary injunction—relied on for findings—harmless error**

Although the trial court in an action for malicious interference with contract and unfair and deceptive trade practices erred by taking judicial notice of a consent order where the purpose of the order was to preserve the status quo in view of the motion for preliminary injunction and it was not entered into to dispose of any facts critical to disposition of the issues which were to be tried, the error was harmless because the judge relied on the order in finding a fact alleged in plaintiff's complaint and admitted in defendants' answers.

Am Jur 2d, Judgments § 1084.

5. **Master and Servant § 9 (NCI3d)— action to recover overpayment of commissions—evidence sufficient to support findings**

In an action arising from the movement of salesmen from one company to another, there was sufficient evidence to sup-

port the trial court's finding that defendants were liable for the entire amount of commission overpayment.

Am Jur 2d, Master and Servant § 86.

APPEAL by defendants from judgment entered 11 October 1988 by *Judge B. Craig Ellis* in WAKE County Superior Court. Heard in the Court of Appeals 18 October 1989.

This is an action for tortious interference with contract, unfair and deceptive trade practices, breach of common law fiduciary duties, and overpayment of commissions.

Plaintiff, a North Carolina corporation, is in the business of marketing, sales and installation of aluminum products. Plaintiff employed defendants as salesmen in its Commercial Contractor Division.

As salesmen, defendants' principal job duties included acquiring sales commitments or contracts with general contractors for particular jobs. As compensation, defendants received draws against their commissions which were 10% of sales that were consummated as a result of their efforts.

During November and December 1985, the months just prior to their resignations, defendants entered numerous contracts or commitments with contractors and subsequently received draws against their commissions for these sales. Additionally, defendant Pollard received $1,150 for sales to new contractors during November and December 1985. Defendants listed their sales information on their call reports and their sales and weekly log sheets and submitted it to their immediate supervisor, Glynn Queen.

On 5 January 1986 defendants resigned from their positions with plaintiff and began to work with Hobbs Guttering Company (Hobbs) as salesmen of aluminum gutters. Defendants also became partners with Hobbs, each with a 25% interest in his company.

At trial, the court found that the sales consummated and contracted for by defendants during November and December 1985 were valid contracts between plaintiff and the contractors. The trial court also found that since defendants began their employment with Hobbs, defendants had induced contractors Vernon Wall, Ed Smith, Brad Pulley and Ken Lunsford not to perform contracts with plaintiff and to enter contracts with Hobbs for the same work.

The trial court found that plaintiff suffered losses totalling $1,400 as a result of losing the benefit of those sales. The trial court further found that several sales for which defendant had received commissions from plaintiff were performed by defendants during their employment with Hobbs and accordingly defendants had been overpaid. Specifically, defendant John Pollard had received total draws of $14,681.40 but had only earned $10,301.11. Defendant Calvin Morrison had received draws of $16,324 but had only earned $7,185.63. The trial court found that it would be unjust for defendants to retain the overpayment especially in view of defendants' admissions in a consent order dated 24 January 1986. This consent order was entered to resolve plaintiff's motion for a preliminary injunction.

The trial court concluded that "Defendants did tortiously interfere with the contracts of the Plaintiff by inducing the aforementioned contractors or customers of the Plaintiff not to perform their contracts with the Plaintiff." The trial court also concluded that defendants' acts constituted unfair and deceptive trade practices in violation of G.S. 75-1.1 *et seq.* The trial court further found that both defendants were overpaid commissions. The trial court then awarded plaintiff $1,400 for loss profits on contracts with Wall, Pulley, Smith and Lunsford and then trebled these damages pursuant to G.S. 75-1.1 *et seq.* The trial court also awarded plaintiff costs and interest as well as attorney's fees. In addition, the trial court awarded plaintiff $9,138.37 from defendant Morrison and $4,380.30 from defendant Pollard for overpayment of commissions. The trial court denied defendants' motion for new trial. Defendants appeal.

Crisp, Davis, Schwentker, Page & Currin, by Cynthia M. Currin, for plaintiff-appellee.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk, for defendant-appellants.

EAGLES, Judge.

I. Motion for New Trial

[1] Defendants first assign as error the trial court's denial of their motion for a new trial pursuant to G.S. 1A-1, Rule 59.

Initially, we note that judgment here was rendered in open court on 2 August 1988. At that time defendants gave oral notice of appeal. Defendants subsequently moved for a new trial on 9 August 1988 and the trial court denied the motion on 28 November 1988.

"For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court." *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971). The rule in *Wiggins* is subject to two exceptions and one qualification:

> "The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that 'the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned' and thereby regain jurisdiction of the cause. [Citation omitted.]"

Estrada v. Jaques, 70 N.C. App. 627, 637-8, 321 S.E.2d 240, 247 (1984), quoting *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977). Even where notices of appeal are filed on the same day as the motion for a new trial, the trial court is without jurisdiction to rule on the motion. *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643 (1988), *writ of supersedeas denied and temporary stay denied*, 321 N.C. 745, 366 S.E.2d 871 (1988), *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988).

Here defendants moved for a new trial *after* giving notice of appeal. None of the *Bowen* exceptions apply. Accordingly, the trial court was without jurisdiction to hear the motion for new trial and this assignment of error must fail.

II. Interference With Contractual Relations

[2] Defendants next assign as error the trial court's denial of a motion to dismiss and argue that there was insufficient evidence as to interference with contractual relations.

In order to hold a person liable for interference with contractual relations plaintiff must offer evidence tending to show: "(1) a valid contract existed 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); *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954).

Defendants contend that plaintiff has not produced evidence to prove elements (1) and (3). Defendants argue that no contractual rights accrued based on work orders submitted by salesmen after the salesmen had entered a verbal agreement with contractors. They contend that there was no "meeting of the minds" between plaintiff and the contractors and that even if oral contracts are shown, the contracts are not supported by consideration. We disagree.

A valid contract can only exist when the parties " 'assent to the same thing in the same sense, and their minds meet as to all terms.' " *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (citation omitted). "This assent, or meeting of the minds, requires an offer and acceptance in the exact terms and that the acceptance must be communicated to the offeror." *Id.* "An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance." *Durant v. Powell*, 215 N.C. 628, 633, 2 S.E.2d 884, 887 (1939), quoting Rest. of Law of Contracts, American Law Inst., Volume 1, Sec. 29.

At trial Mr. Queen, plaintiff's employee who supervised defendants, testified about the standard industry procedure for the sale of aluminum products. He testified that customarily the salesmen would approach contractors to discuss installation of aluminum products. If the contractor agreed, then the salesmen would make appropriate measurements and then quote a price. If that price met the contractor's approval, the parties would then shake hands and the salesmen would return to the office and fill out a work order. Here the parties agreed not only to have the plaintiff complete the work but also agreed for the contractor to pay agreed upon costs for completion of the work. The trial judge properly found this sufficient to establish that a contract existed.

Defendants further contend that even if a contract existed there was no consideration. "It has been held that 'there is consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' " *Penley v. Penley*, 314 N.C. 1, 14, 332 S.E.2d 51, 59 (1985), quoting 17

C.J.S. 426 and cases cited therein. Here, plaintiff and the contractors exchanged mutual promises. Plaintiff agreed to sell aluminum products and the contractors agreed to purchase those products. These mutual promises were sufficient consideration to support the existence of a contract.

Next, defendants contend that plaintiff did not introduce sufficient evidence for the judge to find that defendants " 'intentionally induced' third parties not to perform the alleged agreements with plaintiff." Plaintiff's evidence was that before defendants left its employment, plaintiff had contracts for work to be performed for several of the contractors and that defendants while working with Hobbs subsequently performed the work contracted for. As a result, plaintiff could not perform the work as agreed upon.

"Under North Carolina law, a third party who induces one party to terminate or fails to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification." *Fitzgerald v. Wolf*, 40 N.C. App. 197, 199, 252 S.E.2d 523, 524 (1979). "A person is justified in inducing the termination of a contract of a third party if he does so for a reason reasonably related to a legitimate business interest." *Id.* at 200, 252 S.E.2d at 524. Here, defendants had no legitimate business interests in those contracts. They left plaintiff's employ and then approached plaintiff's customers with whom they had previous dealings and urged the customers to abrogate their contracts with plaintiff and "get their gutters done by someone else if they so desired." Where defendants had previously approached the contractors as representatives of plaintiff and then sought to undercut plaintiff's business with the contractors by inducing the contractor to terminate the contract, defendants should be liable for the tort of malicious interference with contract.

Finally, defendants contend that because they were not "outsiders," they cannot be liable for interference with contractual relations. Defendants argue that *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976), requires that a person accused of tortious interference with contract be an outsider. Defendants argue that the term "outsider" "appears to connote one who was not a party to the terminated contract and who had no legitimate interest of his own in the subject matter thereof." *Id.* at 87, 221 S.E.2d at 292. Defendants argue that at the time the contracts were formed they were not outsiders and had a legitimate interest in the subject

matter because their commissions from plaintiff were derived from the work orders.

Recent cases hold that one need not be an outsider in order to be held liable for malicious interference with contract. *See United Laboratories, Inc. v. Kuykendall, supra; Privette v. University of North Carolina at Chapel Hill*, 96 N.C. App. 124, 385 S.E.2d 185 (1989); *Murphy v. McIntyre*, 69 N.C. App. 323, 317 S.E.2d 397 (1984), citing *Smith v. Ford Motor Company*, 289 N.C. 71, 221 S.E.2d 282 (1976). Though defendants' status as an outsider or nonoutsider is not determinative here, we note that defendants did not begin to interfere with plaintiff's contracts until after resigning from their employment with plaintiff. This assignment of error must also fail.

III. Unfair and Deceptive Trade Practices

[3] Defendants next assign as error the trial court's finding that defendants were liable under both G.S. 75-1.1 and for tortious interference with contracts. Defendants contend that in *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981), this court held that a plaintiff may recover damages for either breach of contract or for violation of G.S. 75-1.1 but not for both. While we note that defendants have correctly articulated the holding in *Marshall*, we find the holding inapplicable here because the facts are clearly distinguishable.

In *Marshall*, defendants leased spaces in a trailer park to plaintiffs and failed to provide promised facilities, services and amenities. Defendants brought an action seeking to recover damages for "(1) breach of agreements under which defendants leased to the several plaintiffs spaces in the park for use as sites for their respective mobile homes, (2) breach of agreements under which defendants sold mobile homes to the several plaintiffs, and (3) violations of G.S. 75-1.1(a)." 47 N.C. App. at 531, 268 S.E.2d at 98-9. At the conclusion of the trial, the jury awarded damages for breach of the lease and then awarded damages for defendants' failure to provide promised facilities, services and amenities, which were then trebled pursuant to G.S. 75-16. The breach of lease claim resulted from defendants' failure to provide promised facilities, services and amenities and damages were assessed for both breach of lease and failure to provide promised facilities, services and amenities, which were then trebled pursuant to G.S. 75-16.

In reviewing this award, we stated that the net result was to give some of the plaintiffs quadruple damages. This result was inconsistent with the legislative intent. Accordingly, the *Marshall* court held that one could only recover damages for breach of contract or violation of G.S. 75-1.1 "[w]here the same course of conduct gives rise to traditionally recognized cause of action." 47 N.C. App. at 542, 268 S.E.2d at 103.

Here, the trial court did not allow damages for both tortious interference with contract and G.S. 75-1.1(a) violation. Instead the court calculated lost profits and then trebled that amount pursuant to G.S. 75-1.1 *et seq.* There was no double recovery allowed. Accordingly, this assignment of error must also fail.

IV. JUDICIAL NOTICE OF CONSENT ORDER

[4] Defendants assign as error the trial court's taking of judicial notice of a consent order dated 24 January 1986. Defendants entered a consent order providing for preliminary injunction restraining them from interfering with contracts entered into prior to 6 January 1986 between plaintiff and customers, from using materials to which they had access during their employment and from misleading or making false representations to contractors to divert business from plaintiff. Defendants argue in their brief that the "findings of fact and other proceedings upon a hearing to determine whether a temporary injunction should issue are not proper matters for the consideration of the court or jury in passing upon the issues at the final hearing and are, therefore, not binding upon them." Defendants cite *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E.2d 703 (1967). On the other hand, plaintiff argues that the facts found in a consent order constitute a judicial admission and that a consent order is a "formal concession which removes the admitted fact from the field of evidence by formally conceding its existence." We disagree.

Initially, we note that a "consent judgment is a contractual agreement and '[i]ts meaning is to be gathered from the terms used therein, and the judgment should not be extended beyond the clear import of such terms. . . .'" *Price v. Horn*, 30 N.C. App. 10, 16, 226 S.E.2d 165, 168-9 (1976), *rev. denied*, 290 N.C. 663, 228 S.E.2d 450 (1976), quoting 47 Am. Jur. 2d, Judgments, Section 1085, p. 142.

Here the manifest purpose of the 24 January 1986 consent order was to preserve the status quo of parties in view of motion for preliminary injunction. It was not entered into to dispose of any facts critical to disposition of the issues which were to be tried. The trial judge erred in taking judicial notice of the consent order. However, the error was harmless.

The trial judge relied on the order in finding of fact number 20 where he found that "[b]y Defendants' own admissions as set forth in the Order dated 24 January 1986, they received as compensation from Plaintiff draws against their commissions which were 10% of each Defendant's sales." This fact was alleged in plaintiff's complaint and admitted in defendants' answers. "The reception of incompetent evidence to prove an admitted fact is not cause for disturbing the result at trial." *Wiles v. Mullinax*, 4 N.C. App. 73, 76, 165 S.E.2d 781, 783 (1969), *modified by* 275 N.C. 473, 168 S.E.2d 366 (1969). Accordingly, this assignment of error must fail.

V. Overpayment of Commissions

[5] Finally, the defendants assign as error the denial of their motion to dismiss the claim based on the overpayment of commissions and argue that there was not sufficient evidence to support a finding on that issue. Defendants contend that trial court erred in finding them liable for the entire amount of commission overpayment since they introduced evidence that plaintiff had agreed "to take care of" them and defendants had performed other tasks justifying additional compensation.

The law is clear that findings by the trial court will be upheld if there is some evidence to substantiate the finding. *Worthington v. Worthington*, 27 N.C. App. 340, 219 S.E.2d 260 (1975), *disc. rev. denied*, 289 N.C. 142, 220 S.E.2d 801 (1976); *Wachovia Bank & Trust N.A. v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981). Based upon the exhibits and testimony, the trial judge found that the basis of compensation was 10% commission. From the records submitted, the trial court then determined that defendants had been overpaid. There was evidence that each compensation check paid to defendants was annotated with the words: "advance on commission." Further, neither social security taxes nor income taxes were withheld from the compensation checks, which fact plaintiff alleges is consistent with the conclusion that they were commission payments. Since there was evidence to support the trial court's

findings, they will be sustained. Accordingly, this assignment of error must fail.

For the foregoing reasons, the judgment is

Affirmed.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. FRANKIE WINSLOW AND STATE OF NORTH CAROLINA v. JOVAHNIE WIGGINS WINSLOW

No. 891SC682

(Filed 20 March 1990)

1. **Criminal Law § 321 (NCI4th)— cocaine—joinder of defendants—no error**

The trial court did not err in a prosecution for trafficking in cocaine by possession by granting the State's motion for joinder of the defendants for trial where the State presented ample evidence that each defendant constructively possessed all of the cocaine, so that defendants would have received a fair trial even if each had presented defenses tending to incriminate the other; no objection was made at trial to defendants' attorney's joint representation; and, given the strong evidence of constructive possession by both defendants, the argument that defendants were prejudiced by having one attorney who did not present evidence that the individual defendants possessed only some or none of the cocaine was not persuasive.

Am Jur 2d, Trial §§ 20, 22.

2. **Narcotics §§ 4.7, 4.3 (NCI3d)— cocaine—trafficking by possession—constructive possession—no instruction on lesser-included offense**

The trial court did not err in a prosecution for trafficking in cocaine by possession by not submitting the lesser-included offense of possession of cocaine where the evidence was clear that each defendant had constructive possession of all 52.3 grams of cocaine in that defendants emerged together from

the master bedroom where all of the cocaine was found; the bedroom contained clothing and furnishings indicating both defendants lived there; cocaine, drug paraphernalia and large amounts of cash were seized from the bedroom and hall; defendant Frankie Winslow admitted that he lived in the master bedroom and that the drugs would be found there, provided the key to the safe containing cocaine, and had $476 in cash in his pockets; and defendant Jovahnie Winslow's dresser contained cocaine and lactose, $700 in cash, and a notepad with information on cocaine sales, she was seen dropping $1,000 as the officers entered the bedroom, and a total of $1,400 was found in envelopes labeled with the name "Jo."

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 40, 44.

3. Narcotics § 3.1 (NCI3d)— cocaine—evidence of previous buy—admissible

The trial court did not err in a prosecution for trafficking in cocaine by possession by admitting testimony regarding the purchase of cocaine by a suspect at defendants' house several hours before the search resulting in this prosecution where an undercover SBI agent gave the suspect $2,500 in SBI funds to make the purchase, $600 of those funds were recovered from the informant, and a search of defendants' bedroom revealed the remaining $1,900.

Am Jur 2d, Evidence §§ 321, 322, 323, 324.

4. Criminal Law § 1098 (NCI4th)— narcotics—nonstatutory aggravating factor—intent

The trial court did not use evidence of a cocaine purchase at defendants' house to prove an element of the charged crimes and to aggravate defendants' sentences where the court admitted evidence of the purchase to show that defendants' possession of cocaine was knowing or intentional and the finding of the nonstatutory aggravating factor that both defendants had the specific intent to sell the quantity of cocaine they possessed was supported by evidence that defendants possessed 52.3 grams of cocaine as well as a variety of packaging materials. N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendants from judgments entered 1 February 1989 by *Judge Thomas S. Watts* in PERQUIMANS County Superior Court. Heard in the Court of Appeals 6 February 1990.

Defendants Frankie and Jovahnie Winslow were each indicted for trafficking in cocaine, a Schedule II substance, by possession in violation of N.C. Gen. Stat. § 90-95(h). The State's evidence presented at trial tended to show the following:

Special Agent Kenneth Bazemore of the State Bureau of Investigation worked as an undercover agent in drug investigations. On 25 February 1988, he met with a suspect, Calvin Hyman, to make an undercover purchase of one and a half ounces of cocaine. At Hyman's direction, Hyman and Bazemore drove together to defendants' residence. Bazemore gave Hyman $2,500 in SBI special funds to make the cocaine purchase. Hyman entered the defendants' residence and fifteen minutes later returned to the car with two small baggies containing a white powdery substance and white rocks later determined to be cocaine. The trial court instructed the jury that the foregoing evidence was admitted only to show that the defendants had the intent which is a necessary element of trafficking by possession. He further instructed the jury that one of the elements of trafficking in cocaine by possession was that the possession be knowing or intentional.

Based in part on the cocaine Bazemore purchased from Hyman, Bazemore obtained a search warrant for defendants' house and for defendants and their two sons and returned to the house. On voir dire, Bazemore testified that, several minutes after officers entered the house, Frankie said that the master bedroom was his and his wife's and that all the drugs in the house were in that bedroom. After determining that Frankie had not been under interrogation when he spoke, the trial court overruled Frankie's objection and admitted Bazemore's testimony against Frankie only. Although the trial judge did not order Frankie's statement sanitized to remove any reference to Jovahnie, before the jury Bazemore testified that Frankie had said the master bedroom was *his* and any drugs would be found in that bedroom. The trial court instructed the jury to consider Frankie's statement against Frankie only.

The search of the master bedroom revealed the following: Frankie provided a key to unlock a safe found on the bed. The safe contained four baggie corners containing a white powdery

substance determined to be 13.6 grams of cocaine. Officers also found two baggie corners and two paper packets containing a white powder later determined to be 3.7 grams of cocaine. In the bottom drawer of a dresser with a mirror and various cosmetics on top, officers found a napkin containing a plastic baggie with a white powdery substance inside. The SBI lab determined that the powder was 35 grams of cocaine. The dresser also contained a notepad listing names and phone numbers as well as figures Bazemore testified were the weights and costs of various amounts of cocaine. Under the dresser in a shoe was a baggie containing a white powder determined to be lactose, a cutting agent for cocaine. The dresser also contained $300 in an envelope and $400 in a pair of socks. In various spots throughout the bedroom, officers found several boxes of baggies, a strainer, red twist ties, paper packets, face masks and razor blades.

Sergeant Timothy Spence of the Hertford Police Department found ten hundred dollar bills behind a dresser after seeing Jovahnie drop the money there. Eight of the ten bills were from the SBI special funds Bazemore had given Hyman earlier that night. In a shoe box just inside the bedroom door, officers found three white envelopes containing $505, $609, and $600 respectively. The envelopes were labelled with the names "Eric," "Wink," and "Jo." Of the $1,714 contained in the three envelopes, a total of $1,100 was from the SBI special funds Bazemore provided to Hyman. Inside Jovahnie's purse was an envelope labelled "Jo" containing $800. Frankie had $476 in his pocket.

In the hall just outside the master bedroom, officers found one set of Accu-Lab electronic digital scales and seven packages of paper packets. In the upstairs bathroom, officers found baggie corners containing a white powder.

When law enforcement officers entered defendants' house with the search warrant, defendants Frankie and Jovahnie came out of the master bedroom. The bedroom furniture included a double bed with a nightstand on each side. Men's and women's clothing and shoes were found throughout the bedroom.

Defendants did not present any evidence. The jury returned verdicts of guilty of trafficking in cocaine by possession as to both defendants. Each defendant was sentenced to fifteen years imprisonment and fined fifty thousand dollars. From these judgments, each defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. Sigsbee Miller, for the State.

Linwood Hedgepeth and Georgia H. Goslee for defendant appellants.

ARNOLD, Judge.

[1] Defendants first assign error to the trial court's granting of the State's motion for joinder of defendants for trial. Defendants had objected to the joinder in an off-the-record bench conference. N.C. Gen. Stat. § 15A-927(c)(2) requires the court to deny joinder of defendants for trial whenever it is necessary to promote or achieve a fair determination of guilt or innocence. Whether defendants should be tried jointly or separately is a question addressed to the sound discretion of the trial judge. *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987). Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's ruling on the question will not be disturbed on appeal. *Id.*

Defendants argue that the joint trial prejudiced them in that each was precluded from presenting certain defenses that would have incriminated the other: first, the defense that the other possessed all the cocaine and second, the defense that, while he or she possessed some cocaine, the amount possessed was less than the 28 grams required for a trafficking in cocaine conviction. In support of this argument, Frankie points to the discrepancy between Bazemore's voir dire testimony that Frankie had said the master bedroom was "his and his wife's" and Bazemore's testimony before the jury that Frankie had said the bedroom was "his." Frankie argues this redaction of his statement denied him the defense that he possessed some amount under 28 grams of cocaine.

Antagonism between two defendants' defenses does not necessarily warrant severance. *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), *cert. denied*, 446 U.S. 929 (1980). "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *Id.*

In *State v. Cook*, 48 N.C. App. 685, 686, 269 S.E.2d 743, 744, *disc. rev. denied*, 301 N.C. 528, 273 S.E.2d 456 (1980), defendant Whitaker testified that, while he had been present at the murder scene, codefendant Cook had killed the victim. Defendant Cook's

evidence identified codefendant Whitaker as the gunman. *Id.* This Court, while recognizing that these defenses were antagonistic, concluded that both defendants still received a fair trial because the State had presented "ample evidence to support a conviction of either or both defendants of [victim's] murder." *Id.* at 688, 269 S.E.2d at 745.

Similarly, had each defendant here defended on the grounds that he or she possessed only some or none of the cocaine, their defenses would have been antagonistic. However, as discussed further under defendants' next assignment of error, the State presented ample evidence that each defendant constructively possessed all the cocaine. Given all the evidence, defendants would have received a fair trial even if each had presented defenses tending to incriminate the other. The trial court did not, therefore, abuse his discretion in joining the defendants for trial.

Under this same assignment of error, defendants also argue that the joinder was in error because they were represented by the same attorney. No objection was made at trial to defendants' attorney's joint representation. "In order to establish a conflict of interest violation of the constitutional right to effective assistance of counsel, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' " *State v. Howard*, 56 N.C. App. 41, 46, 286 S.E.2d 853, 857, *disc. rev. denied*, 305 N.C. 305, 290 S.E.2d 706 (1982) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Defendants argue that their attorney's performance was adversely affected on the same grounds that they argue they were prejudiced by their joinder for trial, that is, that each was precluded from defending with evidence that he or she possessed only some or none of the cocaine. Again, given the strong evidence that each defendant constructively possessed all the cocaine, we are not persuaded by the argument that defendants were prejudiced by having one attorney who did not present these defenses. This assignment of error has no merit.

[2] In their next assignment of error, defendants argue that the trial court erred by failing to submit the lesser-included offense of possession of cocaine to the jury. Defendants argue that the evidence of the amount of cocaine each defendant possessed was equivocal. We disagree.

Felonious possession of cocaine requires proof of possession of one gram or more of cocaine, N.C. Gen. Stat. § 90-95(d)(2), while trafficking in cocaine by possession requires proof of possession of 28 grams or more of cocaine. N.C. Gen. Stat. § 90-95(h)(3). No instruction is required on a lesser-included offense when the State's evidence is positive as to each element of the crime charged and there is no evidence showing the commission of a lesser-included offense. *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). Here, the evidence was clear that each defendant had constructive possession of all 52.3 grams of cocaine.

Constructive possession of contraband material exists when there is no actual possession of the material, but there is an intent and capability to control its disposition. *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). Where possession of the premises is nonexclusive, constructive possession of contraband materials may not be inferred without other incriminating circumstances linking a defendant to the contraband. *Id.* at 569, 313 S.E.2d at 589.

Defendants Frankie and Jovahnie shared their house with each other and their two sons, so each defendant's possession was nonexclusive. However, there were other incriminating circumstances showing each defendant's intent and capability to control the cocaine. Defendants emerged together from the master bedroom where all the cocaine was found. The bedroom contained clothing and furnishings indicating both defendants lived there. Cocaine, drug paraphernalia and large amounts of cash were seized from the bedroom and hall. The following evidence linked Frankie in particular to the cocaine: he admitted that he lived in the master bedroom and that drugs would be found there; he provided the key to the safe containing cocaine; and he had $476 in cash in his pockets. The following evidence linked Jovahnie in particular to the cocaine: her dresser contained cocaine and lactose, $700 in cash, and a notepad with information on cocaine sales; she was seen dropping $1,000 as the officers entered the bedroom and a total of $1,400 was found in envelopes labelled with the name "Jo." The foregoing evidence is sufficient for the jury to infer that each defendant constructively possessed all 52.3 grams of cocaine. Since the State's evidence is positive as to the amount of cocaine each defendant possessed and there was no evidence that either defendant possessed an amount less than 28 grams, the trial court was correct in refusing to submit the lesser-included offense of possession of cocaine to the jury.

[3] Defendants next assign error to the admission of testimony from SBI Agent Bazemore regarding Calvin Hyman's purchase of one and a half ounces of cocaine from defendants' residence several hours before the search. Defendants argue that there was no evidence showing that one or both defendants, rather than someone else in the house, sold the cocaine to Hyman. We disagree. Bazemore gave Hyman $2,500 in SBI special funds to make the cocaine purchase. Before the search of defendants' house, Bazemore recovered $600 of those funds from Hyman. The search of defendants' bedroom revealed the remaining $1,900. This evidence was sufficient to connect defendants with the earlier purchase. The trial court did not err in admitting evidence of that earlier purchase to show that defendants knowingly possessed the cocaine which was the basis of the trafficking charge.

[4] In their last assignment of error, defendants argue that evidence of Hyman's cocaine purchase from their residence was used both to prove an element of the charged crimes and to aggravate their sentences in violation of N.C. Gen. Stat. § 15A-1340.4(a)(1). We do not agree. The trial court admitted evidence of Hyman's cocaine purchase from defendants to show that defendants' possession of cocaine was knowing or intentional. The trial court aggravated each defendant's sentence with the nonstatutory factor that both defendants "had the specific intent to sell the quantity of cocaine [they] possessed at the time of the search of [their] residence," citing *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). Evidence that defendants possessed 52.3 grams of cocaine as well as a variety of packaging materials support this finding. *See State v. Williams*, 307 N.C. 452, 456-57, 298 S.E.2d 372, 375 (1983). Therefore, evidence used to prove an element of the crime was not also used to support an aggravating factor.

No error.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. DWIGHT WRIGHT MAYSE

No. 8929SC768

(Filed 20 March 1990)

1. **Rape and Allied Offenses § 5 (NCI3d)— first degree rape— evidence of deadly weapon—sufficient**

The trial court did not err by denying defendant's motion to dismiss a charge of first degree rape where the victim testified that there was a hunting knife lying on a table which defendant picked up while he threatened to kill her and that defendant referred to a .25 handgun, so that the victim reasonably believed that defendant had an object which was a dangerous weapon that he would use.

Am Jur 2d, Rape §§ 63, 67.

2. **Rape and Allied Offenses § 5 (NCI3d)— first degree rape— evidence of serious mental injury—sufficient**

There was sufficient evidence that defendant in a first degree rape prosecution inflicted serious injury on the victim where the victim testified that she had given up her course of study at a technical college because of her inability to concentrate, she had moved from the city where she lived because people at work treated her as if she had some kind of disease, she felt degraded and ashamed, and she felt that people were looking at her and whispering; she had received professional help from the mental health center and from a shelter for abused women; she had never had any problems of this sort before the alleged crimes; and the mental injury continued up to the time of trial seven months after the incidents.

Am Jur 2d, Rape §§ 63, 67.

3. **Rape and Allied Offenses § 6 (NCI3d)— first degree rape— instructions on deadly weapon—no error**

The trial court in a first degree rape prosecution did not err in its instructions to the jury on the deadly weapon element where the evidence and the verdict sheet support the conclusion that the jury understood that it must unanimously decide that the defendant employed an object which the victim reasonably believed was a dangerous weapon.

Am Jur 2d, Rape § 108.

4. **Kidnapping § 1.2 (NCI3d)— first degree kidnapping—victim not released**

The trial court properly denied defendant's motion to dismiss the first degree kidnapping charge where defendant abducted the victim in her own automobile, took her car keys from the ignition and never returned them to the victim, and the victim escaped by her own wits rather than by being released by defendant in that she used a duplicate set of keys in her pocketbook of which defendant had no knowledge.

Am Jur 2d, Abduction and Kidnapping §§ 11, 12, 13, 15, 16, 18.

5. **Criminal Law § 162 (NCI3d)— first degree rape—doctor's testimony to victim's credibility—objections not timely**

The trial court in a first degree rape prosecution did not err by allowing a medical doctor to testify as to the victim's credibility where defendant's objections were neither timely nor did they clearly present the alleged error. N.C.G.S. § 15A-1446(a) and (b).

Am Jur 2d, Rape §§ 65, 68, 68.5.

6. **Constitutional Law § 78 (NCI3d)— rape—life sentence—not cruel and unusual**

A sentence of life imprisonment for first degree rape was not cruel and unusual punishment.

Am Jur 2d, Rape §§ 112, 113.

APPEAL by defendant from a judgment entered 21 February 1989 by *Judge Claude Sitton* in RUTHERFORD County Superior Court. Heard in the Court of Appeals 13 February 1990.

The State's evidence tended to show that, as the victim was leaving a convenience store about 2:00 a.m., the defendant came out of the store, jumped into the passenger seat of her car, stuck "something in [her] ribs," grabbed her around the neck and told her to drive. The victim testified that, at an isolated area on a dirt road, defendant struck her in the jaw with his fist, threatened to use "a 25" to kill her, and sexually assaulted her. He then drove her car to another location and sexually assaulted her again. At a third location, victim was again raped and forced to go in a trailer where defendant picked up a 12-inch hunting knife twice

and threatened to kill her. Victim testified that she escaped when she found additional car keys in her pocketbook and drove away from the trailer. Defendant was arrested at his aunt's house where victim's original set of keys were found. Defendant testified at trial in his own behalf, stating that he and the victim had consensual sexual relations after taking cocaine.

The jury found the defendant guilty of first-degree rape and first-degree kidnapping. Defendant was sentenced to life imprisonment for first-degree rape and a consecutive forty years in prison for first-degree kidnapping. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Elisha H. Bunting, Jr., for the State.

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

LEWIS, Judge.

Defendant addresses five assignments of error in his appeal.

I: Dismissal of the first-degree rape charge.

[1] The defendant moved for dismissal of the first-degree rape charge at the close of the State's case and contends on appeal that the trial court erred in denying that motion. First-degree rape is defined in North Carolina in G.S. § 14-27.2 in pertinent part as follows:

> (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; or
>
> b. Inflicts serious personal injury upon the victim. . . .

Defendant states that there was insufficient evidence to support either theory of first-degree rape.

A: Theory I—Employing a dangerous weapon.

Defendant first contends that there is no evidence to support a finding that a dangerous or deadly weapon was employed or displayed. The victim indicated that after she was raped inside the shack, she was forced to go to a trailer located nearby where there was a "hunting knife laying on the table" which was "twelve or more inches long." At trial, the victim testified about that knife.

Q: [D]id you ever see him touch the knife?

A: Yes, he picked it up a couple times.

. . .

Q: What was he saying or doing when he picked the knife up?

. . .

A: He told me, he looked me dead in the eye, and he said, "If you turn colors on me, I'll kill you."

. . .

Q: . . . Did he have the knife when he said that?

A: Yes. He was talking crazy. . . .

The North Carolina statute cited above which defines first-degree rape was changed in 1980 so that the State no longer has to show that a deadly weapon was used in a particular manner to procure the victim's submission. G.S. § 14-21(1)(b), repealed effective 1980. In its current form, the statute "simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape *period.*" (Emphasis in original.) *State v. Sturdivant*, 304 N.C. 293, 299, 283 S.E.2d 719, 724-25 (1981).

In *State v. Whittington*, a first-degree sexual offense case, the Court stated that there was "a series of incidents forming a continuous transaction between defendant's wielding the knife and the sexual assault. . . . [I]t is of no consequence that defendant was not in possession of the deadly weapon at the precise moment that penetration occurred." 318 N.C. 114, 120, 347 S.E.2d 403, 406 (1986).

The victim testified that defendant also stuck a hard object into her ribs when defendant first jumped into victim's automobile and that defendant stated: "If this can't take care of you, I have

a 25 that will," an apparent reference to a .25 revolver. Since the victim reasonably believed that the defendant had an object which was a dangerous weapon that he would use, the trial court did not err in denying defendant's motion to dismiss the first-degree rape charge.

B: Theory II—Infliction of serious mental injury.

[2] Defendant contends that there is no evidence to support a finding that he inflicted serious mental injury on the witness. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), presents the standard for determining whether "the acts of the accused cause mental upset which could support a finding of 'serious personal injury.' " *Id.* at 205, 297 S.E.2d at 589.

> We therefore believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury as to result in 'serious personal injury' must be decided upon the facts of each case.

Id. at 205, 297 S.E.2d at 590. The victim testified at trial about her "mental state" since the time of the alleged crimes. She stated that because of her inability to concentrate, she gave up her course of study at the technical college where she had been enrolled. She also moved from the city where she lived because "where [she] was working people treated [her] like [she] had some kind of disease." She described her reasons for leaving school and her job and moving. "I felt so degraded; I felt so ashamed, like everybody was looking at me and whispering. I was scared; I was afraid. I mean, some people knew what had happened. . . . [People] walked around like they were on eggshells. You know, it was like they'd whisper when I'd come into a room or something." She received professional help from the Mental Health Center and from the shelter for abused women. Victim indicated that she had never had any problems of this sort before the alleged crimes and that the mental injury continued "even up to this very moment" which was seven months after the incidents. The State has clearly offered

"proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself" as required by *State v. Boone* cited above. Therefore, we hold that the victim suffered serious mental injury and that defendant's motion to dismiss was properly denied.

II: Jury instructions on the deadly weapon element.

[3] Defendant contends that "the trial court's instructions to the jury on the deadly weapon element of first degree rape denied defendant a unanimous verdict and allowed him to be convicted on a theory not supported by the evidence."

The verdict sheet stated:

> Members of the Jury, for your unanimous Verdict, do you find the defendant,
>
> (1) Guilty of First Degree Rape. . .
>
> (a) That the defendant employed an object that the victim reasonably believed was a dangerous or deadly weapon. . . .

In *State v. Connard*, the Court states:

> [T]here is no requirement that the written verdict contain each and every element of the subject offense. G.S. § 15A-1237; *State v. Sanderson*, 62 N.C. App. 520, 302 S.E.2d 899 (1983). It is sufficient if the verdict can be properly understood by reference to the indictment, evidence and jury instructions. *Id.; State v. Perez*, 55 N.C. App. 92, 284 S.E.2d 560 (1981), *disc. rev. denied*, 305 N.C. 590, 292 S.E.2d 573 (1982).

81 N.C. App. 327, 335-36, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392, 354 S.E.2d 238 (1987). The evidence and the verdict sheet in this case support the conclusion that the jury understood that it must decide unanimously that the defendant employed an object which the victim reasonably believed was a dangerous weapon.

III: Dismissal of the kidnapping charge.

[4] Defendant was convicted of first-degree kidnapping which includes as one of its elements the following as found in G.S. § 14-39(b); "If the person kidnapped . . . was not released by the defendant in a safe place. . . , the offense is kidnapping in the first degree.

. . ." According to State's evidence, when defendant abducted the victim in her own automobile and they went to the trailer, he took the victim's car keys from the ignition and never returned them to the victim. In order to escape, the victim used a duplicate set of keys which were in her pocketbook and of which the defendant had no knowledge. Defendant never "released" the victim; she escaped by her wits. The motion to dismiss was properly denied.

IV: Expert testimony that the victim was "genuine" and "appropriately upset."

[5] The defendant contends that it was error to allow a medical doctor who examined the victim to testify as to victim's credibility. Defendant specifically addresses two statements made by the witness. In both instances, we hold that defendant's counsel failed to make an "appropriate and timely objection" and that he has therefore waived his right to "assert the alleged error on appeal" as required by G.S. § 15A-1446(a) and (b). Counsel must have "clearly presented the alleged error to the trial court." *Id.*

The first statement was included in the following exchange.

Q: How would you describe [the victim's] emotional and mental state?

A: Well, she was crying and upset, and found it difficult at first to talk or discuss anything with me. She seemed quite appropriately upset by the history that she gave.

Q: What do you mean when you say that she was appropriately upset?

A: With her history of having been injured and/or raped that morning—

[Counsel for defendant]: Objection

A: It seemed very appropriate.

THE COURT: Sustained as to the last statement, as to, "being raped earlier that morning." Do not take that into consideration in your deliberations.

Defendant challenges the admissibility of the witness' statement that the victim was "appropriately upset," stating that such a statement "unfairly assisted the State in this credibility contest between the prosecuting witness and the defendant. Defendant's counsel

did not object until after the witness' second statement above and the court ruled only on that statement concerning 'being raped that morning.' " Therefore, the objection was neither timely nor did it address the testimony which defendant's counsel is now discussing on appeal.

The second set of questions and answers proceeded as follows:

Q: Did, did she seem to be, you say that she was upset and crying, did that seem to be genuine in your opinion?

A: Yes.

Q: So you didn't feel that you were dealing with somebody who was play acting at that time?

A: No.

[Counsel for defendant]: Objection.

THE COURT: Sustained. Do not lead the witness.

[Counsel for the State]: Yes sir.

Defendant discusses the alleged error in admitting the testimony concerning the credibility of the victim as indicated by the statements that the victim's behavior was "genuine" and that she was not "play acting." Once again, the alleged objection to the first question (which included the term "genuine") was not timely and the objection to the second question (with the term "play acting") did not address "the alleged error." In this instance, the Court believed that the objection was to the *form* instead of the substance of the question, that is, that counsel was leading the witness. No further objection was made by defendant after his objection was sustained.

Since the objections were neither "timely" nor did they "clearly [present] the alleged error," G.S. § 15A-1446(a) and (b), defendant has waived his right to assert the alleged error on appeal.

V: Cruel and unusual punishment.

[6] Defendant was convicted of first-degree rape, a violation of G.S. § 14-27.2, for which he received the maximum term. In his brief, defendant recognized the facial validity of the statutes; however, he alleged that the sentence constitutes cruel and unusual punishment as applied to him. In presenting his argument, defendant relies on *Solem v. Helm*, 463 U.S. 277 (1983). The North Carolina

Supreme Court has already distinguished *Solem* from cases in which the offense is first-degree rape. In *Solem*, the defendant "received a sentence of life imprisonment without parole after pleading guilty to uttering a 'no account' check for $100, for which the maximum punishment was ordinarily five years imprisonment." *State v. Peek*, 313 N.C. 266, 276, 328 S.E.2d 249, 256 (1985). In the instant case, on the other hand, the defendant was convicted of first-degree rape which the North Carolina General Assembly has chosen to punish as a Class B felony with a mandatory life sentence. G.S. § 14-27.2(b). We hold that the sentence imposed does not constitute cruel and unusual punishment.

No error.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. LARRY BLAKE BUMGARNER, DEFENDANT

No. 8926SC788

(Filed 20 March 1990)

1. **Automobiles and Other Vehicles § 126.2 (NCI3d)— driving while impaired—chemical test—officer assistance for additional test—transportation by officer not required**

The statute requiring an officer in charge of a defendant arrested for DWI who has submitted to a chemical analysis and desires additional testing to "assist the person in contacting someone to administer the additional testing or to withdraw blood," N.C.G.S. § 20-139.1(d), did not require the officer to drive defendant to the hospital for an additional test and was satisfied when the officer allowed defendant access to the telephone.

Am Jur 2d, Automobiles and Highway Traffic §§ 123, 305, 306, 377, 380.

2. **Automobiles and Other Vehicles § 126.2 (NCI3d)— independent sobriety test—due process—transportation by officers not required**

Defendant's due process rights were not violated by the failure of officers to take him to a hospital to obtain an inde-

pendent sobriety test after the officers had administered a breathalyzer test to him.

Am Jur 2d, Automobiles and Highway Traffic §§ 123, 305, 306, 377, 380.

3. Arrest and Bail § 9 (NCI3d); Constitutional Law § 68 (NCI3d) — DWI charge — delay of pretrial release — right to secure witnesses

A magistrate's pretrial release requirement that a defendant charged with DWI not be released until 11:00 a.m. that morning except into the custody of a sober adult was authorized by N.C.G.S. § 15A-534.2(c) and did not violate defendant's constitutional right to secure witnesses in his favor. Art. I, § 23 of the N. C. Constitution.

Am Jur 2d, Automobiles and Highway Traffic § 304; Bail and Recognizance § 29.

APPEAL by defendant from judgment entered on 28 March 1989 by *Judge Robert W. Kirby* in the MECKLENBURG County Superior Court. Heard in the Court of Appeals on 13 February 1990.

Defendant was found guilty in district court of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. He received Level Two punishment and appealed to the superior court.

Prior to his trial in superior court, defendant filed a motion to dismiss the charge against him based upon a violation of his statutory and constitutional rights to obtain a second chemical analysis in addition to the sobriety tests conducted by law enforcement officers. The motion to dismiss was heard and denied. In superior court, defendant was convicted by a jury for driving while impaired. The trial court imposed Level Two punishment, which included a sentence of twelve months imprisonment. The sentence was suspended and defendant was placed on supervised probation. The conditions of probation included an active sentence of thirty days and a fine of $300. From this judgment, defendant filed a timely notice of appeal.

The evidence showed that Mr. Bumgarner was arrested by Trooper A. J. Fox on 20 February 1988. Trooper Fox testified that he stopped defendant after he observed defendant's automobile run off both sides of a highway. He noticed a strong odor of alcohol on defendant's breath. He asked Mr. Bumgarner to perform several

roadside sobriety tests. Defendant failed to get past "O" in reciting his "ABC's," and he did not satisfactorily perform the "finger-to-nose" test. At this point, defendant was arrested for DWI and transported to the Mecklenburg County jail.

At the jail, Trooper Fox requested that defendant perform some additional sobriety tests. Defendant was asked to stand on one leg, raise his other foot six to eight inches off the floor and count from 1001 to 1030. He became wobbly and at 1003 put his foot down and quit. When asked to perform the "walk-and-turn" test, defendant swayed while he walked and stumbled. He failed to adequately perform two other motor skills tests.

After being advised of his *Miranda* rights and signing a waiver, defendant stated he had consumed seven beers between 5:00 p.m. and 11:30 p.m. on the evening in question. Trooper Fox testified that defendant's speech was slurred as he answered the officer's questions. Trooper Fox was of the opinion that Mr. Bumgarner had consumed a sufficient quantity of some impairing substance to lose control of his faculties to an appreciable extent.

Defendant submitted to chemical analyses of his breath. The officer authorized to administer the tests informed defendant both orally and in writing of his rights relating to the procedures. One of these rights includes the right to have a qualified person of his own choosing administer an additional chemical test. N.C. Gen. Stat. § 20-16.2(a)(5). The officer performed two chemical analysis tests on defendant at 2:02 a.m. and 2:10 a.m. The results showed a breath alcohol concentration of .16 and .14, respectively.

Defendant testified that immediately after submitting to the tests he asked for an additional chemical test. Neither Trooper Fox nor the officer administering the breath analyses recalled such a request. Defendant was then committed into the custody of the sheriff of Mecklenburg County. While in the booking area of the sheriff's office, defendant testified that he again requested an additional blood test. At that point, Trooper Fox assisted defendant in contacting two local hospitals by providing him access to a free telephone and a telephone book. Trooper Fox also looked up one number for defendant.

The first hospital he contacted refused to perform the test. Defendant then called Charlotte Memorial Hospital where he was told that a blood analysis could be performed if he was transported

to the hospital with the arresting officer or if someone at the jail withdrew a blood sample for later analysis. Defendant informed Trooper Fox and deputies in the booking area of this information. Mr. Bumgarner asked one of the booking officers if he had the expertise to withdraw the blood, but defendant received no further assistance in his requests.

Magistrate Karen Johnson testified for the State. On the night of the arrest, she set defendant's bond at $400 and, based upon the testimony of Trooper Fox, her personal observations, as well as the results of the chemical analyses, imposed the restriction that defendant could not be released before 11:00 a.m. that morning except into the custody of a sober adult. This is a standard restriction in dealing with an impaired driving charge and is authorized by N.C. Gen. Stat. § 15A-534.2(c).

After appearing before the magistrate, defendant had three alternatives for immediately securing his release. He could have posted the full amount of the bond in cash, called a bail bondsman who would have paid eighty-five percent of the bond or gone through a pretrial release program. Defendant chose to go through the pretrial release program. Magistrate Johnson testified that under any of the alternatives defendant would not have been released prior to 11:00 a.m. except into the custody of a sober adult. Although defendant had the right to telephone a sober adult to take responsibility of him, he made only three telephone calls while in custody, the two hospital calls and one to an attorney who was not available. At some point, the secured bond and order of commitment were stricken, and defendant was released at about 9:00 a.m.

At defendant's hearing on the motion to dismiss the complaint, the trial court found as a fact that the only assistance provided to defendant was that afforded by Trooper Fox after defendant was committed to the custody of the sheriff of Mecklenburg County. The court found that no assistance whatsoever was provided by the Mecklenburg County Sheriff's Department at any time. The court held that this shortcoming of the sheriff's department, however, was not so flagrant as to warrant dismissal of the charges, and defendant's motion was denied.

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

Rankin, Merryman, Dickinson, Rawls & Ledford, by Eben T. Rawls, III and Joseph L. Ledford, for appellant.

ARNOLD, Judge.

Defendant contends that the charge against him must be dismissed based upon a flagrant violation of his rights to assistance in obtaining additional chemical analysis pursuant to the provisions of N.C. Gen. Stat. § 20-139.1(d) and the due process clause of the fourteenth amendment of the United States Constitution since no officer transported him to a hospital for the purpose of having a blood sample withdrawn. He also asserts a violation of his constitutional right to secure witnesses in his favor pursuant to article I, section 23 of the North Carolina Constitution by reason of the pretrial release restrictions placed upon him by the magistrate.

[1] First we will examine defendant's contention that the law enforcement officers had a duty to transport him to a facility that would perform the additional test. A defendant who submits to chemical analysis is informed that he has a right to "have a qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer." N.C. Gen. Stat. § 20-16.2(a)(5). In order to make this right a reality, the General Assembly also provided as follows:

> Right to Additional Test.—A person who submits to a chemical analysis may have a qualified person of his own choosing administer an additional chemical test or tests, or have a qualified person withdraw a blood sample for later chemical testing by a qualified person of his own choosing. Any law-enforcement officer having in his charge any person who has submitted to a chemical analysis *must assist the person in contacting someone to administer the additional testing or to withdraw blood, and must allow access to the person for that purpose.* The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis. (Emphasis added).

N.C. Gen. Stat. § 20-139.1(d).

The General Assembly did not specifically delineate the required duties of law enforcement officers once the right to additional tests are asserted. Prior to the effective date of the Safe Roads Act in 1983, we had held the law only required that an arresting officer assist a defendant in contacting someone to administer the test and that providing transportation was not re-

quired. *State v. Bunton*, 27 N.C. App. 704, 220 S.E.2d 354 (1975). The *Bunton* decision, however, was based on an older version of N.C. Gen. Stat. § 20-139.1(d) which, in 1975 provided:

> The person tested may have a physician, or qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer. The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer. Any law-enforcement officer having in his charge any person who has submitted to the chemical test under the provisions of G.S. 20-16.2 *shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test.*

Defendant contends that *Bunton* does not interpret the new version of N.C. Gen. Stat. § 20-139.1(d) and that the General Assembly expanded the rights of a defendant under the newer statute to require more assistance than providing a defendant with access to a telephone. We disagree.

In the quoted passages above, we have emphasized the operative language in both the old statute and the new version. Language in a statute should not be construed beyond its plain meaning. *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 274 S.E.2d 370 (1981). Using this rule to analyze the two statutes, we believe that the substance of the language in the two statutes simply has not changed. The old statute instructed officers to "assist such person in contacting a qualified person," while the new version states that the officer must "assist the person in contacting someone to administer the additional testing or to withdraw blood." The gist of both statutes is the same: the police must *assist* a defendant in *contacting* a person who can perform the additional test. Because the substance of the language has not changed, we hold that the following rule from *State v. Bunton* still applies: "All that the statute required of the arresting officer was that he assist defendant in contacting the doctor; he was not required in addition to transport the defendant to the doctor." *Bunton*, 27 N.C. App. 704, 707-708, 220 S.E.2d 354, 356.

The only substantive change in the amended statute is the requirement that law enforcement officials allow access to an in-

terned defendant. The General Assembly probably made this addition in 1983 because of *State v. Sawyer*, which interpreted the statute as containing this guarantee of access. *State v. Sawyer*, 26 N.C. App. 728, 217 S.E.2d 116, *cert. denied*, 288 N.C. 395, 218 S.E.2d 469 (1975). It would be imprudent for us to read the addition of this access requirement as otherwise expanding an officer's duties of assistance.

N.C. Gen. Stat. § 20-139.1(d) does not guarantee an additional sobriety test. On the facts before us, we see no violation of defendant's statutory rights. Trooper Fox provided defendant with the assistance envisioned by the statute. The fact that assistance was provided by the trooper rather than the sheriff's deputies is not sufficient to require dismissal of the charge.

Most other states follow the *Bunton* rule that we have reembraced here. The majority rule is that when an accused is entitled to an independent test he must only be given reasonable opportunity to procure one. Annotation, *Drunk Driving: Motorist's Right to Private Sobriety Test*, 45 A.L.R. 4th 11 (1986). Most jurisdictions draw the line between police *interference* and police *assistance*, usually demanding no more than that the defendant be allowed a phone call. *Id.*

[2] Defendant in the case before us contends that the failure of law enforcement officers to take him to the hospital also violated his due process rights as guaranteed by the United States Constitution. While this challenge apparently was not raised in *State v. Bunton*, we now reject such an assertion. Again, the majority rule is that beyond allowing a telephone call, there are few constitutional demands on officers in this situation. *See* Annotation, 45 A.L.R. 4th 11. Law enforcement officers may not hinder a driver from obtaining an independent sobriety test, but their constitutional duties in North Carolina go no further than allowing a defendant access to a telephone and allowing medical personnel access to a driver held in custody.

[3] Finally, defendant contends that his constitutional right to secure witnesses in his favor as protected by article I, section 23 of the North Carolina Constitution was violated by the pretrial release requirement imposed by Magistrate Johnson. Defendant claims that the imposition of the requirement that he not be released until 11:00 a.m. unless a sober adult appeared thwarted his attempt to obtain evidence in his own behalf at the only point

in time such evidence could be gathered. This restriction violated his pretrial release right and prejudiced him. Again, we disagree.

The restriction defendant complains of is clearly authorized by N.C. Gen. Stat. § 15A-534.2(c). There is ample evidence to support the trial court's finding that the magistrate performed her job in setting the pretrial release requirements. Magistrate Johnson based her determination of the additional pretrial release restriction upon the testimony of Trooper Fox, her personal observations, as well as the results of the sobriety test. This evidence was sufficient to support her decision to impose the restriction. Furthermore, the record clearly indicates that the magistrate informed defendant of the requirements of his pretrial release. Although defendant tried to contact an attorney to observe his sobriety test, he admittedly did not attempt to call any other witness and apparently was unable to find a sober adult to agree to take custody of him. Defendant cannot blame anyone but himself for not securing his timely release.

In summary, the provisions of N.C. Gen. Stat. § 20-139.1(d) were not violated by only providing defendant with access to a telephone. His federal constitutional rights were not violated in failing to transport him to the hospital. Furthermore, the magistrate correctly imposed the pretrial release restriction requiring a sober responsible adult to take custody of the defendant pursuant to N.C. Gen. Stat. § 15A-534.2. There was no statutory or constitutional violation in her actions.

No error.

Judges JOHNSON and ORR concur.

BORG-WARNER ACCEPTANCE CORPORATION, PLAINTIFF v. HUGH W. JOHNSTON AND WIFE, AUDREY S. JOHNSTON, DEFENDANTS

No. 8926SC830

(Filed 20 March 1990)

1. **Guaranty § 2 (NCI3d)— guarantor of corporate debt—defense available only to corporation**

Defendants, as guarantors of a corporate debt, held no property interest in the Raleigh Inn and may not assert the defense contained in N.C.G.S. § 45-21.36 where title to the real property was held solely in the name of the corporation even though defendant Mr. Johnston owns 77% of the capital stock of the corporation, pledged his own assets, and extended his own credit in order to pay off creditors.

Am Jur 2d, Guaranty §§ 108, 109, 114.

2. **Guaranty § 2 (NCI3d)— guarantor of corporate debt—corporation in bankruptcy—no jurisdiction in state court—defenses not available**

Where defendants were guarantors of a corporate debt, they could not utilize the provisions of N.C.G.S. § 45-21.36 through N.C.G.S. § 26-12 since that statute requires that the principal must be joined as a party and requires that the surety show that our courts have jurisdiction over the principal. The corporation here has filed bankruptcy and is subject to the exclusive jurisdiction of the U. S. District Court for the Western District of North Carolina.

Am Jur 2d, Bankruptcy § 97.

3. **Guaranty § 2 (NCI3d)— guarantors—waiver of rights**

Defendant guarantors waived their right to be allowed to show as a defense the value of the real and personal property of the Raleigh Inn as of the day their answer was filed by specifically agreeing in their guaranties not to assert or take advantage of any defense based on lack of due diligence by the lessor in collection, protection or realization upon any collateral securing the indebtedness evidenced by the lease.

Am Jur 2d, Guaranty §§ 108, 114.

4. Guaranty § 2 (NCI3d)— guarantors—waiver of rights

There was no prejudicial error in an action on a guaranty agreement where the trial court erroneously found that the guaranty agreements were to induce leases rather than to have effect as security where the Raleigh Inn (the debtor) was given two options to purchase by plaintiff; the money loaned to the Inn was used for such work as removing tile and carpet, installing new carpet, completing a sound and lighting system for the lounge, installing a new gas hot water circulating system, and furnishing and installing 310 bathroom vanities; personal property which was purchased included a custom-made refrigerated salad bar, a custom-built registration desk, drapes, bedspreads, and 628 pillows; nearly $300,000 of the funds advanced were for the cost of labor used in remodeling the hotel; and plaintiff filed UCC financing statements at the Wake County Registry on the equipment and fixtures owned by the Inn. However, defendants waived in their guaranties any rights to defenses upon default under N.C.G.S. § 25-9-504(1) and (2); unlike a debtor, a guarantor may contractually waive his right to a commercially reasonable disposition of the debtor's collateral.

Am Jur 2d, Guaranty §§ 108, 114.

Judge COZORT concurring.

APPEAL by defendants from an order entered 13 April 1989 by *Judge Robert D. Lewis* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 13 February 1990.

On 16 January 1987 Borg-Warner Acceptance Corporation ("Borg-Warner") filed a Complaint against the defendants seeking to recover amounts owed to it by the Raleigh Inn, Inc. ("Inn"), formerly the Royal Villa, Inc., and guaranteed by the defendants. The defendants responded on 30 March 1987 with an Answer and Counterclaim.

On 21 December 1988, Borg-Warner filed a Motion for Summary Judgment. The defendants filed affidavits in opposition and also moved for summary judgment. Borg-Warner opposed the defendants' motion.

The matter was heard before the Honorable Robert D. Lewis on 13 April 1989 and an order was entered establishing certain

facts in the case and finding that only two issues remained to be tried by the jury pursuant to Rule 56(d) of the North Carolina Rules of Civil Procedure. The order further dismissed defendants' counterclaim with prejudice. The defendants gave timely notice of appeal.

DeLaney and Sellers, P.A., by Timothy G. Sellers and Charles E. Lyons, for plaintiff-appellee.

Stott, Hollowell, Palmer & Windham, by E. Gregory Stott and Grady B. Stott, for defendants-appellants.

LEWIS, Judge.

On 29 June 1983 and 28 December 1983, defendants signed guaranty agreements with the plaintiff under the terms of which they agreed to unconditionally guarantee the indebtedness of Royal Villa, Inc. to the plaintiff under two Equipment Lease Agreements between the plaintiff and Royal Villa, Inc. dated 29 June 1983 and 28 December 1983.

Royal Villa, Inc. was the owner of the real property upon which the Royal Villa Hotel was located and where the equipment, furniture and furnishings leased by the plaintiff to Royal Villa, Inc. were to be delivered. As additional security for its performance under the terms of the Equipment Leases, Royal Villa, Inc. executed a deed of trust in favor of the plaintiff encumbering the real estate. After executing these documents, Royal Villa, Inc. changed its name to The Raleigh Inn, Inc.

In May of 1986, the Inn filed a petition under Chapter Eleven of the Bankruptcy Code. The Inn subsequently defaulted in making timely payments to Borg-Warner. Pursuant to the terms of the Equipment Leases, the entire unpaid balances due were declared immediately due and payable on 30 November 1986.

An Order was entered by the Bankruptcy Court granting Raleigh Federal Savings & Loan Association, holder of a first deed of trust on the Wake County real property, and the plaintiff relief from the Automatic Stay of the Bankruptcy Code and permission to foreclose their deeds of trust.

During the course of the bankruptcy proceeding, a potential buyer of the Inn deposited $50,000.00 which was later forfeited

to the plaintiff and applied to the indebtedness owed to them by the Inn.

The plaintiff instituted foreclosure proceedings in Wake County and a foreclosure sale was held on 23 September 1987. The plaintiff was the only bidder present at the scheduled sale and entered a bid of $100,000.00. No other bids were made. A Trustee's Deed was delivered to Borg-Warner. The net proceeds from the foreclosure sale, totaling $94,353.00 were disbursed to Borg-Warner and applied to reduce the indebtedness of the Inn. At the time of the sale, the Promissory Note secured by the first deed of trust in favor of Raleigh Federal Savings & Loan Association was also in default with a balance due and owing in excess of $3,500,000.00. Proceedings had been instituted in Wake County to foreclose the Raleigh Federal Savings & Loan Association deed of trust.

In January 1988, the real property formerly owned by the Inn and acquired by the plaintiff through foreclosure was sold to P.S. Investment Company, Inc. for the sum of $5,024,419.89. The personal property located at the Inn was also sold to P.S. Investment Company, Inc. for $10.00. Neither the Inn nor the defendants received any notice from Borg-Warner of the sale of the property.

Borg-Warner claims and defendants deny that there is a total balance due and owing on the Inn leases of $1,222,298.23. Defendants claim that through its sale of the real and personal property of the Inn, plaintiff received a return on its loan of $1,694,318.00 and that this amount should be used to extinguish their indebtedness.

I.

Defendants' Right To Assert Certain Statutory Defenses

[1] Defendants contend that as guarantors they are entitled to the defense established by G.S. § 45-21.36, which provides in pertinent part:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against

> the mortgagor, trustor *or other maker of any such obligation whose property has been so purchased*, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part. . . .

G.S. § 45-21.36. (Emphasis added.) This statute limits protection to those parties who hold a property interest in the mortgaged property and is not applicable to other parties liable on the underlying debt. *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 264, 261 S.E.2d 145, 148 (1979), *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). Defendants contend that they do own a property interest in the property of the Inn since Mr. Johnston owns 77% of the capital stock of the corporation, pledged his own assets and extended his own personal credit in order to pay off creditors. Borg-Warner argues that defendants do not possess a property interest in the Inn since title to that property was held solely in the name of the corporation. In support of its argument, Borg-Warner cites *American Foods, Inc. v. Goodson Farms, Inc.*, 50 N.C. App. 591, 275 S.E.2d 184, *disc. rev. denied*, 303 N.C. 180, 280 S.E.2d 451 (1981), *aff'd*, 304 N.C. 386, 283 S.E.2d 517 (per curiam) (1981) (affirming result of hearing). In that case J. Michael Goodson, one of the defendants, was the comaker of a note securing property in the name of Lewis Nursery, Inc. This Court refused to allow defendant Goodson to assert the defense contained in G.S. § 45-21.36, stating:

> By contending they are comakers and as such are entitled to the defense established by G.S. § 45-21.36, defendants are in effect asking this Court to pierce the corporate veil in a unique way. Defendant Goodson is asking us to wrap the corporate cloak of Lewis Nursery, Inc., around him, since he financed the corporation, and conclude that he and Goodson Farms had an equitable interest in the lands, title to which was recorded in the name of Lewis Nursery, Inc. This we cannot do. Defendants did not hold a property interest in Lewis Nursery, Inc.

Id. at 597, 275 S.E.2d at 188. We see no difference between this case and the case at bar. Title to the real property was held solely in the name of the corporation. Defendants, as guarantors of the Inn, hold no property interest in the Inn and therefore may not assert the defense contained in G.S. § 45-21.36.

[2] The defendants next contend that since the Inn, as mortgagor, could utilize the provisions of G.S. § 45-21.36, they should be allowed to do so pursuant to G.S. § 26-12, which states:

> (a) As used in this section, 'surety' includes guarantors. . . .
>
> (b) When any surety is sued by the holder of the obligation, the court, on motion of the surety may join the principal as an additional party defendant, *provided the principal is found to be or can be made subject to the jurisdiction of the court.* Upon such joinder the surety shall have all rights, defenses, counterclaims, and setoffs which would have been available to him if the principal and surety had been originally sued together.

G.S. § 26-12. (Emphasis added.) Because the Raleigh Inn, Inc. has filed bankruptcy pursuant to Chapter Eleven of the United States Bankruptcy Code, it is subject to the exclusive jurisdiction of the United States District Court for the Western District of North Carolina. *See* 28 U.S.C. 1334(d). The statute expressly states that the principal must be joined as a party and to do so requires the surety to show that our courts have jurisdiction over the principal. This the defendants are unable to do. Therefore, the defendants may not avail themselves of the rights and privileges afforded by G.S. § 26-12.

[3] In the alternative, the defendants assert that they should be allowed to show the value of the real and personal property of the Inn as of March 30, 1987, the day their answer was filed in this case. Defendants contend that their answer provides notice to the plaintiff pursuant to G.S. § 26-7 "to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation." However, the defendants expressly waived their right to this defense by specifically agreeing in their guaranties "not to assert or take advantage of . . . (k) any defense based on lack of due diligence by Lessor in collection, protection or realization upon any collateral securing the indebtedness evidenced by the Lease. . . ."

II.

Defendants' Equipment Leases As Security Interests

[4] Defendants assign as error the trial court's finding that the guaranty agreements were to induce leases instead of finding that the agreements were to have effect as security, and as such were governed by Article 9, Chapter 25 of the Uniform Commercial Code.

> Whether a lease is in fact intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

G.S. § 25-1-201(37). The Inn was given two options to purchase from Borg-Warner. One option to purchase is in the amount of $1.00. The other option is in the amount of "fair market value." Additionally, the defendants point out that the money loaned to the Inn was used for such work as removing tile and carpet, installing new carpet, completing a sound and lighting system for the lounge, installing a new gas hot water circulating system, and furnishing and installing 310 bathroom vanities. Personal property which was purchased included a custom-made refrigerated salad bar, a custom-built registration desk, drapes, bedspreads, and 628 pillows. Furthermore, nearly $300,000 of the funds advanced was for the cost of labor used in remodeling the hotel. The plaintiff filed UCC financing statements at the Wake County Registry on the equipment and fixtures owned by the Inn. We find that based on these factors, the parties did intend for the leases to act as security. Accordingly, Article 9 applies to these agreements.

Defendants argue that under Article 9 they are entitled to the protections afforded under the statute which pertain to certain rights upon default. *See* G.S. § 25-9-504(1)(a)(b), G.S. § 25-9-504(2). However, defendants waived any right to assert these defenses in their guaranties. While it is true that a *debtor* may not waive his entitlement to a commercially reasonable disposition of his collateral by a secured creditor, G.S. § 25-9-501, a *guarantor* may contractually waive his right to a commercially reasonable disposi-

tion of the debtor's collateral. In *U.S. v. H & S Realty Co.* it was held:

> Courts upholding a waiver have offered a number of rationales distinguishing guarantors from debtors. First, the purpose of guaranty agreements is to 'facilitate the issuance of loans by ensuring that the lender has a ready source from which it can collect in the event of default by the debtor. To this end, it would not be unusual for a lender to require a guarantor to waive objections to payment that otherwise might be available' . . . Second, the guarantor is thought to have a lesser interest in the collateral than does a debtor, and thus it is not unconscionable to permit waiver by a guarantor but not by a debtor . . . Third, there appears to be a feeling that guarantors are more likely than debtors to enter contracts with their eyes open, so that guarantors do not need the protection of section 9-501(3)(b)'s nonwaivability provision. . . .

U.S. v. H & S Realty Co., 647 F.Supp. 1415, 1420-21 (D. Maine 1986), *affirmed*, 837 F.2d 1 (1st Cir. 1987) (citations omitted); *See also Int'l. Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 316 S.E.2d 619, *disc. rev. denied*, 312 N.C. 493, 322 S.E.2d 556 (1984) (defendant guarantors contractually waived right to "notice of default of payment, demand and diligence, and all other notices of any kind whatsoever" upheld).

Because we have found the defendants' assignments of error to be without merit, we

Affirm.

Judges WELLS and COZORT concur.

Judge COZORT concurring.

The trial court granted partial summary judgment and left for trial the issues of (1) the fair market value of the personal property sold to P. S. Investment Company, Inc.; and (2) the amount of money damages, if any, plaintiff is entitled to recover. In *Schuch v. Hoke*, 82 N.C. App. 445, 346 S.E.2d 313 (1986), this Court held that a partial summary judgment order which establishes liability and reserves for trial the issue of damages is an interlocutory order not immediately appealable. *See also Tridyn Industries v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). I

am unable to distinguish the instant case from *Schuch* and *Tridyn*, and I vote to dismiss the appeal.

MILDRED MINTZ BENTON AND HUSBAND, WILLIAM E. BENTON v. JOSEPH H. MINTZ

No. 8913SC488

(Filed 20 March 1990)

1. **Attorneys at Law § 6 (NCI3d)— withdrawal of attorney from case proper**

The trial court did not err in permitting an attorney to withdraw as counsel for defendant since dissolution of the attorney/client relationship as well as defendant's reputed unwillingness to pay surveyors hired pursuant to litigation preparation constituted justifiable cause for the attorney's withdrawal; the attorney provided reasonable notice to his client by filing a motion to withdraw some five months prior to trial, which motion defendant received; the attorney filed with the superior court and sent to defendant notice of the hearing to determine the "Motion to Withdraw" about three weeks prior to the hearing; and the trial court granted the attorney's motion for withdrawal and ordered said withdrawal.

Am Jur 2d, Attorneys at Law §§ 173, 174, 175.

2. **Trial § 3.2 (NCI3d)— withdrawal of defendant's counsel—immediate trial—denial of continuance improper**

The trial court erred in failing to grant defendant a continuance after having allowed withdrawal of defendant's counsel where defendant repeatedly told the court that he did not know trial was to commence on the day of the special proceeding to allow counsel to withdraw; the record tended to verify defendant's claim of lack of knowledge; defendant's ex-lawyer verified that he had likely misled his client as to the nature of the proceedings on the day in question; the record contained no indication that defendant knew or should have known of the trial; shortly after learning of his counsel's desire to withdraw, defendant filed with the superior court clerk a request to be personally informed should his case be sched-

uled on a court calendar; defendant informed the trial court that he would have difficulty procuring his witnesses on such short notice; defendant requested that the trial be delayed for a day or one week to allow him to gather witnesses; defendant's ex-lawyer told the court that the case should be continued; defendant was prejudiced by having to proceed to an immediate trial without counsel; and nothing in the record indicated that movant sought to delay or evade trial.

Am Jur 2d, Continuance §§ 7, 13.

APPEAL by defendant from judgment entered 6 October 1988 by *Judge I. Beverly Lake, Jr.* in BRUNSWICK County Superior Court. Heard in the Court of Appeals 4 December 1989.

Frink, Foy, Gainey & Yount, P.A., by Stephen B. Yount, for plaintiff-appellees.

Shipman & Lea, by Gary K. Shipman, for defendant-appellant.

GREENE, Judge.

This non-jury civil action arises from a complicated boundary dispute. The trial court entered judgment for the plaintiffs, and the defendant appeals.

The plaintiffs instituted this action on 20 December 1983. On 21 January 1987 Bruce H. Robinson entered an appearance on the defendant's behalf. On 8 April 1988 Mr. Robinson filed a "Motion to Withdraw" from representation of the defendant. On 17 May 1988 the defendant filed with the Clerk of Superior Court of Brunswick County a handwritten document entitled "Rejection of Motion to Withdraw of Defendant's Attorney Name Bruce H. Robinson." On the same day, the defendant filed with the Clerk a letter asking the Clerk to inform the defendant personally of the date for which trial of the civil action 83CVD648 would be scheduled. On 6 September 1988 the calendar scheduling the trial for 3 October 1988 was issued. On 9 September 1988 Mr. Robinson filed and sent to defendant a Notice of Hearing which read as follows:

> PLEASE TAKE NOTICE that the undersigned will bring the above entitled matter for hearing before the District Court [sic] in Brunswick County, Bolivia, North Carolina, on the 3rd day of October, 1988, at 10 A.M. or as soon thereafter as counsel may be heard, *for the purpose of determining whether*

Bruce H. Robinson, Jr. will be permitted to withdraw as counsel for defendant in the above captioned case. [Emphasis added.]

On 30 September 1988 the defendant filed with the Clerk of Superior Court a copy of a letter sent by defendant to Mr. Robinson on 29 September 1988. That letter read in part:

> When I received the notice of the hearing for October 3, 1988 from you to attend District Court I had upon receiving such no true call or need to be there and document didn't call for me to attend any other court at that time set date, Oct. 3, 1988. I have business commitments that were made that must be fullfilled for two weeks on or mabe [sic] a little longer.
>
> Sir if you want another type court you should schedule for another session of that court later on, then you can say your wishes.

On 3 October 1988 a hearing was conducted to rule on Mr. Robinson's "Motion to Withdraw." At the beginning of this proceeding, the defendant announced "I'm representing myself." Upon the court's questioning as to whether the defendant was releasing his lawyer, Mr. Mintz replied "Not until he's been checked out with what evidence I've got, and I want it done by the Grand Jury." The defendant later stated that Mr. Robinson "shouldn't get out of the case until I find more on him, what he has done to me in this case." The defendant continued, stating "he [Mr. Robinson] shouldn't get out without me getting my money back."

Mr. Robinson asked to be excused from representing the defendant because no "valid attorney/client relationship" existed. He further stated that he had to withdraw because the defendant refused to pay a surveyor, who was hired by Mr. Robinson to prepare for the litigation.

The trial court found "that the relationship of attorney and client is no longer possible between Mr. Robinson and the Defendant; that the Defendant has no confidence in the representation of Mr. Robinson and has, in fact asked the Court to have Mr. Robinson and various surveyors investigated by the Grand Jury." The trial court concluded "that there can be no attorney/client relationship between Mr. Robinson and the defendant." Therefore the trial court allowed Mr. Robinson's Motion for Withdrawal and ordered him removed as counsel for the defendant.

During the special proceeding, the trial court, after announcing that it was inclined to grant Mr. Robinson's "Motion to Withdraw," stated that the case was thus ready for trial. The defendant responded that he needed to gather his witnesses. The defendant stated "I understood this case wasn't going to be tried, but just for my lawyer to get out." After further discussion, the court stated that "the case is not going to be continued." The defendant responded "Judge, Your Honor, is there anyway I can get it [the trial] tomorrow, so I can pick up my witnesses? I thought he [Mr. Robinson] was just going to sign out. I had no indication it was going to be tried." The trial court refused to continue the case even though Mr. Robinson verified that he had probably put his ex-client under the impression that only the motion to withdraw would be heard that day. Upon the trial court's insistence that the trial commence that afternoon, Mr. Mintz stated "Well, one of my witnesses is in the rest home at Wrightsville Beach. I need to get some kind of papers fixed on him." The defendant again asked to delay the trial, but the trial court refused.

The trial commenced that afternoon with the defendant representing himself, and Mr. Steven Yount, Esquire, representing the plaintiffs. At trial, complicated legal issues arose concerning technical evidentiary rules, *res judicata* and civil procedure. The trial court entered judgment against the defendant.

The issues presented are: I) whether the trial court abused its discretion in granting Mr. Robinson's motion to withdraw; and II) whether the trial court erred in failing to grant the defendant's motion for a continuance.

I

[1] The defendant argues that the trial court abused its discretion in allowing Mr. Robinson to withdraw as counsel on the day of trial. Withdrawal of appearance by an attorney is governed by Superior Court Rule 16 which states in pertinent part:

> No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

The record shows that Mr. Robinson had entered a formal appearance; thus, we must determine whether the three-part test of Rule 16 has been met.

The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion. *See Brown v. Rowe Chevrolet-Buick, Inc.*, 86 N.C. App. 222, 357 S.E.2d 181 (1987) (court lacks discretion and must grant continuance where attorney has given *no* prior notice of withdrawal). The defendant apparently does not dispute on appeal that Mr. Robinson presented to the court evidence of a justifiable cause for his withdrawal. Nonetheless we note that the dissolution of the attorney/client relationship as well as the defendant's reputed unwillingness to pay surveyors hired pursuant to litigation preparation, constitute justifiable cause for Mr. Robinson's withdrawal. We have no hesitation in so concluding since the record shows the defendant apparently did not actually want Mr. Robinson to continue representing him. Rather the defendant's statements to the court indicated the defendant wanted Mr. Robinson to remain part of the action to allow the court or a "Grand Jury" to investigate some alleged misdealings of Mr. Robinson toward the defendant. Mr. Robinson also provided reasonable notice to his client by filing a motion to withdraw some five months prior to trial which motion the defendant received. Mr. Robinson filed with the superior court and sent to the defendant notice of the hearing to determine the "Motion to Withdraw" about three weeks prior to the hearing. Lastly, the trial court granted Mr. Robinson's motion for withdrawal and ordered said withdrawal. We find that Mr. Robinson completely complied with the requirements of Superior Court Rule 16 in withdrawing from representation of the defendant. The trial court did not err in permitting Mr. Robinson to withdraw as counsel for defendant.

II

[2] The defendant next argues that the trial court erred in failing to grant the defendant a continuance after having allowed withdrawal of defendant's counsel. "No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C.G.S. § 1A-1, Rule 40(b) (1983). "[A]n attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle v. Shankle*, 289 N.C. 473, 484,

223 S.E.2d 380, 387 (1976). "[T]he decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of a particular case whether immediate trial or continuance will best serve the ends of justice." 289 N.C. at 485, 223 S.E.2d at 387.

An unrepresented party's failure to formally request a continuance does not preclude review of this issue. *Underwood v. Williams*, 69 N.C. App. 171, 174, 316 S.E.2d 342, 344 (1984). The defendant here repeatedly told the court that he did not know trial was to commence on the day of the special proceeding. The record tends to verify defendant's claim of lack of knowledge. In Mr. Robinson's 9 September 1988 Notice of Hearing, Mr. Robinson notified the defendant that the hearing of 3 October 1988 would be "for the purpose of determining whether Bruce H. Robinson, Jr. will be permitted to withdraw. . . ." This notice fails to mention that trial was also scheduled for that date. The defendant's 30 September letter makes evident the defendant's lack of knowledge that the case was scheduled for trial.

During the special proceeding Mr. Robinson verified that he had likely misled his client as to the nature of the 3 October proceedings. The record contains no indication that the defendant knew or should have known of the trial. Furthermore, the defendant made a notable layman's attempt to keep informed as of the trial date. On 17 May 1988, shortly after learning of his counsel's desire to withdraw, the defendant filed with the superior court clerk a request to be personally informed should his case be scheduled on a court calendar. Under these circumstances, the counsel's apparent failure to inform the defendant of the pending trial should not be attributable to the defendant. *See Barclays American Corp. v. Howell*, 81 N.C. App. 654, 657, 345 S.E.2d 228, 230 (1986).

Furthermore, the defendant informed the trial court that he would have difficulty procuring his witnesses on such short notice. The defendant requested the trial court to put off the trial until the next day or the next week to allow him to gather witnesses. In addition, Mr. Robinson told the court that the case should be continued. However, the court ordered the defendant to proceed that afternoon with trial of very complicated issues regardless of whether the defendant had counsel or witnesses.

"A fundamental element of due process is adequate and reasonable notice appropriate to the nature of the hearing. Such notice involves a reasonable time for preparation." *Lowe v. City of Arlington*, 453 S.W.2d 379, 382 (Tex. Civ. App. 1970); *see McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964). The few hours of notice the defendant here had were clearly insufficient for adequate preparation. *See Williams and Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984) (one or two day period insufficient for party to either prepare case or acquire alternative representation). A review of the record indicates complicated legal issues were involved. Given the complex issues at trial, indisputably the defendant was prejudiced by having to proceed to an immediate trial without counsel. "It is quite apparent that the trial of this case is beyond the capability of laymen and without counsel [defendant] will be lost." *See Shankle*, 289 N.C. App. at 486, 223 S.E.2d at 388.

We also note that reversal of the trial court's refusal to grant a continuance "is especially warranted when nothing in the case indicates that the movant's purpose for the motion is to delay or evade trial." *Mills v. Mills*, 348 S.E.2d 250, 252 (Va. 1986). Because nothing in the record here indicates the movant sought to delay or evade trial, and because the movant did not know trial was scheduled and because the movant's ability to produce witnesses and prove its case was prejudiced thereby, we must grant a new trial.

New trial.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. BENJAMIN MARK GOLDMAN, DEFENDANT

No. 8918SC440

(Filed 20 March 1990)

1. Criminal Law § 34.8 (NCI3d)— narcotics offense—evidence of drug possession and marijuana use—admissibility to show predisposition to commit offense

The trial court did not err in admitting evidence of defendant's drug possession and marijuana use where the State

introduced the evidence in an attempt to show that defendant had a predisposition to commit the crimes charged and was therefore not entrapped. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Criminal Law §§ 205, 206; Drugs, Narcotics, and Poisons §§ 43, 46, 47; Evidence § 321.

2. **Criminal Law § 34.8 (NCI3d)— narcotics offense—cocaine and marijuana possession eight days after crimes charged—admissibility of evidence**

The trial court did not err in admitting evidence of defendant's cocaine and marijuana possession just eight days after being charged with three drug related offenses, since the evidence was extremely relevant and had probative value which substantially outweighed the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 46, 47; Evidence §§ 321, 329.

3. **Criminal Law § 34.8 (NCI3d)— narcotics offense—evidence of prior drug use—admissibility to show predisposition to commit crimes**

In a prosecution of defendant for possession with intent to sell and deliver and sale and delivery of LSD and cocaine, the trial court did not err in admitting evidence of defendant's prior drug use to show his predisposition to commit the crimes charged. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 46, 47; Evidence §§ 321, 329.

4. **Criminal Law § 73.1 (NCI3d)— hearsay evidence later withdrawn—defendant not prejudiced**

The trial court did not err by first allowing as corroborating evidence, and then later excluding, hearsay evidence that defendant was a drug dealer, since the court's instruction withdrawing the evidence was appropriate, and there was no indication in the record that the jury disregarded the court's instruction and considered the improper testimony in reaching the verdict.

Am Jur 2d, Trial §§ 655, 748, 753, 919.

5. Narcotics § 4.2 (NCI3d)— possession with intent to sell and deliver cocaine and LSD—entrapment—sufficiency of evidence

In a prosecution of defendant for possession with intent to sell and deliver and sale and delivery of LSD and cocaine, the trial court did not err in denying defendant's motion to dismiss since defendant did not prove as a matter of law that he was entrapped.

Am Jur 2d, Criminal Law § 203; Drugs, Narcotics, and Poisons §§ 43, 47.

APPEAL by defendant from judgment entered 10 January 1989 by *Judge Julius Rousseau* in GUILFORD County Superior Court. Heard in the Court of Appeals on 18 October 1989.

After a trial by jury, defendant was convicted of possessing Lysergic Acid Diethylamide ("LSD") and cocaine with the intent to sell and deliver, selling and delivering LSD and cocaine and trafficking in LSD. Such conduct was in violation of G.S. sec. 90-95. Upon conviction, the trial court imposed an active prison term of ten years. Defendant gave notice of appeal to the judgment in open court.

Attorney General Lacy H. Thornburg, by Associate Attorney General V. Lori Fuller, for the State.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Bryan E. Lessley, for defendant-appellant.

JOHNSON, Judge.

Defendant's convictions arise out of three separate drug transactions which occurred on 30 October 1987, 13 November 1987, and 16 November 1987 between defendant and undercover officers. Undisputed evidence presented by the State showed the following: At the time of the drug transactions, defendant was a nineteen-year-old college student at the University of North Carolina at Greensboro.

On 30 October 1987, defendant through Lonnie Lemmons, an informant for the State Bureau of Investigation, was introduced to Anna Freeman, an undercover agent employed by the State Bureau of Investigation. The introduction took place prior to defendant's sale of LSD to Agent Freeman. Though Mr. Lemmons

stood by the fender of the car operated by Agent Freeman, defendant actually handled the drugs and collected the money that had been prearranged by Lemmons.

The next two sales were similar to the first sale and took place on 13 November 1987 and 16 November 1987. Mr. Lemmons, however, was not present when defendant sold the drugs to the undercover officers.

On 24 November 1987, law enforcement officers searched defendant's apartment and found five marijuana plants growing, each measuring five-feet in height, a cocaine kit and a packet containing 1.8 grams of cocaine. Defendant was thereafter arrested and convicted of seven counts of possessing LSD and cocaine with the intent to sell and deliver, selling and delivering LSD and cocaine and trafficking in LSD.

At trial, defendant testified that: (1) he possessed and sold LSD to Agent Freeman on 30 October 1987; (2) he possessed and sold more than one gram of cocaine to Agent Freeman and Detective Kenneth Kennedy on 13 November 1987; and (3) he possessed and sold more than one hundred and less than five hundred dosage units of LSD to Detective Kennedy on 16 November 1987. Defendant stated that he had never sold cocaine or LSD prior to these three occasions. He also stated that he made the three sales because Lonnie Lemmons instructed him to sell the drugs to Agent Freeman and Detective Kennedy.

Defendant brings forth two Assignments of Error for this Court's review. Assignment of Error number one sets out five arguments to support defendant's overall contention. Inasmuch as each argument relates to specific questions, we will address them separately to insure adequate discussion. We will then address defendant's second Assignment of Error.

By his first Assignment of Error, defendant contends that the trial court erred by refusing to dismiss the charges on the grounds that defendant did not prove as a matter of law that he was entrapped. We disagree.

Our Supreme Court has held that "[w]hether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he

was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955). The affirmative defense of entrapment consists of two elements:

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

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978). We note that this is a two-step test and the absence of one element does not afford the defendant the luxury of availing himself to the affirmative defense of entrapment. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982). The burden of proving entrapment to the satisfaction of the jury lies with the defendant. *Id.*

I

[1] Defendant's first argument challenges the trial court's admission of evidence of his drug possession and marijuana use. We have reviewed the State's evidence and find defendant's contention that the trial court erred in the admission of this evidence to be without merit.

> G.S. sec. 8C-1, Rule 404(b) provides that
>
> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show 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. (Emphasis added.)

The State introduced evidence of defendant's marijuana use and possession in an attempt to show that defendant had a predisposition to commit these crimes and was therefore not entrapped. As a general principle, predisposition may be demonstrated by defendant's ready compliance, acquiescence in, or willingness to cooperate in a criminal plan where the police simply provide the defendant with the opportunity to engage in such crime. *Hageman, supra.* Here, the State's evidence was properly admitted to illustrate the absence of entrapment.

II

[2] By his next argument, defendant contends that the trial court improperly admitted evidence of his cocaine and marijuana possession occurring eight days after the last crime charged. Defendant further contends that the evidence was irrelevant and that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

In making such an argument, defendant asks this Court to hold inadmissible any evidence found after the date of the crime charged. *See United States v. Jimenez*, 613 F.2d 1373 (5th Cir. 1980) and *United States v. Daniels*, 572 F.2d 535 (5th Cir. 1978). We cannot, however, make such a holding since neither *Jimenez* nor *Daniels* stands for the general proposition that *all* evidence found after the date of the crime charged in *all* instances is inadmissible.

In *Jimenez*, the Court, after reviewing the relevancy of the evidence found after the date of the crime charged, determined that a year had lapsed between the heroin deal and the alleged cocaine possession. The Court then concluded that such facts did not necessarily "suggest that subsequent extrinsic offense evidence could never be admitted under Rule 404(b), [but] it certainly bears substantially less on predisposition than would a prior extrinsic offense." *Jimenez, supra*, at 1376. Therefore, the evidence of defendant's alleged cocaine possession was held to be inadmissible.

In *Daniels*, evidence of defendant's possession of a sawed-off shotgun three months after the date of the crime charged was excluded since the act occurred subsequent to the crime charged and the gun possession was not probative to the crime charged (sale of heroin). By making such a determination, the United States Court of Appeals reversed the trial court's decision and emphatically stated that it was erroneous to admit, in order to establish defendant's predisposition to violate the drug laws, evidence concerning his possession of a sawed-off shotgun.

We find *Jimenez* and *Daniels* distinguishable from the present case since the evidence in this case was found only eight days after defendant was charged and the subsequent act of possessing cocaine and marijuana is both relevant and probative to the crimes charged. G.S. sec. 8C-1, Rule 403 is applicable and provides that

> [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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In our view, the evidence of defendant's cocaine and marijuana possession just eight days after being charged with three drug related offenses is extremely relevant and has a probative value that substantially outweighs the danger of unfair prejudice. This argument is overruled.

III

[3] Next, defendant argues that the trial court erred in admitting evidence of his cocaine and LSD use.

As previously stated, G.S. sec. 8C-1, Rule 404(b) provides that evidence of other wrongs is admissible to prove absence of entrapment. We view personal use of drugs as not being synonymous with the intent to sell, distribute or traffic drugs. However, we find no error with the trial court's decision to admit evidence of defendant's prior drug use to show his predisposition to commit the crimes charged.

IV

[4] Through his fourth argument, defendant contends that the trial court committed prejudicial error by first allowing, as corroborating evidence, and then later excluding, hearsay evidence that defendant was a drug dealer.

Undisputedly, competent reputation testimony can be used to establish predisposition. *United States v. Dickens*, 524 F.2d 441 (5th Cir. 1976), *cert. denied*, 425 U.S. 994, 96 S. Ct. 2208, 48 L.Ed.2d 819 (1976). Where the evidence is, however, determined to be incompetent, an appropriate instruction must be given by the court to the jury. This instruction has the effect of withdrawing the evidence from jury consideration and any error in its admission is therefore cured. *State v. Pruitt*, 301 N.C. 683, 273 S.E.2d 264 (1981).

We cannot accept defendant's argument that the trial court committed prejudicial error by placing testimony before the jury which was not corroborated. The court gave the following instruction:

> All right. Members of the jury, in the early part of this trial, Miss Freeman testified she talked to the informer, Mr. Lonnie Lemmons, and that he told her certain things about the defendant, that he was dealing in drugs. I'm at this time telling you to disregard what she might have said Lonnie Lemmons told her about this defendant. This defendant is on trial for the cases you've heard about here in this courtroom, not on something he may have done some other time or any other thing. You can only convict him if the charges he was charged with on the evidence that you've heard here. Disregard anything that she might have said somebody told her about prior drug dealings.

The record does not indicate that the jury disregarded the court's instruction and considered Agent Freeman's earlier testimony in reaching the verdict. We therefore find no error.

In light of our analysis of defendant's second argument, we have considered, but find it unnecessary to address his contention that the trial court erred by admitting evidence showing absence of entrapment. Defendant's fifth argument is therefore not discussed.

[5] Finally, contending there was insufficient evidence to support his conviction, defendant assigns as error the trial court's denial of his motion to dismiss. We must consider all evidence disclosed at trial in the light most favorable to the State in an attempt to ascertain whether or not substantial evidence of the crime is present. *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982). "Ordinarily, the issue of whether a defendant has been entrapped is a question of fact which must be resolved by the jury. It is only when the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit that we can hold as a matter of law that he was entrapped." *Hageman, supra*, at 30, 296 S.E.2d at 450.

At trial, defendant admitted that he possessed and sold LSD and cocaine on the three occasions for which his convictions arose. He denied, however, having a predisposition to possess, sell and deliver, and traffic drugs. The State, on the other hand, presented evidence that defendant was predisposed to the crimes charged. Upon appraisal of the disputed evidence, the trial court submitted the issue of entrapment to the jury.

We hold that there was sufficient evidence to support the denial of defendant's motion to dismiss since he did not prove as a matter of law that he was entrapped. In the trial of defendant's case, we find

No error.

Judge ORR concurs.

Judge WELLS concurs in the result.

STATE OF NORTH CAROLINA v. MICHAEL RAY ROBINSON

No. 8918SC394

(Filed 20 March 1990)

1. Jury § 7.14 (NCI3d)— insufficiency of evidence of racial discrimination

Defendant failed to make out a prima facie case of racial discrimination in the State's exercise of peremptory challenges of black jurors where the State accepted 50% of the prospective black jurors tendered; this was insufficient to show that the State was intentionally trying to keep blacks off the jury because of defendant's race; the State asked essentially the same questions of all potential jurors; no questions indicated any prejudice or discrimination on the part of the State's attorney; the fact that defendant was black and the victim was white was insufficient to tip the balance in favor of creating a prima facie case; and defendant failed to present a sufficient record on appeal to include a prospective juror, whose race was not discernible to the attorneys or the judge, in the category of black prospective jurors peremptorily challenged.

Am Jur 2d, Jury § 235.

2. Rape and Allied Offenses § 5 (NCI3d); Burglary and Unlawful Breakings § 5.3 (NCI3d)— attempted second degree rape— first degree burglary—sufficiency of evidence

There was no merit to defendant's contention that the State failed to present sufficient evidence of defendant's specific

intent to commit second degree rape to sustain convictions of first degree burglary and attempted second degree rape where there was evidence that defendant struggled with the victim and tore her underpants, and this was substantial evidence from which the jury could reasonably conclude that defendant intended to rape the victim.

Am Jur 2d, Burglary § 24; Rape §§ 25, 26.

3. **Rape and Allied Offenses § 6 (NCI3d)— attempted second degree rape—intent to gratify passion on victim notwithstanding resistance—instruction correct**

In a prosecution of defendant for attempted second degree rape, the trial court did not commit plain error by failing to instruct the jury that defendant must have used or threatened to use force sufficient to overcome any resistance the victim might offer, since the element of intent to commit rape is satisfied by showing that defendant has an intent to gratify his passion upon the victim, notwithstanding any resistance on her part; the trial court stated at several points in his charge that in order to find defendant guilty of attempted rape the jury must find that he intended to have "vaginal intercourse with the victim by force and against her will"; and this charge was sufficient to provide the jury with a correct statement of the law to apply to the evidence before them.

Am Jur 2d, Burglary § 24; Rape §§ 25, 26.

4. **Rape and Allied Offenses § 1 (NCI3d)— assault—no lesser offense of attempted rape**

Assault is not a lesser included offense of attempted rape.

Am Jur 2d, Assault and Battery § 57; Rape §§ 20, 22.

APPEAL by defendant from judgment entered 21 October 1988 by *Judge Preston Cornelius* in GUILFORD County Superior Court. Heard in the Court of Appeals 17 October 1989.

Defendant was charged and convicted of first-degree burglary and attempted second-degree rape. He was sentenced to the presumptive terms of fifteen years on the burglary conviction and three years for attempted second-degree rape. Defendant gave notice of appeal to this Court in apt time.

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

Clark & Wharton, by Stanley Hammer, for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: Suzanne Benfield, the victim of the alleged burglary and attempted rape, testified that on 17 April 1988 she locked the front door of her second floor apartment as well as the door to the patio and went to bed about 11:45 p.m. At about 1:00 a.m. she was awakened by a man standing over her. The man put his hand over her mouth, covered her face with a pillow, and pinned her arms down. The assailant then began to struggle with Ms. Benfield who tried to scream; they fell on the floor and the man attempted to rip off her underpants. Suddenly, the man let go of Ms. Benfield and ran from the scene. As the man left, Ms. Benfield saw that he was a tall black man with very short hair. She then went into the living room and saw that the patio door was open about six inches.

Ms. Benfield also testified that defendant lived in her apartment building and that she had spoken with him on two occasions previous to 17 April 1988.

Frank Noah of the Greensboro Police Department testified that he photographed a cut in the screen of the sliding door in Ms. Benfield's apartment and the disarray in her bedroom.

Defendant's evidence in the form of his own testimony was that on the evening of 17 April he went to Ms. Benfield's apartment about 10:00 p.m. and asked to visit. He said she asked him to come back later and would leave a door open. He returned about 12:30 a.m., and, upon finding the front door locked, climbed up over the balcony and entered the patio door which he said was unlocked. He stated that he then entered Ms. Benfield's bedroom and touched her leg to wake her. Defendant stated that she started screaming and it scared him so he covered her face with a pillow and then ran out.

Defendant also gave a statement to Detective Caldwell of the Greensboro Police Department during interrogation. He there stated that he picked up a pillow and looked at Ms. Benfield before she woke up. When she rolled over and looked up, defendant put the

pillow over her face, held it down with one hand and touched Ms. Benfield's leg with the other.

On rebuttal, the State called Ms. Benfield's boyfriend, Rodney Thomasson, who testified that he was with Ms. Benfield on the evening of 17 April until 10:30 p.m., and he did not see defendant that evening.

[1] By his first Assignment of Error, defendant contends that the trial court erred in failing to require the prosecuting attorney to articulate nondiscriminatory reasons for having exercised three (or four) of five peremptory challenges against black jurors.

The State exercised five of its six peremptory challenges. Three of the five were against black potential jurors. A fourth juror excused was stipulated to be either black or Indian. The jury impaneled consisted of three black persons, nine whites, and one white alternate. The trial court specifically found that defendant failed to make out a *prima facie* case of racial discrimination in jury selection.

It is well established that purposeful racial discrimination in the selection of a jury violates the equal protection clause of the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879). In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), the United States Supreme Court set forth the evidentiary burden on a defendant who alleges that a prosecutor's peremptory challenge of potential jurors was motivated by purposeful racial discrimination. To make out a *prima facie* case, defendant must first show that he is a member of a cognizable racial group, and that the prosecution has used peremptory challenges to remove members of defendant's race from the jury. *Id.* The trial court is to consider all relevant circumstances in determining whether a *prima facie* case has been made. If defendant has met his burden of establishing a *prima facie* case, then the burden shifts to the State to come forward with clear and reasonably specific racially neutral reasons for the challenges. The court then decides whether defendant has established purposeful discrimination. The court's findings are to be accorded great deference. *Id.*

Applying these criteria to the instant case, we find that defendant has not made out a *prima facie* case. Although the State challenged three black potential jurors, it also accepted three on the jury. Therefore, it accepted 50% of the prospective black jurors

tendered. This is insufficient to show that the State was intentionally trying to keep blacks off the jury because of the defendant's race. (See *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987), in which the Court held that a *prima facie* case was not established when the State was willing to accept 40% of black potential jurors tendered.) We also note that the State asked essentially the same questions of all potential jurors; no questions indicated any prejudice or discrimination on the part of the State's attorney. *State v. Gray*, 322 N.C. 457, 368 S.E.2d 627 (1988). We also do not find that the fact that defendant is black and the alleged victim is white is sufficient to tip the balance in favor of creating a *prima facie* case since the trial court is to be accorded great deference in determining the existence of a *prima facie* case. *Batson, supra.*

The race of one of the peremptorily challenged jurors was not clearly discernible to the attorneys in this case or to the judge. The court found as fact that this potential juror was either black or Indian. Our Supreme Court has stated that "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence." *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988). In this case no inquiry was made and the question was left unanswered. Defendant has therefore failed to present a sufficient record on appeal to include this prospective juror in the category of black prospective jurors peremptorily challenged.

Although we recognize that the State was not required in this case to come forward with neutral explanations for its challenges, we observe that it would often be of benefit to a reviewing court if those reasons were articulated in the record.

[2] By his second argument defendant contends that the State failed to present sufficient evidence of defendant's specific intent to commit second-degree rape to sustain convictions of first-degree burglary and attempted second-degree rape.

The State is required to prove beyond a reasonable doubt each essential element of the offense for which the defendant is being tried. *State v. Brown*, 85 N.C. App. 583, 355 S.E.2d 225, *disc. rev. denied*, 320 N.C. 172, 358 S.E.2d 57 (1987). Substantial evidence of each element is necessary. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). The evidence must be considered in

the light most favorable to the State. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

The essential elements which need to be established in obtaining a conviction for first-degree burglary are (1) the breaking and entering (2) of an occupied dwelling of another (3) in the nighttime (4) with the intent to commit a felony therein. G.S. sec. 14-51; *State v. Davis*, 90 N.C. App. 185, 368 S.E.2d 52 (1988). The intention of the defendant must exist at the time of entry and the abandonment of such intent by defendant after entry is no defense. *Id.* In the instant case, the State had to present substantial evidence that at the time he entered the dwelling, the defendant intended to have vaginal intercourse with the occupant by force and against her will. To show this intent the State must present "some overt manifestation of an intended forcible sexual gratification [by defendant]." *Id.* at 188, 368 S.E.2d at 54, *quoting State v. Planter*, 87 N.C. App. 585, 588, 361 S.E.2d 768, 769 (1987).

Our Courts have found evidence of a wide variety of conduct sufficient to support a reasonable inference that a defendant intended to commit rape. *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 173 (1983), and *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974). In the instant case there was evidence that defendant struggled with Ms. Benfield and tore her underpants. This is substantial evidence from which the jury could reasonably conclude that defendant intended to rape Ms. Benfield. This argument is overruled.

[3] Third, the defendant contends that the trial court committed plain error by failing to instruct the jury that defendant must have used or threatened to use force sufficient to overcome any resistance the victim might offer. He argues that he is therefore entitled to a new trial. We disagree.

The trial court twice asked defense counsel if he had any corrections, deletions, or additions to the jury charge. At no time did he object to the charge given. Therefore, pursuant to Rule 10(b)(2) of the N.C. Rules of Appellate Procedure, defendant may not raise the alleged error on appeal. Only if defendant shows "plain error" in the instructions will he be entitled to a new trial. *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983). To determine "plain error," the Court must examine the entire record to see if the alleged defect had a probable impact on the jury's finding defendant guilty. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

Viewing the court's entire charge, we do not find error. The elements of attempted second-degree rape are "(i) that defendant had the specific intent to rape the victim and (ii) that defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape." *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988).

The specific language "intent to overcome any resistance on the part of the victim" is not an element of attempted rape. Rather, the element of intent to commit rape is satisfied by showing that "defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part." *Id.*

At several points in his charge, the able trial judge stated that in order to find the defendant guilty of attempted rape, the jury must determine that defendant intended to have "vaginal intercourse with the victim *by force and against her will.*" This charge was sufficient to provide the jury with a correct statement of the law to apply to the evidence before them. This argument is overruled.

[4] Last, defendant contends that the failure of the trial court to instruct the jury on simple assault as a lesser included offense of attempted second-degree rape constituted prejudicial error. Here again, defendant did not object to the instruction as given or request additional instructions. Therefore, "plain error" is required to entitle him to a new trial.

The determination of whether one offense is a lesser included offense of another is made on a definitional, not a factual basis. *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987) (holding that assault on a female is not a lesser included offense of attempted second-degree rape); *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982) (holding that taking indecent liberties with a child under the age of sixteen, assaulting a child under the age of twelve, and assault on a female by a male over the age of eighteen are not lesser included offenses of first-degree rape of a child of the age of twelve or less).

The elements of attempted rape are "the intent to commit the rape and an *overt act* done for that purpose." *State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983) (emphasis in original).

The dispositive question before us is whether the legal definition of the overt act required for attempted rape is the same as that for assault. *State v. Wortham, supra.* "The legal definition of the overt act necessary for attempted rape is an act 'done for that purpose which goes beyond mere preparation but falls short of the completed offense.' " *Id.* at 671, 351 S.E.2d at 296, *quoting State v. Freeman, supra,* at 449, 298 S.E.2d at 379. Our Supreme Court has set forth the legal definition of assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Roberts,* 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967).

The definitions of assault and the overt act required for attempted rape are not legally equivalent. Therefore, applying the definitional test of *State v. Wortham, supra,* we must conclude that assault is not a lesser included offense of attempted rape. The trial court did not err in failing to instruct on assault.

For all the foregoing reasons we find that defendant had a fair trial free of prejudicial error.

No error.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. MICHAEL HAWAITHA MARTIN

No. 8921SC254

(Filed 20 March 1990)

Homicide § 28.3 (NCI3d) — instruction on adequate provocation — no additional instruction on assault required

In a prosecution for homicide the trial judge's instruction on adequate provocation did not require an additional instruction on assault.

Am Jur 2d, Homicide §§ 498, 501.

APPEAL by defendant from judgment of *Judge Thomas W. Ross* entered 29 September 1988 in FORSYTH County Superior Court. Heard in the Court of Appeals 10 October 1989.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford and Assistant Attorney General Karen E. Long, for the State.

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

COZORT, Judge.

The defendant was convicted of second-degree murder and of possession of a weapon of mass death and destruction. He was sentenced to sixteen years in prison. On appeal, the defendant contends that the trial judge erred (1) by denying the defendant's request to instruct the jury on the definition of assault, (2) by refusing to defer sentencing, and (3) by abusing his discretion in weighing mitigating and aggravating factors. We find no error.

The State's evidence tended to show that on the afternoon of 2 February 1988, Roscoe Boyd and Ronald Lee went to Lisa Koger's apartment; that the three of them bought a "12-pack of Budweiser" and returned to the apartment; and that, over the course of the evening, various friends of Ms. Koger's came to visit. When defendant Michael Martin arrived about 11:30 p.m., Lisa Koger, Roscoe Boyd, Ronald Lee, and Greg and Donetta Samuels were still present. Shortly after the Samuelses departed, Martin and Boyd became involved in an argument about professional basketball players. Martin walked over to a duffel bag he had brought with him, took out a sawed-off shotgun, and pointed it at Boyd. Ms. Koger, trying to end the argument, took Boyd outside, where she remained. Boyd, however, came back inside and was shot and killed.

Dr. Modesto Scharyj, Medical Examiner for Forsyth County, determined Boyd's approximate height and weight to be five feet and 140 lbs. At death his blood alcohol measured 80 milligram percent, equivalent to a breathalyzer reading of .08.

Lisa Koger testified that Boyd called Martin a "simple-minded motherfucker" and Martin, in turn, "was calling [Boyd] M.F." and threatened to kill him. She testified further that she did not "see any kind of weapon at all on Roscoe Boyd."

Ronald Lee testified that he, too, did not "see Roscoe with any kind of weapon . . . that night." He described Boyd as a small man, weighing between 135 and 140 pounds—"a little bigger than me." Lee testified that neither he nor Boyd tried to prevent Martin from leaving. Lee testified, finally, that he last saw Boyd about "a ruler away" from the shotgun's muzzle but turned away when he "heard Lisa at the door" and at that moment "the gun went off."

Ronald Marrs, tendered as and found to be an expert in firearm and tool mark identification, testified that Boyd's fatal wound was inflicted at a distance "greater than contact [with] but less than four feet from the shirt . . . ." In his opinion, Martin's weapon (a "K-MART 20 guage [*sic*] sawed-off top rated single barrel shotgun") was not subject to accidental discharge and "would not fire unless the trigger is fully depressed."

In his defense Mr. Martin testified that he bought the shotgun from Bobby Hairston and "intended to sell it and make a profit on it." He showed the gun to his co-workers, and cocked it "when Ernest [Anthony Sides] was looking at it." Martin testified that he "didn't know how to uncock it without shooting it" and that the gun was still cocked when he took it out of his bag and pointed it at Boyd.

The defendant testified further that, when he arrived at Lisa Koger's apartment, Roscoe Boyd was the only person drinking and that he smelled marijuana. Martin and Boyd became involved in a misunderstanding about Michael Jordan and Magic Johnson: "[I]f I expressed my opinion, Roscoe [Boyd], you know, he would try to push it down . . . ." The argument continued over "Magic Johnson and Michael Jord[a]n, Larry Byrd, Superbowl."

The defendant testified that he stood up to leave, took up his bag, but was blocked by Boyd, who said: "You ain't got to leave. If you walk out the door, you might catch a knife in your back." The defendant stated that he then pulled out the shotgun. According to the defendant, he was afraid of Boyd and Lee, and he backed up against the refrigerator. The defendant testified that, while he was pointing the gun at Lee, Boyd lunged at him: "I seen him coming at me and I . . . just turned and jerked and he was shot." The defendant testified that he is six feet, two inches tall and weighed between 150 and 155 pounds at the time of his encounter with Boyd.

The defendant also called in his behalf Ernest Sides, who testified that he examined the shotgun in the parking lot at his workplace but did not fire it "because [the] supervisor was around." Sides testified that he intended to resell the gun to Carlos Gatty of New York City.

The defendant's chief assignment of error is the trial court's refusal to instruct the jury on the definition of assault. The defendant maintains that the court's failure to give such an instruction had the likely effect of misleading the jury. Thus, the defendant contends that if the trial court had "been properly instructed on assault," it might "have determined that Roscoe's actions constituted provocation sufficient to negate malice" and so "returned a verdict of voluntary manslaughter."

During the jury charge conference, the trial judge stated that he would "instruct on first degree [murder], second degree [murder], voluntary [manslaughter], and involuntary [manslaughter] and submit those as alternative verdicts along with not guilty." The judge's instructions to the jury were substantially the same as those appearing in North Carolina Pattern Jury Instructions for Criminal Cases, No. 206.10 ("First degree murder where a deadly weapon is used, covering all lesser included homicide offenses and self-defense.").

After the jury returned but before it began its deliberations, the State requested and the judge gave the following instruction based on Pattern Instruction No. 206.10, footnote 9:

> And let me just say that when I was instructing you with respect to voluntary manslaughter, I advised you that voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and without deliberation.
>
> I further instructed you that that [*sic*] killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation. And I instruct you, ladies and gentlemen, that words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant.
>
> All right, with those additional instructions, ladies and gentlemen, I will now allow you to return to the jury room . . . .

Following that final instruction, counsel for the defendant requested the judge "to advise the jury or give them some instruction on what an assault is." The judge replied:

> Well, the difficulty I have with that, Mr. Cofer, is that there are multitudes of definitions for different types of asaults [*sic*] and I think it's within common knowledge what an assault is. If you have some language you would like to propose, I'll be glad to consider what it is. But otherwise, I'll deny any request at this time.

The defendant made no further request.

Our Supreme Court has repeatedly "stated that the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). "Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for reversal." *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978). Applying those principles to the case below, we hold that the trial judge's instruction on adequate provocation did not require an additional instruction on assault. Taken as a whole the instructions accurately and clearly conveyed the law to the jury.

We note that the instructions discussed at length the elements of each of the possible verdicts. Moreover, the trial judge explained and reiterated the State's burden of proof for the alternative verdicts of second-degree murder and voluntary manslaughter:

> Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.
>
> * * * *
>
> . . . Therefore, in order for you to find the defendant guilty of *murder in the first or second degree, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense; or, failing this, that the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.*

If the State fails to prove either that the defendant did not act in self-defense or was the aggressor with the intent to kill or inflict serious bodily harm, you may not convict the defendant of either first or second degree murder; but you may convict the defendant of voluntary manslaughter if the State proved that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed or that the defendant used excessive force.

* * * *

. . . In order for you *to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant unlawful, [sic] intentionally and with malice killed the victim with a deadly weapon, thereby proximately causing his death; and that the defendant did not act in self-defense or if the defendant did act in self-defense, that he was the aggressor with the intent to kill or inflict serious bodily harm in bringing on the fight.*

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

* * * *

Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition and the defendant's act took place so soon after the provocation that the heat — that the passion of a person of average mind and disposition would not have cooled.

Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter. [Emphasis added.]

The defendant's remaining assignments of error have been examined. We find no abuse of the trial court's discretion in sentencing and reject defendant's second and third assignments of error.

No error.

Judges PHILLIPS and LEWIS concur.

JOANNE D. ALPISER, PLAINTIFF v. EAGLE PONTIAC-GMC-ISUZU, INC., GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION, DEFENDANTS

No. 8910SC185

(Filed 20 March 1990)

1. **Landlord and Tenant § 5 (NCI3d); Uniform Commercial Code § 6 (NCI3d)— contract for lease of vehicle with option to purchase—no sale—UCC warranties inapplicable**

A contract for the lease of a vehicle with an option to purchase at the end of the term of the lease for fair market value was not the functional equivalent of a purchase agreement, and the contract therefore did not fall within the scope of Article 2 of the UCC, thereby making its warranty provisions applicable.

Am Jur 2d, Sales §§ 37, 697.

2. **Landlord and Tenant § 5 (NCI3d); Sales § 5 (NCI3d)— lease of vehicle—Magnuson-Moss Warranty Act inapplicable**

The Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301 *et seq.*, did not apply to plaintiff's lease of a vehicle.

Am Jur 2d, Bailment § 161; Consumer Product Warranty Acts § 51.

3. **Contracts § 6 (NCI3d)— lease of vehicle—rights in warranties assigned to plaintiff—contract not unconscionable**

Plaintiff's lease of a vehicle from GMAC was not unconscionable because in it GMAC assigned its rights in the manufacturer's warranties to plaintiff and disclaimed all other warranties concerning the condition of the vehicle, since plaintiff was not under any compulsion to lease the vehicle and could have acquired it outright through conventional financing; plaintiff acquired all the lessor/owner's rights under the manufacturer's warranty; the lease was quite explicit as to the lack

of any warranty by lessor; and plaintiff had some recourse against the manufacturer for the loss she incurred by making lease payments while having an inoperable vehicle.

Am Jur 2d, Bailment § 161; Consumer Product Warranty Acts § 51.

APPEAL by plaintiff from judgment entered 6 July 1988 by *Judge B. Craig Ellis* in WAKE County Superior Court. Heard in the Court of Appeals 10 October 1989.

Plaintiff Joanne Alpiser, the lessee of a new Pontiac Trans Am automobile, appeals the granting of summary judgment in favor of defendant-lessor General Motors Acceptance Corporation ("GMAC"). Shortly after plaintiff leased the vehicle, it developed mechanical problems which could not be repaired and the vehicle became inoperable. After an unsuccessful attempt to enter into a dispute resolution process, plaintiff gave notice to defendant GMAC, defendant General Motors Corporation ("GMC"), the manufacturer, and defendant Eagle Pontiac-GMC-Isuzu ("Eagle"), the GM dealership where the vehicle was leased, of her intention to revoke her acceptance of the vehicle and desire to void the lease. Plaintiff's complaint alleges that the three defendants violated provisions of the North Carolina Uniform Commercial Code ("UCC"), the Federal Magnuson-Moss Act, and the North Carolina New Motor Vehicles Warranties Act. From defendant GMAC, plaintiff sought $7500 compensatory damages and that the lease be terminated without her incurring further liability.

On plaintiff's motion, the trial court amended its summary judgment order of 6 July 1988 in favor of defendant GMAC to state that the order constituted a "final judgment . . . and that there is no just reason for delay with respect to those claims." From the amended order granting summary judgment in favor of defendant GMAC, plaintiff appealed in apt time.

Hensley, Huggard, Seigle, Obiol and Bousman, by John A. Obiol, for plaintiff-appellant.

Ragsdale, Kirschbaum, Nanney & Sokol, P.A., by David P. Nanney, Jr., for defendant-appellee.

JOHNSON, Judge.

Before reaching the questions raised by plaintiff, we note that defendant GMAC urges that this appeal should be dismissed because plaintiff has "fail[ed] to respond or otherwise set forth specific facts" showing a genuine issue as to whether any claim exists with respect to defendant GMAC as required by G.S. sec. 1A-1, Rule 56(e). We disagree. Plaintiff's verified complaint may serve as an "affidavit" for purposes of answering GMAC's verified motion for summary judgment. *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (and cases cited therein). GMAC did not object in trial court that plaintiff's verified complaint was insufficient to respond to its motion. Failure to make a timely objection to the form of affidavits submitted in response to a summary judgment motion constitutes a waiver of such objections. *Id.*; *see Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978), *disc. rev. denied*, 296 N.C. 410, 267 S.E.2d 656 (1979). Defendant's argument is therefore overruled.

In its verified motion for summary judgment, defendant GMAC argued that any claims plaintiff has are against defendants GM and Eagle. The granting of a motion for summary judgment will be upheld on appeal only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), N.C. Rules of Civ. Proc.; *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102, *disc. rev. denied*, 303 N.C. 710 (1981).

[1] The first issue raised by plaintiff is whether the contract at issue falls within the scope of Article 2 of the Uniform Commercial Code ("UCC"), thereby making its warranty provisions applicable. Article 2 is intended to regulate the sale of goods. G.S. sec. 25-2-102. Plaintiff contends that although her contract with GMAC is denominated a "lease agreement," that the transaction is sufficiently analogous to a sale of goods that it should be considered the functional equivalent of a sale. We disagree.

This Court addressed the question of whether an agreement was a true lease or a security agreement subject to the filing requirements of Article 9 of the UCC in *Acceptance Corp. v. David*, 32 N.C. App. 559, 232 S.E.2d 867, *disc. rev. denied*, 292 N.C. 640, 235 S.E.2d 61 (1977). More recently, we examined the issue of whether a lease of a computer system was in fact a purchase agreement making Article 2 of the Texas UCC applicable. *Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 375 S.E.2d 673,

disc. rev. denied, 324 N.C. 436, 379 S.E.2d 249 (1989). In both cases we held that the agreements were true leases and not purchase agreements falling within the scope of Articles 9 or 2 respectively.

In determining whether the agreement in the instant case is the functional equivalent of a purchase agreement, we are guided by the reasoning and factors considered by the Court in both *Acceptance Corp.* and *Tolaram Fibers, Inc.* Similar to the instrument in *Acceptance Corp.*, the writing at issue in this case is designated a lease on its face and is for a fixed term (48 months). As to ownership of the vehicle, the agreement states, "[t]his is a lease only and Lessor [GMAC] remains the owner of the vehicle. You [Lessee] will not transfer, sublease, rent, or do anything to interfere with Lessor's ownership of the vehicle." Also, the lease does not give plaintiff the right to extend or renew the term of the lease.

The agreement in this case, however, has a feature not found in the leases in *Acceptance Corp.* and *Tolaram.* It is that the lessee has the option to purchase the leased vehicle at the termination of the lease for fair market value. Plaintiff contends that a lease with a purchase option should be viewed as a contract for the future sale of goods which is expressly included in Article 2 in G.S. sec. 25-2-106(1). We do not think the purchase option in the instant case has that effect.

The question of whether a purchase option is necessarily indicative of a conditional sale has not previously been addressed in this State. Defendant refers us to a decision of the Georgia Court of Appeals, *Woods v. General Electric Credit Auto Lease, Inc.*, 187 Ga. App. 57, 369 S.E.2d 334 (1988), which we find persuasive. In holding that an automobile lease agreement was a true lease and not a disguised security transaction under the purview of Article 9, the Georgia Court in *Woods* stated that a purchase option "does not per se make the Agreement a lease intended for security or give rise to a conditional sales agreement." *Id.* at 59, 369 S.E.2d at 336. It also found that the "best test" to determine the agreement's purpose and the parties' intent is "a comparison of the option price with the market value of the equipment at the time the option is to be exercised." *Id.*, *quoting Mejia v. C. & S. Bank*, 175 Ga. App. 80, 82, 332 S.E.2d 170, 172 (1985). "If the lessees can acquire the property under the purchase option for little or no additional consideration in relation to its true value, the lease would be one intended for security." *Woods, supra.*

In the instant case, paragraph ten of the lease states that the lessor has the option to purchase the leased vehicle at fair market value at the termination of the lease, and that fair market value "will be the average of the retail and wholesale values stated in a then current vehicle guidebook selected by Lessor." This purchase option indicates to us that the parties intended to engage in a true lease, not a future sale since the option price is the vehicle's fair market value.

The lease does require lessee to pay for all maintenance and repair, and for titling, registration, taxes and inspection during the lease. However, viewing the agreement as a whole, we find that these factors are not determinative and the contract is, in fact, a true lease making Article 2 inapplicable. *See id.*

[2] Next, plaintiff contends that even if the agreement at issue is held to be a true lease, as we have so held, that the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C.A. sec. 2301 *et seq.* ("the Act"), should apply to a lease transaction. We disagree. Plaintiff is correct in noting that for purposes of the Act the terms "consumer," and "supplier" are broadly defined. Plaintiff refers us to no cases in which the Act has been applied to true lease situations and we are not aware of any. *See Sellers v. Frank Griffin AMC Jeep, Inc.*, 526 So.2d 147 (Fla. App. 1 Dist. 1988), and *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 478 N.Y.S.2d 505, 125 Misc. 2d 68 (1984). Our understanding of the Act is in accord with the approach taken by the Florida First District Court of Appeals in *Sellers v. Griffin* when it stated that "[the Magnuson-Moss Act] speaks in terms of an initial sale to a buyer in which warranties are made by the seller, and as such, it does not apply to a pure lease of automobiles or other consumer goods unless the lease bears a significant relationship to an actual purchase and sale." *Sellers, supra,* at 156. Since plaintiff engaged in a true lease rather than some type of purchase agreement, we find the provisions of Magnuson-Moss inapplicable.

[3] Last, we address plaintiff's contention that her lease with GMAC is unconscionable because in it GMAC assigns its rights in the manufacturer's warranties to plaintiff and disclaims all other warranties concerning the condition of the vehicle. Therefore, plaintiff must address its complaints about the automobile to a party other than the lessor.

> A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. *Hume v. United States*, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889); *Christian v. Christian*, 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977). In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. [Citations omitted.]

Brenner v. School House, Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981).

We do not think the lease in question is unenforceable for unconscionability. Presumably, plaintiff was not under any compulsion to lease the vehicle and could have acquired it outright through conventional financing. Also, we do not think the lessor's assigning its warranty rights from the manufacturer to lessee and disclaiming all others creates an unconscionable result for lessee. She is not without a remedy for the defects in her vehicle since she acquired all the lessor/owner's rights under the manufacturer's warranty. Further, the lease is quite explicit as to the lack of any warranty by lessor. We also presume that lessee has some recourse against the manufacturer for the loss she has incurred by making lease payments while having an inoperable vehicle.

For all the foregoing reasons the decision of the trial court granting summary judgment to defendant GMAC is

Affirmed.

Judges WELLS and ORR concur.

LARRY JAMES PENUEL v. WILLIAM S. HIATT, COMMISSIONER NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 894SC679

(Filed 20 March 1990)

1. **Automobiles and Other Vehicles § 2.3 (NCI3d)— revocation of license for impaired driving—revocation mandatory—no judicial review**

The revocation of a driver's license pursuant to N.C.G.S. § 20-17(2) by the DMV upon receiving a record of such driver's conviction of impaired driving under N.C.G.S. § 20-138.1 is mandatory, and the fact that the DMV may conditionally restore a person's license after three years provided the person meets the requirements of N.C.G.S. § 20-19(e)(1) and (2) does not change the character of the revocation from mandatory to discretionary; therefore, the revocation of petitioner's license could not be reviewed by the superior court pursuant to N.C.G.S. § 20-25, as that statute allows judicial review only of discretionary revocations and suspensions.

Am Jur 2d, Automobiles and Highway Traffic §§ 133, 144.

2. **Automobiles and Other Vehicles § 2.3 (NCI3d)— mandatory revocation of license—reinstatment denied—no judicial review**

The superior court did not have jurisdiction to review the DMV's denial of reinstatment of petitioner's license pursuant to N.C.G.S. § 150B-43, because, once a driver's license has been mandatorily revoked and a petitioner unsuccessfully seeks to have the license reinstated by the DMV, no superior court review of the denial is mandated unless the denial was arbitrary or illegal, since reinstatement is not a legal right but is an act of grace.

Am Jur 2d, Automobiles and Highway Traffic §§ 133, 144.

Judge JOHNSON concurring in the result.

APPEAL by respondent from Orders entered 12 April 1989 by *Judge James R. Strickland* in ONSLOW County Superior Court. Heard in the Court of Appeals 6 February 1990.

This is an appeal from an order requiring the Division of Motor Vehicles (hereinafter DMV) to conditionally restore the driving

privileges of petitioner. The record discloses the following: On 13 June 1985 petitioner's North Carolina driving privileges were permanently revoked after petitioner was convicted of driving while impaired for the third time. On 7 July 1988 petitioner requested a hearing pursuant to N.C. Gen. Stat. § 20-19(e) to have his license conditionally restored. A restoration hearing was convened on 17 November 1988 and after reviewing the evidence presented the three hearing officers denied petitioner's request for a conditional restoration of his driver's license. Thereafter, petitioner filed a petition in Onslow County Superior Court for review of the DMV's denial of his request. After a hearing, the trial court found that the denial by the DMV was an arbitrary, capricious act and was in disregard of the laws contained in N.C. Gen. Stat. § 20-19(e). The trial court further found that petitioner is entitled to a conditional restoration of his license and ordered the DMV to conditionally restore it. Respondent DMV appealed.

Warlick, Milsted, Dotson & Carter, by John T. Carter, Jr., for petitioner, appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the Division of Motor Vehicles, respondent, appellant.

ARNOLD, Judge.

[1] The sole issue in this case is whether the superior court had jurisdiction to review the DMV's denial of petitioner's request for conditional restoration of his driver's license pursuant to N.C. Gen. Stat. § 20-19(e). Respondent DMV argues that since petitioner's license was originally mandatorily revoked under N.C. Gen. Stat. § 20-17, petitioner is not entitled to an appeal.

N.C. Gen. Stat. § 20-25 provides statutory authority for judicial review of license revocations by the DMV. N.C. Gen. Stat. § 20-25 in pertinent part provides:

> Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court . . . .

It is well settled that discretionary revocations and suspensions may be reviewed by a superior court under N.C. Gen. Stat. § 20-25,

while mandatory revocations and suspensions may not. *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 476, 164 S.E.2d 2, 5 (1968).

N.C. Gen. Stat. § 20-17(2) provides for the mandatory revocation of a driver's license by the DMV upon receiving a record of such driver's conviction of impaired driving under N.C. Gen. Stat. § 20-138.1. N.C. Gen. Stat. § 20-19(e), which is applicable here, provides for mandatory permanent revocation when a person's license has been revoked under N.C. Gen. Stat. § 20-17(2). However, the DMV may conditionally restore a person's license after three years provided the person meets the requirements of N.C. Gen. Stat. § 20-19(e)(1) and (2).

In the case *sub judice* petitioner asserts that because the DMV *may* restore his driving privileges after three years, this changes the character of the revocation from mandatory to discretionary; thus, review by the superior court could be obtained pursuant to N.C. Gen. Stat. § 20-25. We disagree.

This Court held in *In re Austin*, 5 N.C. App. 575, 579, 169 S.E.2d 20, 23 (1969), that since the original revocation of the petitioner's license under the provisions of N.C. Gen. Stat. § 20-17 was mandatory, the superior court was without authority to hear a petition and render a judgment revoking or modifying the mandatory revocation in that case. However, the Court went on to say that if a petitioner is unlawfully and illegally denied a license upon a hearing on a petition for reinstatement of his license, the superior court, upon proper allegations in a petition and proper notice to the respondent, is authorized to take testimony, examine into the facts of the case, and determine whether the petitioner was illegally and unlawfully denied a license by the DMV. *Id.* at 580, 169 S.E.2d at 23.

In the present case petitioner introduced evidence at both the DMV hearing and the hearing before the superior court that he had not been convicted of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any criminal offense involving the consumption of alcohol or drugs during the past three years and also that he was not currently an excessive user of alcohol or drugs as required by N.C. Gen. Stat. § 20-19(e)(1) and (2) in order to have his license conditionally restored. Petitioner here, like the petitioner in *Austin*, offered no support for the alleged conclusion that the DMV's denial of a conditional restoration

of his license was an arbitrary and capricious act, and was in disregard of the law set forth in N.C. Gen. Stat. § 20-19. Therefore, we hold it was error for the superior court to enter the order requiring the DMV to conditionally restore petitioner's driving privileges.

[2] Furthermore, we hold petitioner's argument that the superior court has jurisdiction to review this administrative decision pursuant to N.C. Gen. Stat. § 150B-43 to be without merit. N.C. Gen. Stat. § 150B-43 provides for judicial review of a final decision in a contested case after exhaustion of all administrative remedies available to an aggrieved party.

This Court in *Davis v. Hiatt*, 92 N.C. App. 748, 750, 376 S.E.2d 44, 46, *disc. rev. allowed*, 324 N.C. 577, 381 S.E.2d 772 (1989), held that N.C. Gen. Stat. § 150B-43 grants jurisdiction to the superior court to review an order of revocation where the revocation is mandatory. The Court found that N.C. Gen. Stat. § 150B-43 allowed review of the *original* mandatory revocation because no adequate procedure for judicial review was provided for pursuant to the provisions of N.C. Gen. Stat. § 20-25. *See id. Davis* is clearly distinguishable from the present case. A contested case within the meaning applicable to N.C. Gen. Stat. § 150B-43 is an agency proceeding that determines the rights of a party or parties. *See* N.C. Gen. Stat. § 150B-2(2). A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived except in the manner and upon the conditions prescribed by statute. *Underwood* at 476, 164 S.E.2d at 5. When a license has been mandatorily revoked the rights of the licensee have been determined by the DMV, and therefore the determination is subject to review by the superior court pursuant to N.C. Gen. Stat. § 150B-43. *See Davis* at 750, 376 S.E.2d at 46. On the other hand, once this right has been mandatorily revoked and a petitioner unsuccessfully seeks to have the license reinstated by the DMV, no superior court review of the denial is mandated unless the denial was arbitrary or illegal, because reinstatement is not a legal right but is an act of grace. *See Austin* at 580, 169 S.E.2d at 23. The legislature permits, but does not require, the DMV to restore a petitioner's driving privileges. *Id.* "The authority to exercise or apply this act of grace is granted to the [Division], not to the courts." *Id.*

Since the superior court had no jurisdiction to order the Division of Motor Vehicles to restore petitioner's driver's license, the decision of the superior court is vacated and the proceeding is remanded to the superior court for entry of an order reinstating the order of the Division of Motor Vehicles denying the restoration of petitioner's driver's license.

Vacated and remanded.

Judge ORR concurs.

Judge JOHNSON concurs in the result.

Judge JOHNSON concurring in the result.

I concur in the result reached by the majority opinion but write separately because I believe the majority misperceives the holding of *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

This Court in *Austin* stated the following:

> We think that if a petitioner is *unlawfully and illegally* denied a license upon a hearing on a petition for reinstatement of his license, the judge of the Superior Court, upon proper allegations in a petition and proper notice to the respondent as provided in G.S. [sec.] 20-25 is authorized to take testimony, examine into the facts of the case, and determine whether the petitioner was illegally and unlawfully denied a license under the provisions of the Uniform Driver's License Act.

Id. at 580, 169 S.E.2d at 23 (emphasis in original). The *Austin* Court went on to find that under the facts before it that the superior court erred in ordering the DMV to reinstate the petitioner's license because he had failed to offer evidence either that "the revocation was not mandatory or that he was unlawfully and illegally denied a license." *Id.* at 581, 169 S.E.2d at 23. Therefore, this Court reversed the decision of the superior court not because it found that the superior court had no jurisdiction to examine the denial of petitioner's reinstatement, but because petitioner failed to put on evidence that the DMV acted unlawfully and illegally in the denial.

I read *Austin* to hold that denial of reinstatement by the DMV after mandatory revocation may only be reversed in superior court if the DMV acted unlawfully and illegally. I find implicit in

this that, upon proper allegations and notice to respondent, the superior court has jurisdiction to review the denial of a petition for reinstatement.

Because I am bound by what I perceive to be the meaning of *Austin*, I must conclude that the superior court had jurisdiction in this case. At the same time, however, I believe the majority opinion is correct in concluding that the DMV did not act illegally in denying petitioner's request for reinstatement. For that reason I agree with the majority's conclusion that the superior court order should be vacated.

STATE OF NORTH CAROLINA v. REGINALD EUGENE RAY

No. 8926SC773

(Filed 20 March 1990)

1. **Weapons and Firearms § 3 (NCI3d)— building with multiple apartments—multiple charges of discharging firearm into occupied property—no double jeopardy**

There was no merit to defendant's contention that, if a single building contains multiple apartments, only one charge of discharging a firearm into occupied property may be brought; therefore, state and federal prohibitions against double jeopardy were not violated by prosecution of defendant on two counts of discharging a firearm into occupied property where he allegedly fired shots into one apartment, and the bullets penetrated a common wall between that apartment and another.

Am Jur 2d, Criminal Law § 279; Weapons and Firearms § 29.

2. **Weapons and Firearms § 3 (NCI3d)— discharging firearm into occupied property—defendant as perpetrator—sufficiency of evidence**

In a prosecution for discharging a firearm into occupied property, evidence was sufficient to be submitted to the jury where it tended to show that shots were fired into an apartment building; one of the occupants observed defendant for five minutes following the shooting; defendant was about 19 feet from the building and the witness had no difficulty observ-

ing defendant despite the early morning hour; a big streetlight stood across the roadway and the witness said that, when defendant ran to a dirt hill, "he hit the light"; the witness had known defendant for a couple of months prior to the shooting; and the witness testified to being "familiar with weapons" and stated that defendant carried what appeared to be an M-2 30/30 automatic rifle.

Am Jur 2d, Criminal Law § 279; Weapons and Firearms § 29.

APPEAL by defendant from judgment entered 28 February 1989 in MECKLENBURG County Superior Court by *Judge Forrest A. Ferrell.* Heard in the Court of Appeals 12 February 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders, for the State.

Assistant Public Defender Robert L. Ward for defendant-appellant.

DUNCAN, Judge.

Defendant was convicted of two counts of discharging a firearm into occupied property and one count of assault with a deadly weapon inflicting serious injury. The trial judge sentenced defendant to concurrent terms of ten years for the discharging-a-firearm convictions and to a consecutive ten-year term for the assault conviction. Defendant appeals, contending that the judge erred by denying his motion to dismiss, on double jeopardy grounds, one of the discharging-a-firearm counts and erred by denying defendant's motion to dismiss all the charges at the close of the State's evidence. We find no error.

I

The State's evidence showed the following: On the evening of 25 August 1988, Eugene Miller, his brother Nick, and defendant, Reginald Eugene Ray, were among a group of people conversing. Defendant said that two people were going to be "sprayed" that night. At approximately 5:00 A.M. the next morning, Nick Miller was awakened by the sound of gunfire. He ran to his brother Eugene's room, where he saw glass on the floor of the room, bullet holes, and holes in a curtain. He also heard his cousin, three-year-old Travis Miller, screaming from an adjoining apartment. Nick Miller

looked out of Eugene's window and saw defendant running from the scene, carrying what appeared to be an automatic rifle and another gun. Travis Miller was subsequently taken to the hospital with bullet wounds in his chest and arm.

Nick Miller and Travis Miller lived in a building consisting of three apartments. The addresses of these apartments are 3604, 3606, and 3608 Jonquil Street, Charlotte, North Carolina. The apartment at 3604 Jonquil Street was vacant at the time of the shooting, but had previously served as a "crack house" out of which cocaine was sold. Nick Miller and his mother resided at 3606 Jonquil, as had Eugene Miller until the day prior to the shooting, when he moved to another address. Travis Miller and his mother occupied the apartment at 3608 Jonquil. The State's evidence showed that the shots entered 3606 Jonquil through Eugene Miller's window, with five of the bullets penetrating a common wall between his room and Travis Miller's apartment.

Defendant testified in his own behalf. He denied making any threats and denied shooting into the apartments. Defendant contended he was at another location at the time of the incident.

The jury convicted defendant of all charges. From the judgment imposed, he appeals.

II

[1] Defendant first argues that his prosecution on two counts of discharging a firearm into occupied property violates federal and State prohibitions against double jeopardy. U.S. Const. amend. V; N.C. Const. art. I, Sec. 19. N.C. Gen. Stat. Sec. 14-34.1 (1986) in part provides that any person who willfully discharges a firearm "into any [occupied] building" is guilty of a Class H felony. Defendant argues that because 3606 and 3608 Jonquil Street are apartments located within the same building, he could not be convicted of multiple offenses under the statute without being subjected to double jeopardy. Defendant contends, in other words, that if a single building contains multiple apartments, only one charge of discharging a firearm into occupied property may be brought.

When a defendant alleges that he has been twice convicted and sentenced for one offense, we analyze his claim of double jeopardy under the "same evidence test." *See State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875, *cert. denied*, 342 U.S. 831, 96 L.Ed. 629 (1951); *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375

(1972); *State v. Irick*, 291 N.C. 480, 502, 231 S.E.2d 833, 847 (1977). This test asks two, somewhat alternative questions: 1) whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment, or 2) whether the same evidence would support a conviction in each case. *Hicks*, 233 N.C. at 516, 64 S.E.2d at 875. If this inquiry discloses a breach of the guarantee against double jeopardy, the fact that a trial judge, as in this case, imposes concurrent sentences for the convictions does not remedy the violation. *State v. Summrell*, 282 N.C. 157, 173, 192 S.E.2d 569, 579 (1972), *overruled in part on other grounds*, 324 N.C. 539, 380 S.E.2d 118 (1989).

"[A] person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons." *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973) (emphasis omitted). In the present case, the first count of the indictment alleges in part that defendant willfully discharged a rifle into "a building located at 3606 Jonquil Street . . . while it was actually occupied by Emma Lucille Miller Harris and Nick Miller." The second count in part charges that defendant fired the rifle into "a building located at 3608 Jonquil Street . . . while it was actually occupied by Lora Miller Cutherberson and Travis Lloyd Cuthberson Miller."

The facts alleged in the second count of the indictment—that the building was located at 3608 Jonquil Street and was occupied by Lora Cuthberson and Travis Miller—would not have sustained defendant's conviction for shooting into 3606 Jonquil while that residence was occupied by Emma Harris and Nick Miller. Additionally, the same evidence would not have supported a conviction in each case; the State was required to prove that both dwellings were penetrated by gunfire, that both dwellings were occupied at the time of the assault, and that defendant had actual or constructive knowledge of the occupancy. *See id.; State v. Walker*, 34 N.C. App. 271, 273-74, 238 S.E.2d 154, 156, *disc. rev. denied*, 293 N.C. 743, 241 S.E.2d 516 (1977). The offense at 3606 Jonquil was complete when the bullets entered the apartment through Eugene Miller's window; to convict defendant of the additional offense of firing into Travis Miller's residence, the State was required to demonstrate further that the projectiles penetrated the common wall between

the two dwellings. Under the same-evidence test, therefore, defendant was not subjected to double jeopardy for discharging a firearm into occupied property, and the trial judge correctly refused to dismiss one of the two counts. We overrule this assignment of error.

III

[2] Defendant next argues that the judge erred by denying his motion to dismiss the charges at the close of the State's evidence. We note, initially, that defendant testified at trial. By presenting evidence, defendant waived his right to argue the denial of his motion on appeal. N.C. Gen. Stat. Sec. 15-173 (1983). The sufficiency of all the evidence presented during trial, therefore, is the sole issue we address. *State v. Bullard*, 312 N.C. 129, 159-60, 322 S.E.2d 370, 387 (1984). When ruling on a motion to dismiss, the evidence must be considered in a light most favorable to the State, with the State receiving every reasonable inference to be drawn from the evidence. *Id.* at 160, 322 S.E.2d at 387-88.

Defendant chiefly contends that the identification testimony by Nick Miller was "inherently incredible." We disagree. Mr. Miller testified that he observed defendant for five minutes following the shooting, that defendant was "about 19 [feet]" from the apartment building, and that he had no difficulty observing defendant despite the early morning hour. A "big streetlight" stood across the roadway, and Mr. Miller said that when defendant ran to a dirt hill, "he hit the light." Mr. Miller also testified to having known defendant for a "couple of months" prior to the shooting incident. Finally, he testified to being "familiar with weapons" and that defendant carried what appeared to be an M-1 30/30 automatic rifle.

The State must establish two propositions when it prosecutes a criminal charge: that a crime was committed and that it was committed by the defendant. *State v. Clyburn*, 273 N.C. 284, 292, 159 S.E.2d 868, 873 (1968). In a light most favorable to the State, the evidence in this case established both propositions, and the trial judge properly allowed the jury to determine if the State had proved defendant's guilt beyond a reasonable doubt. We hold that the judge correctly denied defendant's motion to dismiss, and we overrule this assignment of error.

IV

For the reasons stated above, we hold that defendant received a fair trial, free of error.

No error.

Chief Judge HEDRICK and Judge PHILLIPS concur.

RICHARD P. THEOKAS, PLAINTIFF v. DIANNE B. THEOKAS, DEFENDANT

No. 8912DC849

(Filed 20 March 1990)

1. **Divorce and Alimony § 24.11 (NCI3d)— obligation of estate to pay child support—modification formula in divorce decree—requests to strike denied as premature**

The trial court did not err in denying as premature plaintiff's requests (1) to strike child support and alimony modification formulas of the parties' separation agreement which had been incorporated in the divorce decree and (2) to strike the obligation of plaintiff's estate to pay child support and alimony after plaintiff's death.

Am Jur 2d, Divorce and Separation §§ 849, 1048, 1058.

2. **Divorce and Alimony § 27 (NCI3d)— child support and custody modification hearing—award of attorney's fees to defendant proper**

The trial court did not err in awarding attorney's fees to defendant where the action originally addressed both child support and custody, even though the custody issue was resolved in about 15 minutes, and the court was thus not required to find that plaintiff refused to provide adequate support; evidence was sufficient to support the court's finding that defendant was without the means to defend the matter on a substantially even basis with plaintiff; the court properly found that defendant prevailed on the issues of custody and modification relative to payments of support and maintenance; and defendant was entitled to those fees which she incurred

in defending those claims entirely brought by plaintiff. N.C.G.S. § 50-13.6.

Am Jur 2d, Divorce and Separation §§ 596, 597.

APPEAL by plaintiff from judgment entered 12 April 1989 by *Judge Sol G. Cherry* in CUMBERLAND County District Court. Heard in the Court of Appeals 15 February 1990.

Plaintiff and defendant were married to each other, had one child, and subsequently separated and divorced. At the time of separation, they entered into a written separation agreement which provided in part for the plaintiff to pay defendant child support and alimony which would continue to be paid by plaintiff's estate after his death. The defendant has remarried so that matters relating to her separate maintenance are moot. They also stipulated in the agreement that the support payments could be modified after July 1, 1990 if certain conditions were met. The plaintiff sought incorporation of the separation agreement into the divorce judgment when he filed his complaint. The agreement was incorporated in the final decree.

Plaintiff filed a motion for modification of the incorporated separation agreement seeking a change in visitation and support provisions of that agreement. In her response and counterclaim, defendant requested attorney's fees because plaintiff sought a modification of child custody and support. By means of a non-prejudicial consent order, the two parties modified plaintiff's visitation rights. The court denied plaintiff's request to strike the child support and alimony modification formulas of the agreement, denied plaintiff's request to strike the obligation of plaintiff's estate to pay child support and alimony after plaintiff's death, and awarded attorney's fees to defendant. At the hearing on the amount of attorney's fees to be awarded defendant, the court granted defendant all of her attorney's fees. Plaintiff appeals.

Reid, Lewis, Deese & Nance, by Renny W. Deese, for plaintiff-appellant.

Bain & Marshall, by Elaine F. Marshall and Alton D. Bain, for defendant-appellee.

LEWIS, Judge.

The plaintiff bases his request that the Court reverse the order of the trial court on three assignments of error.

I. Payment of child support by plaintiff's estate.

[1] The separation agreement provided that the plaintiff's obligation to provide child support was to continue notwithstanding his death and was to be a charge against his estate. The exact wording of that agreement is as follows:

> Husband agrees to make monthly child support payments for the minor child directly to the wife . . . until the child reaches the age of 18. . . . Husband [sic] obligation to provide child support shall continue notwithstanding his death in the event he shall die before the child reaches 18 years of age and the same may be a charge against husband's estate.

At trial, the judge stated: "On the post-death provisions, . . . I consider that premature. He's still alive at this point."

North Carolina General Statute § 1A-1, Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding. . . .

The statute says "may." Here the trial judge found the matter was premature and decided not to grant the motion. We will uphold his discretion in denying the motion.

II. Modification of the "formulas" for a potential change in the amount of child support and maintenance payments.

The incorporated separation agreement provided for changes in the level of child support and separate maintenance effective July 1990. Plaintiff requested that the trial court alter the provisions for modification of child support payments and payments for the wife's separate maintenance after July 1990. The trial court stated in its order: "The court finds that any interpretation of the modification provisions as requested by plaintiff regarding the formulas effective July 1990 would be premature." A modification now could be altered by the time of the effective date for the new provisions. In July of 1990, a new hearing would then be

necessary to determine if the "changed circumstances" were still applicable to support the modification. No party or beneficiary is seeking enforcement of these provisions. The trial court properly concluded that any alteration of the modification formulas would be premature.

III. Attorney's fees.

[2] The trial court ruled that the defendant was entitled to an award of attorney's fees. The award of attorney's fees in a child custody and/or support action is governed by General Statute § 50-13.6 which provides in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . .

In opposing that award, the plaintiff notes three alleged bases for reversing that order.

A. *The action addresses support and custody.*

Plaintiff alleges that the first *and* second sentences of the applicable statute apply to him since he contends that this was an action solely for support. Defendant states that this action addressed both support *and* custody and that the second sentence of the statute does not apply to this case. The trial court stated in its findings of fact: "Plaintiff originally sought a custody modification in this action." In the conclusions of law, the court held: "Plaintiff abandons his claim for joint custody." Plaintiff contends that, even though his modification motion did initially put the issue of custody before the court, the issue of custody was quickly settled by agreement and the proceeding was in fact one relating only to support. Plaintiff relies on *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 99 (1984), and on *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980). Those two cases are distinguishable because the issue of custody had been settled in each of those cases long

before the trial court entered subsequent orders dealing only with child support; in the *Gibson* case, five months prior to the entry of the child support judgment, and in the *Hudson* case, by a consent order entered twenty months prior to the order concerning child support. In the case at bar, the plaintiff did present the issue of modification of child custody at the hearing.

> [COUNSEL FOR DEFENDANT]: Your honor, may I inquire of counsel? Pursuant to the motions that have been filed here, he was proceeding on a modification of the custody status of the child, and I'm wanting to know if he's intending on following through with that?
>
> THE COURT: You're moving to change the joint custody, as I understand it.
>
> . . .
>
> [PLAINTIFF]: Yes, your honor. It's a variation of the more extended visitation for custody.

Even though the custody issue may have been "resolved in basically 15 minutes" at trial, as defendant's counsel stated during the hearing on attorney's fees, it nevertheless was an issue and the proceeding is therefore one which addressed both custody and support.

B. *The "insufficient means" requirement.*

Plaintiff alleges that there is a "total absence of any evidence supporting the court's finding that defendant had 'insufficient means to defray the expenses of the action.' " The trial court stated in its order: "Defendant is without the means to defend this matter on a substantially even basis with Plaintiff" and awarded attorney's fees to the defendant. According to the court's findings of fact, plaintiff's leave and earnings statement verified gross monthly earnings of $4,965.55. Defendant earned between $1,450 and $1,540 per month and received $484 per month alimony and $1,200 per month child support. Out of defendant's income, she paid a mortgage payment in the approximate amount of $650 per month. The North Carolina Supreme Court in *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980), described the standard for analyzing this issue.

> If the dependent spouse is not able as litigant to meet the supporting spouse as litigant on substantially even terms because the dependent spouse is financially unable to employ adequate counsel, . . . then by definition the dependent spouse 'has

not sufficient means . . . to defray the necessary [*legal*] expenses [of the suit].' G.S. 50-16.3(a)(2).

Id. at 474, 263 S.E.2d at 724. Such a determination is within the discretion of the trial court and we find no abuse of discretion in this case.

C. *The reasonableness of the award.*

A hearing on the amount of attorney's fees to be awarded defendant was held and defendant was allowed to recover all of her attorney's fees from plaintiff. In the case at bar, we find that the trial court could and did find that the defendant prevailed on the issues of custody and modification relative to payments of support and maintenance. Defendant is entitled to those fees which she incurred in defending those claims entirely brought by the plaintiff. The hourly rate is reasonable and the fee awarded is fair and supported by the evidence.

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIAM VON CUNNINGHAM

No. 8926SC630

(Filed 20 March 1990)

1. Robbery § 4.4 (NCI3d)— attempted armed robbery—time gun was displayed—sufficiency of evidence

In a prosecution for attempted armed robbery where defendant never took his gun out of his waistband but instead showed it to a cashier after she denied his request for money, then told the cashier to say nothing, and left the store, the trial court properly denied defendant's motion to dismiss where the evidence was sufficient to allow the jury to conclude that defendant's use or threatened use of his gun was concomitant with and inseparable from his robbery attempt.

Am Jur 2d, Robbery §§ 5, 89.

2. Criminal Law § 86.4 (NCI3d) — credibility of defendant — cross-examination as to prior conviction — permissible extent of cross-examination — no prejudicial error

In a prosecution of defendant for attempted armed robbery it was entirely proper to cross-examine defendant concerning the existence of his prior conviction of another property crime, and though it may have been improper to cross-examine him as to the date of his arrest, such limited inquiry did not rise to the level of prejudicial error necessary to require a new trial.

Am Jur 2d, Evidence § 327.

APPEAL by defendant from judgment entered 12 December 1988 by *Hyatt, J. Marlene, Judge*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 17 January 1990.

Defendant was charged with attempted robbery with a firearm or other dangerous weapon pursuant to N.C. Gen. Stat. § 14-87. The State's evidence tended to show that on 14 April 1988 a man, later identified as defendant, entered the Zayres store on Eastway Drive in Charlotte and approached one of the cashiers. Defendant laid a note on the counter directing her to give him all the money. When the cashier explained that she could not open the cash register without ringing up a sale, defendant responded by saying "I'm as scared as you are." Defendant then raised his shirt to reveal the butt of a revolver protruding above the waistband of his shorts, told the cashier not to say anything, and left the store. At some point during this exchange defendant picked up the note and returned it to his pocket.

At trial the court instructed the jury on attempted robbery with a firearm and attempted common law robbery. Defendant was convicted of attempted robbery with a firearm and received a 14-year sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford, for the State.

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

WELLS, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the charge of attempted robbery with a firearm. Defendant contends that there was no evidence that he displayed, used, or threatened to use the gun during the course of the attempted robbery, but that the evidence showed that his gun was used only to facilitate his escape.

When presented with a motion to dismiss in a criminal case, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant was the perpetrator. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985). The evidence must be examined in the light most favorable to the State, and any contradictions or discrepancies are for the jury to resolve and do not warrant dismissal. *Rasor, supra.* When considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. Allison*, 319 N.C. 92, 352 S.E.2d 420 (1987). 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).

N.C. Gen. Stat. § 14-87(a) (1986) provides:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony.

G.S. § 14-87(a) therefore defines two crimes: (1) armed robbery, which requires an actual taking, and (2) attempted armed robbery, which requires an attempted taking. *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). The purpose of the statute is to increase the punishment for common law robbery when firearms or other dangerous weapons are used to commit a robbery, whether or not the robber succeeds in the effort to take personal property. The statute provides that an attempted taking with a weapon be punished as severely as a completed taking under the same cir-

cumstances, and that both be punished more severely than forceful takings committed without dangerous weapons. *Id.*

An attempted robbery with a dangerous weapon in violation of G.S. § 14-87(a) occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result. *State v. Allison, supra.* Defendant does not deny that there was an intent to rob the Zayres' cashier nor that an overt act calculated to bring about a robbery took place. Rather, defendant argues that the attempted taking was over prior to the display of the gun and, therefore, the element of endangering or threatening the life of a person is absent.

In construing when a defendant's use of force or intimidation must occur in order to support a conviction for armed robbery, our Supreme Court has said that the commission of armed robbery as defined by G.S. § 14-87(a) does not depend upon whether the threat or use of violence precedes or follows the taking of the victim's property. Rather, where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, --- U.S. ---, 109 S.Ct. 247, 102 L.Ed.2d 235 (1988). The defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable. *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986). In *Hope*, the defendant attempted to walk out of a store wearing a coat that was part of the store's merchandise. When one employee tried to stop the defendant from leaving, another employee discreetly pointed out that the defendant had a gun in his waistline. The employee closest to the defendant told the other employee to call the police. At that point the defendant threatened to kill the first employee. The gun was still visible at the defendant's waist, but he had not deliberately displayed, handled, or pointed the gun at anyone. The Court found this evidence sufficient to support the jury's finding that the defendant's use or threatened use of the gun was inseparable from the taking and induced the victims to part with the coat.

In this case, the evidence was sufficient to allow the jury to conclude that defendant's use or threatened use of his gun was

concomitant with and inseparable from his robbery attempt. This assignment is overruled.

[2] In his second assignment of error defendant contends that the trial court erred in permitting inquiry into the date of his arrest for a prior conviction. Defendant took the stand in his own defense. On cross-examination the following exchange took place:

> Q. Mr. Cunningham, what have you been convicted or found guilty to in a court of law in the past ten years carrying a possible sentence of over sixty days?
>
> A. A misdemeanor of stolen goods, possession.
>
> Q. When were you arrested for that?
>
> Mr. Williams: Your Honor, OBJECT when he was arrested. That is irrelevant.
>
> Ms. Shappert: Your Honor, may I approach?
>
> THE COURT: Objection OVERRULED.
>
> A. It was right after, about, no, April 30, something like that.
>
> Q. April 3rd?
>
> A. The 30th.
>
> Q. April 30th?
>
> A. The warrant was made out April 3rd.

A witness, including a defendant, may be cross-examined with respect to prior convictions for the purpose of impeaching his credibility. N.C. Gen. Stat. § 8C-1, Rule 609(a) (1986). Once a conviction is established, inquiry into the time and place of the conviction and the punishment imposed is permissible. *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977). Exceeding these limitations has been held to constitute reversible error. However, before a new trial is required, a defendant must show not only error, but that the error was prejudicial. The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction. N.C. Gen. Stat. § 15A-1443(a) (1988). Only in constitutional matters must an appellate court conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant. *See State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

It was entirely proper to cross-examine defendant concerning the existence of his prior conviction. The prosecutor's limited inquiry as to the date of the arrest may go beyond the literal limits of *Finch*, but we cannot say that it rises to the level of prejudicial error necessary to require a new trial in this case. Knowledge that defendant committed another property crime around the same time period could clearly have been gained by permissible cross-examination as to the date and place of conviction.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

GABRIEL CELIS, PETITIONER/APPELLANT v. NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION AND YATES MOTOR CO., INC., RESPONDENTS/APPELLEES

No. 8915SC420

(Filed 20 March 1990)

1. **Master and Servant § 108 (NCI3d) — unemployment compensation — voluntary quit — sufficiency of evidence**

Evidence was sufficient to support a finding by respondent that petitioner voluntarily quit his job where the evidence tended to show that petitioner was absent for two days while serving on a jury; he did not inform his supervisor that he would be absent; and although there was evidence that when he returned to work, he had a discussion with the supervisor which constituted a constructive discharge, there was also evidence to the contrary that petitioner left the job of his own free will.

Am Jur 2d, Unemployment Compensation §§ 59, 61, 93, 94.

2. **Master and Servant § 111 (NCI3d) — unemployment compensation — voluntary quit issue — any competent evidence standard for judicial review**

In a proceeding to recover unemployment benefits where the issue was whether petitioner was fired or voluntarily quit his job, the appropriate standard of judicial review was whether

there was any competent evidence to support the Commission's findings, not whether there was substantial evidence to support them. N.C.G.S. § 96-15(i).

Am Jur 2d, Unemployment Compensation §§ 59, 61, 93, 94.

APPEAL by petitioner from judgment entered 30 December 1988 by *Judge Robert L. Farmer* in ORANGE County Superior Court. Heard in the Court of Appeals 7 November 1989.

This is an appeal from denial of unemployment claims. Gabriel Celis (petitioner) was a mechanic employed by Yates Motor Company (Yates). Petitioner was summoned to report for jury duty on 26 April 1988 but mistakenly thought that he would be disqualified and excused from jury service because he was a resident alien. Petitioner testified that he told his supervisor, Yates' assistant parts and service manager, that he had been called for jury service but expected to be back at work at approximately 1:00 p.m. on the 26th. The service manager was also informed of the summons. Petitioner was chosen to sit on a jury and, without contacting his employer, did not return to work until the trial ended, two days later.

When petitioner arrived at work, he and the service manager had a brief conversation, the content of which is disputed. The service manager testified that petitioner walked off the job. Petitioner testified that in their conversation the service manager discharged him.

On 17 May 1988 an Employment Security Commission (Commission) adjudicator denied petitioner's application for unemployment compensation benefits. Claimant appealed and on 27 June 1988 an appeals referee determined that petitioner voluntarily left his employment without good cause attributable to his employer. Petitioner appealed to the Commission.

After making findings of fact the Commission concluded that petitioner was disqualified for benefits because he voluntarily left work without good cause attributable to the employer. Additionally, the Commission concluded that "[e]ven were claimant's separation . . . the result of a discharge as he alleges, he would be disqualified" because he was "justifiably discharged by the employer" for misconduct. The superior court determined that the facts found by the Commission were supported by competent evidence and the find-

ings of fact supported the conclusions of law. Therefore, the superior court affirmed the decision of the Commission. Petitioner appeals.

North State Legal Services, Inc., by John L. Saxon and Karen Murphy, for petitioner-appellant.

No brief for Yates Motor Company, Inc., respondent-appellee.

Chief Counsel T. S. Whitaker, Alfreda Williamson and C. Coleman Billingsley, Jr., staff attorneys, for Employment Security Commission of North Carolina, respondent-appellee.

EAGLES, Judge.

Petitioner makes three arguments on appeal. First, petitioner argues that the Commission's finding that he left work voluntarily is a conclusion of law that is fully reviewable by this court. Second, petitioner asserts that the appropriate standard of review for decisions of the Commission is "substantial evidence on the whole record," not the "any competent evidence" standard. Finally, petitioner argues that if we determine that the evidence shows he was discharged, there is no evidence of misconduct or substantial fault on his part to disqualify him from receiving unemployment compensation benefits. After reviewing the record, petitioner's arguments, and the applicable statutory provisions and case law, we affirm.

[1] Petitioner's first argument is that the Commission's determination that he voluntarily left work was erroneous as a matter of law. Petitioner relies on two decisions from other states in support of his argument that the determination of whether a person voluntarily leaves employment is a question of law. In *Torsky v. Com., Unemployment Compensation Bd. of Review*, 81 Pa. Cmwlth. 642, 474 A.2d 1207 (Pa. Comm. Ct. 1984) and *State ex rel. Dept. of Labor v. Unemployment Ins. Appeal Bd.*, 297 A.2d 412 (Del. Super. Ct. 1972), the courts held that the issue of whether a separation from employment is a discharge or a voluntary quit is a question of law. Additionally, petitioner cites *In re Vaughn*, Precedent Decision #15, Commission Decision #84(H)1379 (Aug. 18, 1984) in which the Commission stated that "[w]hether an employee voluntarily terminates her employment or is discharged is a question of law."

Petitioner argues that the discussion he had with the service manager constituted a constructive discharge. Petitioner testified that the service manager said "[s]eems to me that you don't care about your job," "it [would] be better . . . if [you] pick up [your]

tools and leave," and when petitioner asked "does that mean that I, I shall be leaving[?]," the service manager said "[Y]eah." However, there was also evidence to the contrary to the effect that petitioner left the job of his own free will. The Commission's findings of fact, if supported by evidence, are conclusive on appeal. Here, the Commission heard the witnesses and was in the best position to judge their credibility. The conclusion that petitioner voluntarily left his employment is supported by the findings of fact. Additionally, there was no evidence that the conditions of petitioner's employment were so intolerable as to constitute "good cause attributable to the employer." Petitioner's arguments are without merit.

[2] Petitioner's second argument is that the Commission applied an improper standard of review. Petitioner argues that the standard of review applicable to this type case has not been determined and the "substantial evidence" test should apply (as opposed to "any competent evidence" standard). Petitioner relies on language from *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E.2d 842 (1986), a case in which the Supreme Court declined to decide which standard controls:

> N.C.G.S. § 96-15 does not specify which test should be employed; it merely provides that the Commission's findings shall be conclusive "if there is evidence to support them. . . ." Where the word "evidence" appears, and its meaning is not otherwise qualified, "evidence" has been read to mean "substantial evidence." Moreover we note that the "whole record" test is the test normally preferred.

Id. at 448, 349 S.E.2d at 847 (citations omitted). Petitioner argues that upon review of the record as a whole the only reasonable conclusion here is that he was discharged. The Commission argues that the appropriate standard of review is "any competent evidence." There is evidence in the record to support the findings and the findings support the conclusions.

> The version of G.S. 96-15(i) applicable to this case provides that
>
> [i]n any judicial proceeding under this section, the findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.

This court has stated that the standard of review from decisions of the Commission is whether there is "any competent evidence"

to support the findings. *See Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 583, 375 S.E.2d 171, 173 (1989). *See also State ex rel. Employment Security Commission v. Smith*, 235 N.C. 104, 106, 69 S.E.2d 32, 33 (1952) (citing G.S. 96-4(m)).

We note that effective 5 July 1989 the General Assembly changed the language of G.S. 96-15(i). That statute now provides explicitly that "if there is *any competent* evidence" (emphasis ours) to support the Commission's findings of fact they are conclusive on appeal. There is no statutory provision that requires that the Commission's findings of fact be supported by "substantial evidence" as petitioner argues. Petitioner's argument is without merit and his assignment of error is overruled.

Petitioner's final argument is that his discharge was not due to misconduct or substantial fault on his part. Because of our disposition of the other issues in this case, we need not address petitioner's final argument.

For the reasons stated above, the decision below is affirmed.

Affirmed.

Judges PARKER and ORR concur.

JOHN WESLEY VANDIFORD, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER, DEFENDANT

No. 8910IC797

(Filed 20 March 1990)

Public Officers § 6 (NCI3d)— probationary correctional officer— compensable injury—entitlement to salary continuation

As a probationary correctional officer who sustained a compensable injury, plaintiff was entitled to salary continuation benefits for two years from the date of injury, since there was no distinction in the applicable statute, N.C.G.S. § 143-166.13 *et seq.*, between probationary or temporary employment and permanent employment for purposes of salary continuation.

Am Jur 2d, Workmen's Compensation § 179.

APPEAL by plaintiff from a 16 March 1989 opinion of the Industrial Commission denying his claim for further salary continuation benefits. Heard in the Court of Appeals 8 February 1990.

Plaintiff was employed by defendant as a correctional officer at the Johnston County Prison Unit on 7 February 1986. On 2 May 1986 plaintiff was injured while taking a required training course at the North Carolina Justice Academy. Because of this injury, plaintiff was unable to complete the required training program. Plaintiff's probationary certification expired 6 February 1987 and defendant terminated his employment as a correctional officer on that date. Pursuant to G.S. § 143-166.14 plaintiff was paid his regular salary from 10 October 1986 through 5 February 1987. By using earned leave from 6 February 1987 through 22 February 1987 plaintiff continued to be paid his regular salary. Upon expiration of his leave plaintiff was approved by the Commission to receive temporary total disability compensation from 23 February 1987 until 6 July 1987. In early October 1987 plaintiff returned to his former work as a knitting machine mechanic. From the denial of further salary continuation benefits, plaintiff appeals.

Thomas E. Strickland, P.A., by Thomas E. Strickland, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

WELLS, Judge.

Article 12B of Chapter 143 of the General Statutes is entitled: *Salary Continuation Plan For Certain State Law Enforcement Officers*. This chapter is comprised of Sections 143-166.13 through 143-166.20. Sections 143-166.13 (1987 & Supp. 1989) and 166.14 (1987), in pertinent part, are as follows:

> Sec. 143-166.13. *Persons entitled to benefits under Article.*
>
> (a) The following persons who are subject to the Criminal Justice Training and Standards Act are entitled to benefits under this Article:
>
> . . .
>
> (2) State Correctional Officers, Department of Corrections.
>
> Sec. 143-166.14. *Payment of salary notwithstanding incapacity; Workers' Compensation Act applicable after two years; dura-*

> *tion of payment.* The salary of any of the above listed persons shall be paid as long as his employment in that position continues, notwithstanding his total or partial incapacity to perform any duties to which he may be lawfully assigned, if that incapacity is the result of an injury . . . arising out of and in the course of the performance by him of his official duties, except if that incapacity continues for more than two years from its inception, ... Salary paid to a person pursuant to this Article shall cease upon the resumption of his regularly assigned duties, retirement, resignation, or death, whichever first occurs. . . .

In the present case it is not disputed that plaintiff was covered under G.S. § 143-166.14 for a four-month period and that the injury he received was compensable under the statute. Also undisputed is the fact that it was this injury which prevented him from completing the required training course and completing his probationary period of employment.

Plaintiff assigns as error the finding that his probationary certification expired 6 February 1987. Plaintiff also contends that it was error to conclude that since the plaintiff's employment with the defendant did not continue beyond 6 February 1987, he was not entitled to further benefits under the Salary Continuation Plan of G.S. § 143-166.13 *et seq.* beyond that date.

Our review of an award of the Industrial Commission is limited to two 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, 296 S.E.2d 456 (1982). When supported by competent evidence, findings of fact made by the Commission are conclusive on appeal. *Id.* Here, there was competent evidence in the form of a letter from an administrator for defendant that plaintiff's probationary certification expired on 6 February 1987. Therefore, this finding of fact is conclusive on appeal. The other findings were not excepted to and they are likewise deemed conclusive on appeal. Thus, our review focuses on whether the findings made by the deputy commissioner and adopted by the full Commission support the conclusion of law challenged by the plaintiff.

Plaintiff argues that it was error to conclude as a matter of law that because he was terminated 6 February 1987 from his employment as a correctional officer he is not entitled to further

benefits under the Salary Continuation Plan beyond that date. Plaintiff contends that as a probationary correctional officer who sustained an injury compensable under the statute, he is entitled to salary continuation benefits for two years from the date of injury.

Defendant contends that benefits under G.S. § 143-166.14 ceased when plaintiff's employment was terminated as a result of failure to complete training within the time period prescribed by N. C. Gen. Stat. § 17C-10 (1983). (This section was rewritten effective 1 October 1989; however, the amendment was not applicable to pending litigation.) In support of this contention, defendant relies on the first sentence of G.S. § 143-166.14 which says in part that "[t]he salary of any of the above listed persons shall be paid as long as his employment in that position continues. . . ."

G.S. § 17C-10(b) provides that "[u]pon separation of a criminal justice officer from a criminal justice agency within the year of temporary or probationary appointment, the probationary certification shall be terminated by the Commission." However, this "automatic" termination, occurring after coverage under the Salary Continuation Plan has been established, is not among the reasons articulated in G.S. § 143-166.14 for salary payments to cease. Had the Legislature intended such a limit to payments under the Salary Continuation Plan, it could have so stated when promulgating the Act. The clear thrust and purpose of the provisions of Article 12B is to provide additional salary benefits for law enforcement officers who are injured on the job. Such provisions should be liberally construed and not defeated on narrow, technical grounds.

The statute provides for the payment of salary to covered officers despite a total or partial incapacity to perform any duties to which assigned. The statute makes no distinction between probationary or temporary employment and permanent employment for purposes of salary continuation. Indeed, the Commission made no distinction between those certified on a probationary basis and those permanently certified as plaintiff received benefits under the Salary Continuation Plan for approximately four months. And, while the statute generally directs that "listed" covered persons shall be paid as long as employment continues, the specific reasons articulated for the cessation of salary payments prior to two years from the inception of the incapacity or injury are limited to "the resumption of . . . regularly assigned duties, retirement, resignation, or death." We therefore hold that as long as an individual

who is covered by the statute does not come within these articulated terms for salary discontinuation, his employment for salary continuation benefit purposes continues. To hold otherwise would contravene the intent of the Legislature to provide salary continuation benefits to covered officers notwithstanding incapacity by allowing an employer to simply terminate a covered employee—probationary or permanent—who becomes disabled because of an employment-related injury.

For the foregoing reasons we hold that plaintiff's coverage under G.S. § 143-166.13 *et seq.* did not end with the expiration of his probationary certificate and that he was eligible to receive salary continuation benefits for the full two-year period from the date of the injury.

The decision of the Industrial Commission is reversed and remanded for an award not inconsistent with this opinion.

Reversed and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED JULY 1, 1988 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. 8910INS371

(Filed 20 March 1990)

1. **Insurance § 79.3 (NCI3d)— rate decreases ordered—underwriting profit improperly figured**

In ordering into effect rate decreases for automobile and motorcycle insurance the Commissioner of Insurance erred in declining to take into account dividends and deviations in figuring underwriting profit.

Am Jur 2d, Insurance §§ 22, 30.

2. Insurance § 79.3 (NCI3d)— ratemaking case—insufficiency of findings to support underwriting profit figures

The record failed to show how the Commissioner of Insurance arrived at his underwriting profit figures, and the case is remanded to allow the Commissioner to make findings which clearly show the facts upon which he based his order, how he resolved the conflicting evidence, and the specific consideration given to the material and substantial evidence which was offered.

Am Jur 2d, Insurance §§ 22, 30.

APPEAL by North Carolina Rate Bureau from Order of North Carolina Commissioner of Insurance entered 3 November 1988. Heard in the Court of Appeals 12 October 1989.

Hunter, Wharton & Lynch, by John V. Hunter, III; and Parker, Sink & Powers, by E. Daniels Nelson, for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr., Marvin M. Spivey, Jr., and R. Michael Strickland, for defendant appellant.

COZORT, Judge.

The North Carolina Rate Bureau appeals an Order of the Commissioner of Insurance disapproving the Bureau's 1 July 1988 rate filing and ordering into effect overall decreases in the existing rates. We vacate and remand.

On 1 July 1988, the North Carolina Rate Bureau filed for rate level changes for private passenger automobile and motorcycle insurance. The filing indicated a need for an overall average rate increase of 6.4% for liability and physical damage coverages for non-fleet private passenger automobiles and an overall average rate level adjustment of – 0.3% for motorcycle liability and physical damage coverages. The Bureau's rate filing included a 5% provision for underwriting profit and contingencies which was based in part on an allowance for policyholder dividends and rate deviations.

In disapproving the filing, the Commissioner adopted expense provisions different from those used by the Bureau, reduced the uninsured/underinsured motorist rate, and adopted underwriting profit and contingency provisions of – 1.4% for liability coverage and + 2.3% for physical damage coverage. The Commissioner ordered

into effect rate decreases of 0.3% for automobile liability and 3.1% for automobile physical damage (an overall decrease of 1.4%) and rate decreases of 3.4% for motorcycle liability and 11.4% for motorcycle physical damage (an overall decrease of 5.8%).

On appeal, the Bureau contends that in setting his underwriting profit and contingency provisions, the Commissioner (1) failed to consider dividends and deviations as required by statute, (2) made insufficient findings to allow judicial review, and (3) selected underwriting profit figures that will not produce the 13%-15% rate of return which he found to be a fair and reasonable profit for the Bureau's member companies.

[1] The Bureau contends that the Commissioner's underwriting profit and contingency provisions are in error because he refused to consider the effects of policyholder dividends and downward rate deviations. On the record before us, we agree that the Commissioner erred in this respect. N.C. Gen. Stat. § 58-124.19 (recodified in 1988 as 58-36-10) requires that the Commissioner consider certain rating factors, including "a reasonable margin for underwriting profit and to contingencies" as well as "dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers." In his Order the Commissioner found that dividends and deviations were proper ratemaking criteria, yet he declined to take those criteria into account in figuring underwriting profit because (1) dividends and deviations are the result of discretionary business decisions made by the Bureau's member companies and cannot be assured or guaranteed and (2) the Bureau failed to trend or otherwise predict into the rate period the amount of dividends to policyholders or deviations from manual rates. These findings are insufficient to support the Commissioner's decision not to consider dividends and deviations. The payment of dividends and rate deviations are by nature the result of business decisions, and the Commissioner's Notice of Public Hearing failed to put the Bureau on notice of any trending requirement. *See* N.C. Gen. Stat. § 58-124.32 (recodified in 1988 as 58-36-70). We therefore vacate the ordered underwriting profit provisions and remand for a recalculation that includes an adjustment for dividends and deviations. *See State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 96 N.C. App. 220, 385 S.E.2d 510 (1989).

[2] The Bureau's second and third assignments of error raise related issues. First, the Bureau contends that the Commissioner did not

make sufficient findings to explain how he derived his underwriting profit figures. Second, the Bureau contends that the evidence shows that the underwriting provisions selected by the Commissioner will not produce a 14% overall return unless either investment income from capital and surplus is considered in violation of Article 36 (*see State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980)) or a premium to surplus ratio is used which does not accurately reflect the actual ratio of companies doing business in this State. In response to these contentions, the Commissioner fails to provide a meaningful analysis of the Commissioner's basis for arriving at the rate levels set forth in the Order of 3 November 1988. Rather, the Commissioner urges this Court to rely on the Commissioner's duty to make policy and judgment decisions.

In *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 95 N.C. App. 157, 381 S.E.2d 801 (1989), this Court held that the Commissioner had not sufficiently explained the factual basis for his Order. In that case, however, the Commissioner selected underwriting provisions different from those of any other witness, and, given the divergence in statistics and methodology, the absence of further findings rendered review impossible. In the present case, however, the Commissioner selected underwriting provisions identical to those of witness Schwartz, and the record contains the underlying basis for Schwartz' results. However, Schwartz stated that his underwriting provisions were sufficient to produce a profit slightly in excess of 6.6%, or a 14% overall return minus investment income on capital and surplus. Although the Commissioner found that his underwriting profit would generate an overall return, without consideration of investment income from capital and surplus, of 14.4%, we are unable to determine from the record exactly how the Commissioner made such a finding. We remand to allow the Commissioner to make findings that clearly show the facts upon which he bases his order, how he has resolved the conflicting evidence, and the specific consideration given to the material and substantial evidence that has been offered. *See State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 95 N.C. App. 157, 381 S.E.2d 801 (1989); and *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985).

The Bureau's remaining assignment of error dealt with an alleged error in the Commissioner's calculation of the rate level

change for bodily injury liability. In oral argument before this Court, the error was conceded. On remand the Commissioner must adjust his order accordingly.

Vacated and remanded.

Judges PHILLIPS and LEWIS concur.

TONY W. SHREVE v. DUKE POWER COMPANY AND LEWIS STULTZ

No. 8817SC330

(Filed 20 March 1990)

1. **Libel and Slander § 5.2 (NCI3d)— slander by employee's supervisor—employee fired—sufficiency of evidence**

Evidence in plaintiff's action for slander was sufficient to be submitted to the jury as to the individual defendant who was plaintiff's supervisor where plaintiff alleged that, approximately one week after plaintiff had lodged a complaint about plant safety violations with defendant employer's safety director, the individual defendant reported to other management personnel at the plant that plaintiff had threatened him with physical violence; as a result of this report plaintiff was fired; plaintiff testified that he had never threatened defendant; and if this evidence was believed, it would establish that defendant slandered plaintiff in his trade and means of livelihood and in accusing him on criminal conduct.

Am Jur 2d, Libel and Slander §§ 273, 275.

2. **Libel and Slander § 10.1 (NCI3d)— alleged slander by supervisor—conversations among management personnel—conversation privileged**

The trial court properly granted directed verdict for defendant employer in plaintiff's action for slander where utterances by defendant's management personnel with regard to a negative report by plaintiff's supervisor were privileged, and there was no evidence from which a jury could reasonably

infer that defendant acted out of malice or ill will toward plaintiff.

Am Jur 2d, Libel and Slander §§ 273, 275.

APPEAL by plaintiff from judgment entered by *Wood, William Z., Judge*, during the 16 November 1987 civil session of ROCKINGHAM County Superior Court.

Plaintiff brought this action for slander, in which he alleged that on 3 February 1984 defendant Stultz, while acting as an agent of defendant Duke, made defamatory statements about plaintiff, which statements were false, and that such statements were made maliciously as a part of a plan of defendant Duke to discharge and discredit plaintiff. Plaintiff alleged that the defamatory statement made by Stultz was that plaintiff had threatened Stultz with physical violence.

At the close of plaintiff's evidence at trial, defendants moved for directed verdict. This motion was denied. Defendants elected not to put on evidence and renewed their motion. Following arguments of counsel, defendants' motion was allowed.

Plaintiff appealed to this Court. In an unpublished opinion, filed 18 October 1988, this Court dismissed plaintiff's appeal for procedural irregularities. On discretionary review, our Supreme Court reversed and remanded the case to this Court for disposition of plaintiff's appeal on the merits.

C. Orville Light for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and David A. Senter, for defendants-appellees.

WELLS, Judge.

A motion by a defendant for a directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure, tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977); *see also Effler v. Pyles*, 94 N.C. App. 349, 380 S.E.2d 149 (1989). On such a motion, the plaintiff's evidence must be taken as true and the evidence must be considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference to be drawn

therefrom. *Id.* A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts that the evidence reasonably tends to establish. *Id.*

At trial, plaintiff's evidence tended to show that on 3 February 1984 he was employed by defendant Duke at its Dan River power plant. Plaintiff had been employed by Duke for about 16 years and had a good work record. Defendant Stultz was one of plaintiff's supervisors at the Dan River plant. On 3 February 1984, approximately one week after plaintiff had lodged a complaint about plant safety violations with Duke's safety director from Charlotte, Stultz reported to other Duke management personnel at the plant that plaintiff had threatened him with physical violence. As a result of Stultz' report, plaintiff was fired from his job. Plaintiff testified that he had never threatened Stultz and that he was fired solely because he had voiced concerns about safety at the plant. In their answer to plaintiff's complaint, defendants admit that on the occasion in question defendant Stultz had reported to other Duke management personnel that plaintiff had threatened Stultz.

The speaking of false and defamatory words which tend to prejudice another in his trade, business, or means of livelihood, or which accuse another of committing a crime, constitute slander and are actionable *per se*. *See Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971). In North Carolina, it is a statutory crime to communicate a threat to physically injure another. *See* N.C. Gen. Stat. § 14-277.1 (1986).

[1] Plaintiff's evidence was clearly sufficient to take his case to the jury as to defendant Stultz. If believed, it would establish that Stultz slandered plaintiff in two respects: (1) in his trade and means of livelihood, and (2) in accusing him of criminal conduct. We therefore order a new trial as to defendant Stultz.

[2] Defendant Duke asserts that when its other management personnel repeated what Stultz had reported to them, their utterances were privileged under North Carolina law. We agree.

A defamatory statement is qualifiedly privileged when made

(1) in good faith,

(2) on subject matter

(a) in which the declarant has an interest, or

(b) in reference to which the declarant has a right or duty,

(3) to a person having a corresponding interest, right, or duty,

(4) on a privileged occasion, and

(5) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.

See Troxler v. Charter Medical Center, Inc., 89 N.C. App. 268, 365 S.E.2d 665, *disc. rev. denied*, 322 N.C. 838, 371 S.E.2d 284 (1988); *Towne v. Cope*, 32 N.C. App. 660, 233 S.E.2d 624 (1977). The existence of a privilege creates a presumption that the statement was made in good faith and without malice. *Towne*, 32 N.C. App. at 664, 233 S.E.2d at 627. In order to prevail in the face of such a presumption, plaintiff would have to show actual malice. *Id.*

At most, plaintiff's evidence shows that Duke's other management personnel discussed Stultz' accusation against plaintiff among themselves, believed Stultz, and fired plaintiff for threatening his supervisor. There is no evidence from which a jury could reasonably infer that defendant Duke acted out of malice or ill-will toward plaintiff. Duke's statements were privileged, and we therefore hold that the trial court properly allowed its motion for a directed verdict.

The result is:

As to defendant Stultz,

New trial;

As to defendant Duke,

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

M. S. HATCHER AND WIFE, BETTY M. HATCHER, PLAINTIFFS v. EARL G. ROSE AND WIFE, BONNIE H. ROSE, DEFENDANTS

No. 8920DC601

(Filed 20 March 1990)

Payment § 5 (NCI3d)— no prepayment language in note—no right to prepay

The trial court erred in finding that defendants were entitled to prepay their promissory note where no statute in effect at the time of the signing of the note allowed for prepayment in the absence of any language with regard thereto, and where the common law rule was that, if there was no provision in the contract for prepayment, the debtor could not compel the creditor to accept early payment.

Am Jur 2d, Bills and Notes § 285.

APPEAL by plaintiffs from judgment entered 7 April 1989 by *Judge Tanya Wallace* in RICHMOND County District Court. Heard in the Court of Appeals 14 November 1989.

This is an action on a promissory note. The uncontroverted evidence shows that on 7 July 1983 defendants executed a note in plaintiffs' favor in the amount of $70,000, plus nine per cent (9%) interest per annum, for the purchase of a tract of real property in Richmond County. The note provided that it was "payable as follows: $629.81 due and payable August 1, 1983; $629.81 due and payable September 1, 1983; $629.81 due and payable on the 1st day of each successive month thereafter until paid in full." Defendants made their monthly payments up to 1 April 1988. On 27 September 1988 plaintiffs filed suit, alleging that payments for April, May, June, July, August and September of 1988 were past due. Defendants admitted in their answer that they did not make the payments for those months. However, defendants asserted that they tendered full payment of the outstanding principal balance and interest (in the amount of $63,601.21) on 11 May 1988 but this tender was refused. Although the note did not provide for prepayment, defendants plead accord and satisfaction in defense. Plaintiffs assert that there is no contractual right to prepay the debt.

The trial court granted summary judgment in favor of defendants on the basis that defendants had the right to prepay the

note. The trial court also ordered plaintiffs to accept tender of the balance owed and to have the deed of trust cancelled. Plaintiffs appeal.

Page, Page & Webb, by John T. Page, Jr., for plaintiff-appellants.

Leath, Bynum, Kitchin & Neal, by Henry L. Kitchin and Stephan R. Futrell, for defendant-appellees.

EAGLES, Judge.

Plaintiffs' arguments challenge the entry of summary judgment in favor of defendants and the denial of plaintiffs' motion for summary judgment. We reverse the decision of the trial court and remand for entry of judgment in favor of plaintiffs.

A party moving for summary judgment is entitled to summary judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56. Here there is no dispute regarding the facts. A question of law is all that is presented. Accordingly, this case was appropriate for summary judgment.

Plaintiffs argue that the trial court committed an error of law when it found defendants were entitled to prepay their promissory note, had made a legal tender and were entitled to have the note and deed of trust cancelled upon the payment of $63,601.21. Plaintiffs argue that no statutes allow for prepayment on the facts of this case. Additionally, plaintiffs argue that the common law rule is that if there is no provision in the contract for prepayment, the debtor cannot compel the creditor to accept early payment. We agree.

Plaintiffs rely on decisions where the Supreme Court has stated that unless there is provision in a contract for prepayment there is no right to prepay. In *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961), our Supreme Court stated that "a debtor cannot compel his creditor to accept payment before maturity except upon terms stipulated." *Id.* at 181, 120 S.E.2d at 451. Although *Barbour* involved the payment of bonds before their maturity, it is analogous. In both cases the prepayment of a debt was at issue and in both cases there was no contractual provision for prepayment. Additionally, in *Smithwick v. Whitley*, 152 N.C. 366, 67 S.E.

914 (1910), the Supreme Court noted without contrary comment that the plaintiff had admitted that the defendant-creditor was "not required by law to accept payment of the unmatured notes before maturity or to surrender the mortgage." *Id.* at 369, 67 S.E. at 915.

Defendants rely on language from Webster's, Real Property Law, 3rd Edition which states that "[a] mortgagor is entitled to pay off his mortgage debt and to have his land released from the security at any time and returned to him free, clear, and unencumbered." *Id.* at § 284. However, based on *Barbour, supra*, and the language in *Smithwick, supra*, we hold that at common law there was no right to compel the creditor to accept prepayment of a debt where the contract was silent as to prepayment.

We consider now whether statutory enactments affect our disposition of this case. G.S. 24-2.4 provides that "[a] borrower may prepay a loan in whole or in part without penalty where the loan instrument does not explicitly state the borrower's rights with respect to prepayment or where the provisions for prepayment are not in accordance with law." While this statute seems applicable, it became effective on 10 July 1985, two years after the promissory note involved here was signed. Plaintiffs argue that the statute should not be given retroactive effect because it would deprive plaintiffs of a vested right (i.e., the return on their investment over a period of time). *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) ("When a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only.").

In their brief defendants agree that G.S. 24-2.4 does not apply here but they argue that G.S. 24-2.4 does not apply because another statute, G.S. 24-1.1A(b), is the controlling law regarding prepayment. G.S. 24-1.1A(b) became effective 13 June 1977 and provides that

> [n]o prepayment fees shall be contracted by the borrower and lender with respect to any home loan where the principal amount borrowed is one hundred thousand dollars ($100,000) or less; otherwise a lender and a borrower may agree on any terms as to the prepayment of a home loan.

Defendants argue that the intent of the General Assembly was to protect "small-to-average" home buyers with this statute. De-

fendants would have us construe G.S. 24-1.1A(b) as allowing prepayment of loans under one hundred thousand dollars ($100,000) where the parties have not expressly agreed. Contrary to defendants' argument, G.S. 24-1.1A(b) only prohibits prepayment *penalties* on certain home loans; it does not address the issue of prepayment of the loan itself. If the General Assembly in enacting G.S. 24-1.1A(b) intended to amend the common law regarding prepayment of loans where the loan agreement is silent, they could have used the straightforward and unequivocal language subsequently enacted in 1985 as G.S. 24-2.4.

For the reasons stated, we reverse the decision of the trial court and remand for entry of judgment for plaintiffs consistent with this opinion.

Reversed and remanded.

Judges PARKER and ORR concur.

TOWN OF ATLANTIC BEACH, PLAINTIFF v. TRADEWINDS CAMPGROUND, INC., DEFENDANT

No. 893SC809

(Filed 20 March 1990)

Dedication § 4 (NCI3d)— individual developer—plats recorded—streets dedicated—attempted withdrawal from dedication by adjacent landowner void

Where the original developer of a subdivision was an individual rather than a corporation, he dedicated the property in question for public use when he recorded plats of the area; consequently, only he or one claiming an interest in the streets through him had standing to withdraw the dedication, and defendant, as an adjacent lot owner, lacked such standing so that the trial court properly declared his attempted withdrawal of dedication void.

Am Jur 2d, Dedication §§ 25, 26.

APPEAL by defendant from *Winberry, Judge*. Judgment entered 11 May 1989 in Superior Court, CARTERET County. Heard in the Court of Appeals 12 February 1990.

This is a civil action wherein plaintiff seeks a mandatory injunction against defendant 1) requiring removal of any improvements or property from certain land designated as the right of way for a street and 2) prohibiting defendant from placing anything on said real property in the future. According to the record on appeal, the trial judge made the following uncontroverted findings of fact:

> 1. The Defendant is the owner of lots 10, 11, 21 and 22, Block 5 of the Asbury Beach subdivision originally platted and recorded in Book 16, Page 530, Carteret County Registry and subsequently rerecorded in Map Book 2 at Page 48.
>
> 2. A portion of the Asbury Beach property was subsequently rerecorded by Ben Moore Parker and Zack H. Bacon by a map recorded in Map Book 1, Page 199. This rerecorded map included lots 10, 11, 21 and 22 which are presently owned by the Defendant.
>
> 3. The original Asbury Beach map showed a street running generally in a north/south direction which street was named New Bern Way and which was 50 feet in width and adjoined the eastern boundary of defendant's lots 11 and 22.
>
> 4. By deed recorded in Book 495, Page 484, Carteret County Registry, defendant received a quitclaim deed on 29 March 1984, from Freddie Price and Angela B. Price, which conveyed to them the relevant lots by description.
>
> 5. Defendant recorded a document in the Carteret County Registry on 2 August 1984 which purported to withdraw from dedication the western one half of New Bern Way where it bordered defendant's lots 11 and 22.
>
> 6. The original developers of Asbury Beach were individuals as opposed to a corporation.

From a judgment declaring defendant's withdrawal of dedication void and enjoining him from any use of New Bern Way other than as a means of ingress, egress and regress, defendant appealed.

Richard L. Stanley for plaintiff, appellee.

Bobby J. Stricklin for defendant, appellant.

HEDRICK, Chief Judge.

Defendant-corporation's sole argument on appeal is that the trial court committed reversible error by declaring the corporation's withdrawal of dedication of a portion of New Bern Way void. Defendant contends the withdrawal was valid because "the street had not been actually opened and used in more than thirty-two years, and the plaintiff-appellee did not accept dedication of the street until one year after the defendant-appellant recorded the withdrawal. . . ." We disagree.

Where land is "sold and conveyed by reference to a map or plat which represent [sic] a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use. . . ." *Steadman v. Pinetops*, 251 N.C. 509, 515, 112 S.E.2d 102, 107 (1960). When an individual owner of land subdivides it and sells it by block and lot number with reference to a plat showing streets therein, he and those who claim through him retain the fee interest in the streets while the owners of lots adjacent to the street have only an easement. *Russell v. Coggin*, 232 N.C. 674, 62 S.E.2d 70 (1950). The only circumstance under which adjacent lot owners may be deemed to own any right, title or interest in a dedicated street, other than an easement, is where the street was dedicated by a corporation which has become nonexistent. *Id.*; G.S. 136-96.

G.S. 136-96 allows withdrawal of dedication of land if the property is not actually opened and used by the public within fifteen years after the dedication. The filing of such withdrawal, however, must ordinarily be done by "the dedicator or some one or more of those claiming under him . . ." rather than the owner of property adjacent to the dedicated land. *Id.* In the present case, the original developer of the Asbury Beach subdivision (an individual rather than a corporation) dedicated the property in question for public use when he recorded plats of the area in Deed Book 16, Page 530, Carteret County Registry. Consequently, only he or one claiming an interest in the streets through him had standing to withdraw dedication. Defendant, as an adjacent lot owner, lacked such standing, and the trial court properly declared his attempted withdrawal of dedication void.

The judgment of the trial court is affirmed.

Affirmed.

Judges PHILLIPS and DUNCAN concur.

ROBERT W. PITTMAN v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8910IC666

(Filed 20 March 1990)

State § 8.2 (NCI3d)— Tort Claims Act—State vehicle blocking road —no warning signs—collision—award for injuries proper

Evidence was sufficient to support the Industrial Commission's conclusion that defendant was negligent, plaintiff was not contributorily negligent, and plaintiff was therefore entitled to recover under the Tort Claims Act for injuries and property damage sustained when plaintiff's vehicle collided with defendant's truck where the evidence tended to show that defendant partially blocked a well-traveled highway for the purpose of replacing old speed limit signs; there was no advance warning sign to indicate that the road ahead was partially blocked; the flashing light on defendant's truck was not a proper warning that its parked truck was in the highway because it was blocked from plaintiff's view by the vehicle ahead of him, as defendant should have reasonably foreseen would be the case; and plaintiff, traveling at the lawful rate of 45 m.p.h. (66 feet per second) and being hemmed in by a vehicle to his left when defendant's parked truck suddenly came into view only 50 or 55 feet away, had no reasonable opportunity to avoid the truck during the split second which was available to him.

Am Jur 2d, Automobiles and Highway Traffic §§ 900, 907, 909, 915; Municipal, County, School, and State Tort Liability § 233.

APPEAL by defendant from decision and order filed 3 May 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 1989.

Hamrick, Mauney, Flowers & Martin, by Fred A. Flowers, for plaintiff appellee.

Attorney General Thornburg, by Assistant Attorney General Richard L. Griffin, for defendant appellant.

PHILLIPS, Judge.

The appeal is from a decision and order holding that plaintiff is entitled to recover $20,000 of defendant under the State Tort Claims Act for injuries and property damage sustained when plaintiff's vehicle collided with defendant's truck. The only questions presented are whether the Commission erred in finding and concluding that defendant was negligent and plaintiff was not contributorily negligent in causing the collision. Determinative of the case are the following unchallenged findings of fact:

> On 7 October 1986 plaintiff was driving his Ford wrecker with a car in tow south on N.C. Highway 18 about two miles north of Shelby. At the same time two employees of the Department of Transportation were working on the side of the road replacing old speed limit signs. The Department's truck was parked partially blocking the road adjacent to a sign that was being replaced. The four lane section of road where the men worked is divided by only double yellow lines, is flat with a broad shoulder, and has a posted speed limit of 45 miles per hour. At approximately 1:30 in the afternoon plaintiff was traveling several car lengths behind a large paneled truck which obstructed the front view from the wrecker. Suddenly the paneled truck veered to the left out of the right hand lane of southbound traffic into the innermost lane of traffic, barely avoiding the state truck. Plaintiff was between 50 and 55 feet from the state truck when it came into view; he put on the brakes and attempted to move over as the paneled truck had done, but another vehicle was in the left hand lane; he ran into the left side of the state truck and sustained physical injuries to himself and damage to his truck. Defendant's normal procedure for replacing the signs takes between three and ten minutes with one man standing on the truck and unbolting the old sign and replacing it while the other man assists from the side of the truck by handing up tools. The driver's side wheels of the truck rest in the lane of traffic and block the roadway while the passenger side wheels are off the side of

the road. It is not the State's practice to put up advance warning signs along the highway to indicate that the road ahead is partially blocked; however, the truck did have a flashing yellow light on top and four flashing lights on the rear of the truck.

These facts lead inevitably and obviously to the Commission's conclusions that defendant was negligent in causing the collision and plaintiff was not contributorily negligent. The following principles of negligence law are too rudimentary and inherent in the concept of due care and fault to require a citation of authority: Obstructing a well-traveled highway without properly warning approaching motorists is negligence; a motorist's failure to avoid a highway obstruction that suddenly comes into view is contributory negligence only when the motorist has a reasonable opportunity to avoid the obstruction after it comes into view. In this instance the flashing light on defendant's truck was not a proper warning that its parked truck was in the highway because it was blocked from plaintiff's view by the vehicle ahead of him, as defendant should have reasonably foreseen would be the case; and plaintiff—traveling at the lawful rate of 45 miles an hour (66 feet per second) and being hemmed in by a vehicle to his left when defendant's parked truck suddenly came into view only 50 or 55 feet away—had no reasonable opportunity to avoid the truck during the split second that was available to him.

Affirmed.

Judges ARNOLD and GREENE concur.

IN THE MATTER OF: THE ESTATE OF JAMES HIRAM WARD, JR., DECEASED

No. 893SC557

(Filed 20 March 1990)

1. **Wills § 61 (NCI3d)— dissent of spouse—distribution of intestate share—cost of caveat proceeding irrelevant**

The trial court properly ordered the executor of an estate to distribute to decedent's widow her intestate share by dissent without regard to the cost of a caveat proceeding, since

a dissenting spouse may share in her spouse's estate as if there were no will, and that purpose would be frustrated rather than served if the surviving spouse's intestate share could be diminished or consumed by the expense of litigating the validity of a will in which she had no interest. N.C.G.S. § 30-3(a); N.C.G.S. § 29-2(5).

Am Jur 2d, Wills § 907.

2. **Wills § 25 (NCI3d)— expense of litigating caveat—no lawful claim against estate—no proper cost of administration**

The expense of litigating a caveat is not a lawful claim against the estate or a proper cost of administration under the provisions of N.C.G.S. § 29-2(5); rather, such expense is a cost of court taxable against either party or apportioned among the parties in the discretion of the court.

Am Jur 2d, Wills § 1092.

APPEAL by propounders and executor from order entered 14 April 1989, *nunc pro tunc* 13 March 1989, by *Reid, Judge*, in PITT County Superior Court. Heard in the Court of Appeals 7 February 1990.

Poyner & Spruill, by James T. Cheatham, and Bailey & Dixon, by Wright T. Dixon, Jr. and Cathleen M. Plaut, for dissenter appellee.

Ward and Smith, by Robert D. Rouse, Jr., for propounder appellants.

Speight, Watson and Brewer, by William H. Watson and James M. Stanley, Jr., for executor appellant Wachovia Bank & Trust Company, N.A.

PHILLIPS, Judge.

Only these facts are pertinent to the question presented: James Hiram Ward, Jr. died testate; his widow, Martha Harris Ward, dissented from the will; a *caveat*, since resolved, was filed by James Earl Ward, decedent's son; and the Superior Court ordered the executor of the estate to distribute to Martha Harris Ward her intestate share by dissent without regard to the cost of the *caveat* proceeding.

[1] The only question presented is whether the order is correct. The following provisions of our law require an affirmative answer: Upon dissenting from a will a surviving spouse takes "the same share of the deceased spouse's real and personal property as if the deceased had died intestate." G.S. 30-3(a). So far as the property rights of a dissenting spouse are concerned it is as if there was no will. *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953). A surviving spouse's right to dissent from a will is determined upon the amount of the decedent's "net estate," *Phillips v. Phillips*, 296 N.C. 590, 252 N.C. 761 (1979), which G.S. 29-2(5) defines as "the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate." The clear purpose of these provisions is to entitle a dissenting spouse to share in her spouse's estate as if there was no will, and that purpose would be frustrated, rather than served, if the surviving spouse's intestate share could be diminished or consumed by the expense of litigating the validity of a will in which she has no interest.

[2] Appellants' argument that the expense of litigating the *caveat* is both a lawful claim against the estate and a proper cost of administration under the above provisions of G.S. 29-2(5) has no basis. As used in that statute, a lawful claim against the estate means a claim for redress of some sort that is filed with the personal representative pursuant to the provisions of Article 19 (Claims against the Estate) of Chapter 28A of the North Carolina General Statutes, which is enforceable against the estate because of some act, omission or obligation of the decedent. And "costs of administration," as used in G.S. 29-2(5), means those ordinary, usual, and necessary expenses of administering a decedent's estate. A will *caveat* and its expense is neither of these; for a will *caveat* is a claim that the will involved is invalid, and its expense is a cost of court taxable "against either party, or apportioned among the parties, in the discretion of the court." G.S. 6-21.

Affirmed.

Judges WELLS and JOHNSON concur.

EMILY WEEKS DUFFELL, PLAINTIFF v. ALICE W. POE AND SUMMIT SAVINGS BANK, DEFENDANTS

No. 8911SC518

(Filed 20 March 1990)

Appeal and Error § 6.2 (NCI3d)— fewer than all claims adjudicated —premature appeal

An appeal from the dismissal of plaintiff's claim against the individual defendant was premature where plaintiff filed claims against the individual defendant and defendant bank; the record disclosed no final judgment entered with respect to plaintiff's claims against defendant bank; and the order appealed from adjudicates fewer than all the claims of the parties.

Am Jur 2d, Appeal and Review § 301.

APPEAL by plaintiff from *Brewer, Judge*. Order entered 6 February 1989 in Superior Court, LEE County. Heard in the Court of Appeals 5 February 1990.

This is a civil action wherein plaintiff seeks to recover from defendants Alice W. Poe and Summit Savings Bank certain funds on deposit with defendant Summit Savings Bank pursuant to Certificate of Deposit No. 3325898 issued in the names of Beulah Wilkie, deceased, and her sister, Alice W. Poe. On 20 January 1988, defendant Summit Savings Bank filed an answer denying that it was indebted to plaintiff. On 25 January 1988, defendant Alice W. Poe filed a motion to dismiss pursuant to Rule 12(b)(6) for plaintiff's failure to state a claim upon which relief could be granted. Her motion was allowed, and plaintiff's claim against defendant Poe was dismissed on 6 February 1989. Plaintiff appealed.

J. Michael Weeks for plaintiff, appellant.

Gunn & Messick, by Paul S. Messick, Jr., for defendant Alice W. Poe, appellee.

HEDRICK, Chief Judge.

In her complaint, plaintiff filed claims against defendants Alice W. Poe and Summit Savings Bank. Defendant Alice W. Poe filed a motion to dismiss pursuant to Rule 12(b)(6). Defendant Summit

Savings Bank filed an answer, and the record before us discloses no final judgment has been entered with respect to plaintiff's claims against defendant Summit Savings Bank. Thus, the order appealed from adjudicates "fewer than all of the claims or parties," and plaintiff's appeal will be dismissed. G.S. 1A-1, Rule 54(b); *Thompson v. Newman*, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

Dismissed.

Judges JOHNSON and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 MARCH 1990

BENGSTON v. PEOPLES No. 8918SC177	Guilford (87CVS4128)	No Error
BERKELEY FED. SAVINGS & LOAN v. TERRA DEL SOL, INC. No. 8920SC545	Moore (88CVS84)	Appellee's motion to dismiss appeal for violation of App. R. 12(a) is denied; Appellee's motion to amend the record on appeal is denied; Appellants' petition for writ of certiorari is denied; Appellants' motion for relief from judgment under Rule 60 is denied; Appellee's motion for sanctions is denied. For the reasons stated above, this appeal is dismissed as interlocutory. Dismissed.
BREININGER v. MACKO No. 8921DC700	Forsyth (88CVM13466) (88CMD5526)	No Error
BRINSON FOR ADOPTION OF BRINSON No. 8918SC531	Guilford (86SP694)	Vacated in part & Remanded
BURROWS v. BLOSSOM No. 894SC301	Duplin (88CVS003)	Affirmed

FULLER v. FULLER No. 8910DC785	Wake (88CVD11510)	Vacated & Remanded
IN RE WATSON No. 8915DC169	Alamance (87J144)	Affirmed
JACKSON v. JACKSON No. 8912DC815	Cumberland (88CVD5160)	Reversed
JOHNSON v. JOHNSON No. 8926DC752	Mecklenburg (87CVD9881-RJ)	Affirmed
JOHNSON GRADING CO. v. THE FOX FIRM, INC. No. 8920DC181	Union (88CVD554)	Reversed & Remanded
JUDA v. N. C. NATIONAL BANK No. 8915SC191	Orange (86CVS454)	Affirmed
LARCINESE v. LARCINESE No. 8918DC843	Guilford (86CVD5294)	Affirmed
McCLAMROCK v. HELMS No. 8919DC354	Cabarrus (88CVD1312)	Affirmed
MARTIN v. LAWSON No. 8917DC1069	Surry (89CVD26)	Affirmed
QUINN v. THOMPSON No. 8921DC1111	Forsyth (88CVD1860)	Reversed & Remanded
RAYMOND v. RILEY CONSTRUCTION CO. No. 8915DC295	Chatham (88CVD232)	Reversed
RHINEHARDT v. BURLESON No. 8929DC895	McDowell (80CVD355)	Dismissed
SILVER v. DEAN No. 8925DC941	Burke (86CVD103)	Affirmed
SKINNER v. TOWN OF BLACK MOUNTAIN No. 8928SC92	Buncombe (88CVS163) (88CVS164) (88CVS165)	Affirmed
STATE v. BARNES No. 8927SC408	Lincoln (87CRS3791) (87CRS3792)	No Error
STATE v. BARTON No. 8916SC231	Robeson (88CRS06366) (88CRS06367)	No Error
STATE v. DAFINIS No. 8912SC478	Cumberland (87CRS30927)	No Error

STATE v. DUNLAP No. 8826SC1257	Mecklenburg (88CRS21398)	Vacated
STATE v. FLYNT No. 895SC1060	New Hanover (86CRS5988)	No Error
STATE v. GRIFFIN No. 8927SC833	Gaston (88CRS10674)	No Error
STATE v. HAMPTON No. 8926SC854	Mecklenburg (88CRS074859) (88CRS074858)	No Error
STATE v. KALKBRENNER No. 894SC1026	Onslow (88CRS20909)	No Error
STATE v. LEWIS No. 897SC988	Wilson (88CRS6665)	No Error
STATE v. McCLEARY No. 8914SC822	Durham (88CRS12925) (88CRS12926) (88CRS12927) (88CRS12928) (88CRS12929) (89CRS5233) (88CRS5280) (88CRS5281) (88CRS5282)	Dismissed
STATE v. MITCHELL No. 8926SC808	Mecklenburg (88CRS73036)	No Error
STATE v. OLIVER No. 8914SC196	Durham (87CRS25518)	No Error
STATE v. RANDOM No. 8926SC949	Mecklenburg (86CRS87477)	Dismissed
STATE v. SLADE No. 8920SC665	Moore (88CRS3367)	No Error
STATE v. VANCE No. 8926SC248	Mecklenburg (88CRS18396)	No Error
STATE v. WILLIAMS No. 8912SC917	Cumberland (88CRS24848)	Appeal Dismissed
STATE v. WISE No. 8910SC798	Wake (88CRS78778) (88CRS78779)	No Error
STATE ex rel. ADAMS v. RIDGEWAY No. 8926DC342	Mecklenburg (87CVD0383)	Reversed & Remanded

WARD v. THE DAILY REFLECTOR No. 893SC957	Pitt (89CVS249)	Affirmed
WEAVER v. WATAUGA COUNTY No. 8924SC77	Watauga (88CVS305)	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 and 4th.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 5 (NCI3d). Availability of review by statutory appeal

The trial court did not err by granting summary judgment for the State where the Coastal Resources Commission denied plaintiff a major development permit to build a 900-foot-long pier on Bogue Sound. *Weeks v. N.C. Dept. of Natural Resources and Community Development*, 215.

The trial court correctly dismissed for lack of subject matter jurisdiction a petition for a preliminary injunction to delay announcement and issuance of a certificate of need for nursing home beds where the petition was improperly filed in Cherokee County rather than in Wake County. *Gummels v. N.C. Dept. of Human Resources*, 245.

ANIMALS

§ 2.2 (NCI3d). Liability of owner for injuries caused by horses

Plaintiff's evidence was insufficient for the jury in an action to recover for injuries sustained by plaintiff's minor child when he was kicked in the face by defendants' horse where there was no evidence of prior knowledge by defendants of the horse's viciousness. *Williams v. Tysinger*, 438.

APPEAL AND ERROR

§ 6.2 (NCI3d). Finality as bearing on appealability; premature appeals

An appeal from a preliminary injunction granting possession of church property to plaintiffs and ordering the pastor to vacate the property was not premature. *Looney v. Wilson*, 304.

Entry of summary judgment on some but not all of plaintiff's claims in an action arising from the termination of his employment and his involuntary commitment affected a substantial right and the orders were appealable; however, orders regarding discovery were interlocutory. *You v. Roe*, 1.

Defendant could properly appeal summary judgment on its negligence claim against third party defendant since common allegations of plaintiff's contributory negligence in the appealed and remaining claims should be determined by the same jury, but plaintiff could not immediately appeal the court's entry of summary judgment for third party defendant on its indemnity claim. *Britt v. American Hoist and Derrick Co.*, 442.

Appeal from the dismissal of plaintiff's claim against the individual defendant was premature where no final judgment was entered with respect to plaintiff's claim against defendant bank. *Duffell v. Poe*, 663.

§ 6.8 (NCI3d). Appeals on motions for nonsuit or summary judgment

The denial of defendants' motion for summary judgment made on grounds of sovereign and qualified immunity affected a substantial right and was immediately appealable. *Corum v. University of North Carolina*, 527.

§ 16.1 (NCI3d). Limitations on powers of trial court after appeal

The trial court was without jurisdiction to hear defendant's motion for a new trial where the motion was made after oral notice of appeal had been given. *American Aluminum Products, Inc. v. Pollard*, 541.

APPEAL AND ERROR — Continued

§ 24 (NCI3d). Necessity for objections, exceptions, and assignments of error

Plaintiff in a domestic action complied with Rule 10(c) of the North Carolina Rules of Appellate Procedure. *Koufman v. Koufman*, 227.

Even though respondent in a termination of parental rights proceeding violated the North Carolina Rules of Appellate Procedure by not entering an exception in the record relating to the failure of the trial court to appoint a guardian ad litem for the minor child and not making an exception or objection at trial, the Court of Appeals was unwilling to dismiss the appeal. *In re Barnes*, 325.

§ 28 (NCI3d). Exceptions and assignments of error related to findings of fact

An unemployment compensation claimant's broadside exception to the findings did not comply with Rule 10(a) of the North Carolina Rules of Appellate Procedure. *Nadeau v. Employment Security Commission*, 272.

§ 39.1 (NCI3d). Making and serving case on appeal

An appeal from an order modifying alimony was dismissed where the record was filed more than 150 days from notice of appeal. *Roberts v. Roberts*, 319.

§ 45 (NCI3d). Form and contents of brief

Although plaintiff in a domestic action did not entirely comply with Rule 28 of the North Carolina Rules of Appellate Procedure, the Court of Appeals disposed of the appeal on its merits in the interest of preventing manifest injustice. *Koufman v. Koufman*, 227.

ARREST AND BAIL

§ 9 (NCI3d). Right to bail generally

A magistrate's pretrial release requirement that a defendant charged with DWI not be released until 11:00 a.m. except into the custody of a sober adult was authorized by statute and did not violate defendant's constitutional right to secure witnesses in his favor. *S. v. Bumgarner*, 567.

ASSAULT AND BATTERY

§ 15.5 (NCI3d). Defense of self, property, or others; instruction required

The evidence supported the trial court's instruction that one who is an aggressor cannot claim self-defense. *S. v. Bailey*, 472.

ASSIGNMENTS

§ 1 (NCI3d). Rights and interests assignable

The trial court properly entered summary judgment for defendant tortfeasor in plaintiff insurer's action based on the theory of equitable subrogation, since there could be no assignment of rights arising out of a cause of action for the personal injury of insureds' dependent. *Harris-Teeter Super Markets v. Watts*, 101.

ATTORNEYS AT LAW

§ 1 (NCI3d). Nature and scope of professional obligations

A law firm was not liable for a former firm member's conversion of funds sent to him by plaintiff for investment on the basis of actual or apparent authority,

negligence or breach of fiduciary duty, or violation of provisions of the N. C. Securities Act relating to civil liability for offering and selling securities by means of false or misleading statements. *Heath v. Craighill, Rendleman, Ingle & Blythe*, 236.

§ 5.1 (NCI3d). Liability for malpractice

A genuine issue of material fact existed as to whether third-party defendant attorneys had a duty to conduct a title search or obtain title insurance on behalf of defendant clients. *Ives v. Real-Venture, Inc.*, 391.

§ 6 (NCI3d). Withdrawal of attorney from case

The trial court did not err in permitting an attorney to withdraw as counsel for defendant on the day of trial because of dissolution of the attorney-client relationship and defendant's unwillingness to pay surveyors hired pursuant to litigation preparation. *Benton v. Mintz*, 583.

§ 7.5 (NCI3d). Allowance of fees as part of costs

Defendant was not exempt from the sanctions of N.C.G.S. § 6-21.5, under which plaintiff was awarded attorney fees incurred in defense of defendant's motion to set aside a sheriff's deed. *Short v. Bryant*, 327.

Plaintiffs were entitled to attorney fees in an action under 42 U.S.C. § 1983 where they asserted a violation of their right to due process through defendant county's having compelled them to make payments without an opportunity to be heard. *McNeill v. Harnett County*, 41.

AUTOMOBILES AND OTHER VEHICLES

§ 2.3 (NCI3d). Nature and scope of judicial review in license revocation proceedings

Where the revocation of petitioner's driver's license was mandatory, the superior court did not have jurisdiction under G.S. 20-25 or G.S. 150B-43 to review the DMV's denial of petitioner's request for conditional restoration of his driver's license under G.S. 20-19(e). *Penuel v. Hiatt*, 616.

§ 5.1 (NCI3d). Requirements for transfer of title; statement of liens and encumbrances

A warranty by defendant auctioneer that title to a vehicle was free and clear of all liens and encumbrances constituted a warranty of title which was broken when a vehicle which defendant sold plaintiff was subsequently discovered to have been stolen. *Gordon v. Northwest Auto Auction*, 88.

§ 62 (NCI3d). Negligence in striking pedestrians generally

Plaintiff's evidence was sufficient for the jury in an action to recover for injuries sustained by plaintiff pedestrian when she was struck by defendant's vehicle in a restaurant parking lot. *Denton v. Peacock*, 97.

§ 89.1 (NCI3d). Sufficient evidence of last clear chance

The trial court erred in failing to instruct the jury on the issue of last clear chance in an action to recover for injuries sustained in a collision between plaintiff's motorcycle and defendant's truck. *Knote v. Nifong*, 105.

§ 89.2 (NCI3d). Insufficient evidence of last clear chance with respect to other motorists

The evidence did not require the trial court to instruct the jury on the doctrine of last clear chance in an action to recover for injuries sustained in a collision

AUTOMOBILES AND OTHER VEHICLES — Continued

BAILMENT

BILLS OF DISCOVERY

BURGLARY AND UNLAWFUL BREAKINGS

CONSTITUTIONAL LAW — Continued

§ 65 (NCI3d). Right of confrontation generally

The admission of substitute evidence of currency seized from defendant's apartment did not violate defendant's state or federal constitutional rights to confront witnesses against her. *S. v. Jones*, 189.

§ 66 (NCI3d). Right of confrontation; presence of defendant at proceedings

There was no prejudicial error in defendant's absence at a hearing on his motion for funds to obtain a psychiatrist and a ballistics expert where defendant made no showing that the hearing would have been more reliable due to his physical presence or his contributions to the process of cross-examination. *S. v. Seaberry*, 203.

§ 68 (NCI3d). Right to call witnesses and present evidence

A magistrate's pretrial release requirement that a defendant charged with DWI not be released until 11:00 a.m. except into the custody of a sober adult was authorized by statute and did not violate defendant's constitutional right to secure witnesses in his favor. *S. v. Bumgarner*, 567.

§ 78 (NCI3d). Cruel and unusual punishment

A sentence of life imprisonment for first degree rape was not cruel and unusual punishment. *S. v. Mayse*, 559.

CONTRACTS

§ 6 (NCI3d). Contracts against public policy generally

An automobile lease was not unconscionable because the lessor assigned its rights in the manufacturer's warranties to the lessee and disclaimed all other warranties concerning the condition of the vehicle. *Alpiser v. Eagle Pontiac-GMC-Isuzu*, 610.

§ 6.1 (NCI3d). Contracts by unlicensed contractors or businesses

The trial court did not err by granting summary judgment for plaintiffs on defendant's counterclaim for the unpaid balance on a construction contract; however, plaintiffs were not entitled to recover sums they had paid to an unlicensed contractor on a building contract. *Hawkins v. Holland*, 291.

§ 27.2 (NCI3d). Sufficiency of evidence; breach of contract

Summary judgment was properly granted in favor of defendant on plaintiff's breach of contract claim arising from the denial of his access to laboratory space. *You v. Roe*, 1.

§ 29.2 (NCI3d). Calculation of compensatory damages for breach of contract

The evidence in an action for breach of contract was sufficient to support an award of $12,500 for lost profits from the sale of a tract of land. *Potter v. Homestead Preservation Assn.*, 454.

§ 33 (NCI3d). Sufficiency of allegations of interference with contractual rights by third persons

Plaintiff contractor stated a claim for tortious interference with contract where it alleged that the individual defendants intentionally caused their corporation not to request a bank to disburse construction loan funds to plaintiff as the final payment due under a construction contract for the wrongful purpose of limiting their personal liability under their guaranty agreement. *Embree Construction Group v. Rafcor, Inc.*, 418.

CONTRACTS — Continued

§ 34 (NCI3d). Actions for interference; sufficiency of evidence

Summary judgment was properly granted in favor of defendant on a claim for malicious interference with contract arising from the termination of plaintiff's employment. *You v. Roe*, 1.

There was sufficient evidence of interference with contractual relations where aluminum products salesmen moved from one company to another. *American Aluminum Products, Inc. v. Pollard*, 541.

CORPORATIONS

§ 1.1 (NCI3d). Disregarding corporate entity

Defendant Florida corporation was a sham corporation under the control and dominion of the individual nonresident defendants, and its acts were in law the acts of the nonresident defendants and subjected them to the personal jurisdiction of our courts. *Greenville Buyers Market Assoc. v. St. Petersburg Fashions, Inc.*, 136.

CRIMINAL LAW

§ 34 (NCI4th). Compulsion and duress; particular circumstances

Testimony by defendant that, during a struggle with the victim, he gained control of a gun, demanded and received the victim's wallet, and then shot him in the back of the head negated a defense of duress. *S. v. Bailey*, 472.

§ 34.8 (NCI3d). Admissibility of evidence of other offenses to show modus operandi or common plan, scheme or design

Evidence of defendant's drug possession and marijuana use was properly admitted to show that defendant had a predisposition to commit the narcotics crimes charged and was thus not entrapped. *S. v. Goldman*, 589.

Evidence of defendant's cocaine and marijuana possession eight days after being charged with three drug related offenses was relevant and probative of the crimes charged. *Ibid.*

§ 42.1 (NCI3d). Other articles used in commission of crime or found at scene

There was no error in a narcotics prosecution from the admission of testimony regarding a bag of cocaine found in a crack in a service station wall after defendant had fled from officers. *S. v. Davis*, 259.

§ 43 (NCI3d). Maps, diagrams and photographs

Photographs of currency seized from defendant's residence were properly admitted for illustrative purposes although the currency was not produced at the trial. *S. v. Jones*, 189.

§ 51 (NCI3d). Qualification of experts

Although the state failed to tender a fire department lieutenant as an expert, he was properly permitted to state opinions as an expert where the trial court could implicitly find him to be an expert. *S. v. Greime*, 409.

§ 67 (NCI4th). Jurisdiction of superior court

The record failed to show that the superior court had jurisdiction to try defendant upon a warrant charging him with misdemeanor possession of drug paraphernalia. *S. v. Martin*, 19.

CRIMINAL LAW — Continued

§ 73.1 (NCI3d). Admission of hearsay statement as prejudicial or harmless error

The trial court did not err by first allowing and then later excluding hearsay evidence that defendant was a drug dealer where the court gave an appropriate instruction withdrawing the evidence. *S. v. Goldman*, 589.

§ 75.10 (NCI3d). Confessions; waiver of constitutional rights generally

Statements made by defendant during custodial interrogation were properly admitted into evidence where the trial court found that defendant knowingly and intelligently waived his rights and that the interrogating officer honored the limits which defendant had placed on his waiver of counsel. *S. v. Greime*, 409.

§ 77.1 (NCI3d). Admissions and declarations of defendant

Evidence that defendant had testified in a prior proceeding that an apartment from which cocaine was seized was her residence and that she lived there alone was admissible as an admission of a party-opponent. *S. v. Jones*, 189.

§ 84 (NCI3d). Evidence obtained by search and seizure

Evidence concerning currency seized from defendant's apartment was not inadmissible in a prosecution of defendant for narcotics offenses because officers released the currency to federal officials without obtaining a court order. *S. v. Jones*, 189.

§ 86.4 (NCI3d). Impeachment of defendant by prior arrest, indictments, and accusations of crime

Any error in the cross-examination of defendant about the date of his arrest for a prior conviction was harmless. *S. v. Cunningham*, 631.

§ 87.1 (NCI3d). Leading questions

The trial court did not err in allowing the six-year-old prosecuting witness to answer a leading question in a prosecution for first degree sexual offense and taking indecent liberties with a child. *S. v. Joyce*, 464.

§ 89.2 (NCI3d). Corroboration of witnesses

Testimony by a witness from DSS as to when the mother of sexual abuse victims knew of the alleged sexual assaults on her children was properly admitted to corroborate the mother's testimony although the mother had not yet testified. *S. v. Joyce*, 464.

§ 162 (NCI3d). Objections, exceptions, and assignments of error to evidence

The trial court in a first degree rape prosecution did not err by allowing a medical doctor to testify as to the victim's credibility. *S. v. Mayse*, 559.

§ 169.2 (NCI3d). Error in admission of evidence harmless where evidence or count withdrawn, objection sustained, or restrictive instruction given

There was no prejudicial error in a narcotics prosecution from the admission of evidence of the contents of a van where the charge involving that evidence was dismissed. *S. v. Davis*, 259.

§ 187 (NCI4th). Service of motion

The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress or by admitting marijuana obtained by a search of his person where the motion to suppress was not timely filed. *S. v. Davis*, 259.

CRIMINAL LAW — Continued

§ 211 (NCI4th). Speedy Trial Act; excludable periods; general provisions

Indictments against both defendants for trafficking in marijuana were remanded for dismissal where the Speedy Trial Act was in effect when defendants were indicted and convicted, their trial was 345 days after indictment, and continuances were improperly entered. *S. v. Foland*, 309.

§ 321 (NCI4th). Joinder of charges against defendants charged with drug offenses

The trial court did not err in a prosecution for trafficking in cocaine by possession by granting the State's motion for joinder of the defendants for trial where the State presented ample evidence that each defendant constructively possessed all of the cocaine. *S. v. Winslow*, 551.

§ 376 (NCI4th). Expression of opinion by colloquies with counsel generally

The trial judge's comments to defense counsel did not constitute an expression of opinion where several of the comments were made outside the presence of the jury, and other challenged remarks were generally innocuous and were made for the purpose of controlling the course of trial and examination of witnesses. *S. v. Joyce*, 464.

§ 427 (NCI4th). Defendant's failure to testify; comment by prosecution

The prosecutor's comment noting that the court would instruct the jury as to the law regarding defendant's election not to testify did not amount to an improper comment on defendant's failure to testify. *S. v. Oakman*, 433.

§ 544 (NCI4th). Mistrial for reference to prior crimes

The trial court in an armed robbery, kidnapping and felonious assault case did not abuse its discretion in denying defendant's motion for a mistrial when the prosecutor asked defendant on cross-examination whether he shot out the windows of his girlfriend's house a short time before the charged crimes were committed, thus suggesting to the jury that defendant had a gun in his possession before the events in question and bolstering the victim's testimony that defendant first used the gun. *S. v. Bailey*, 472.

§ 557 (NCI4th). Defendant's other prior criminal activity

The trial court in a narcotics prosecution involving possession did not err by denying defendant's motion for a mistrial following a detective's testimony that officers had moved to a certain location because an informant had stated that the suspect was selling narcotics. *S. v. Davis*, 259.

§ 566 (NCI3d). Mistrial; consideration of improper evidence

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a prosecution for driving while impaired where the prosecutor asked a witness to state the lower of the two breathalyzer readings. *S. v. McDonald*, 322.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally

The trial court did not err in finding that the aggravating circumstances outweighed the mitigating circumstances and in ordering defendant's imprisonment for a term exceeding the presumptive sentence. *S. v. Greime*, 409.

CRIMINAL LAW — Continued

§ 1098 (NCI4th). Aggravating factors; prohibition of use of evidence of element of offense

The trial court did not use evidence of a cocaine purchase at defendants' house both to prove an element of the charged crimes and to aggravate defendants' sentences. *S. v. Winslow*, 551.

§ 1532 (NCI3d). Preliminary hearing for probation violation generally

Defendant was not prejudiced by the trial court's failure to hold a preliminary hearing on defendant's violation of probation within the time required by G.S. 15A-1345(c) where defendant's arrest in Virginia was prima facie evidence of a probation violation, and there was no need for a preliminary hearing to determine whether there was probable cause that defendant had violated a condition of his probation. *S. v. Clemmons*, 502.

DAMAGES

§ 3.5 (NCI3d). Loss of earnings or profits

The trial court did not err in an action arising from the breach of a lease by admitting testimony on the issue of lost prospective profits using calculations based on the sales of the successor tenant. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

§ 17.1 (NCI3d). Instructions on cause and extent of injuries

The trial court erred in refusing to instruct the jury on the thin-skulled plaintiff rule in an action to recover for injuries sustained in an automobile accident. *Casey v. Fredrickson Motor Express Corp.*, 49.

§ 17.7 (NCI3d). Punitive damages

An assignment of error regarding punitive damages in an action arising from the breach of a lease was moot. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

DEATH

§ 11 (NCI3d). Recovery by person contributing to death

A declaratory judgment action which determined that the husband of deceased was not a slayer under G.S. Chapter 31A was not res judicata and did not prevent the administratrix from attempting to prevent him from sharing in the proceeds of a wrongful death action under the common law doctrine that one may not profit from his own wrong. *In re Cox*, 312.

DECLARATORY JUDGMENT ACT

§ 4.3 (NCI3d). Availability of remedy in insurance matters

The extent of available UIM coverage under two policies issued by defendant insurer to plaintiff was justiciable in a declaratory judgment action where defendant refused to state the extent of UIM coverage even though the amount of damages for an insured's death had not yet been determined in a wrongful death action. *Smith v. Nationwide Mutual Ins. Co.*, 363.

DEDICATION

§ 4 (NCI3d). Withdrawal and revocation of dedication

Where the original developer of a subdivision was an individual rather than a corporation, he dedicated rights of way for streets when he recorded plats of the area, and only he or one claiming an interest in the streets through him had standing to withdraw the dedication. *Town of Atlantic Beach v. Tradewinds Campground*, 655.

DEEDS

§ 14.1 (NCI3d). Reservation of mineral and water rights

The severance and reservation of mineral rights to plaintiff's predecessor in title was not rendered invalid because the granting, habendum, and warranty clauses in the deeds conveying the property recited a transfer of fee simple interests without mention of any reservation, but plaintiffs as a matter of law breached their covenant of seisin when they conveyed to defendants with no limitation in the description of the property conveyed. *Ives v. Real-Venture, Inc.*, 391.

DIVORCE AND ALIMONY

§ 21.9 (NCI3d). Equitable distribution of marital property

The trial court correctly denied the petition of the administrator of defendant's estate to be allowed to substitute for defendant in an equitable distribution action where defendant died after filing a counterclaim for equitable distribution but before the counterclaim or plaintiff's claim for divorce could be adjudicated. *Trogdon v. Trogdon*, 330.

§ 24.4 (NCI3d). Enforcement of child support orders; contempt

The trial court in a child support action did not err by holding that defendant was not in contempt where defendant had reduced his child support payments after the enrollment of a son in a private boarding school. *Koufman v. Koufman*, 227.

§ 24.9 (NCI3d). Child support; findings

The trial court erred in a child support action by making a finding as to the children's expenses where there was no basis for the conclusion that certain of the home and automobile maintenance costs would decrease because one child was not present in the home. *Koufman v. Koufman*, 227.

§ 24.11 (NCI3d). Review of child support orders

The trial court properly denied as premature plaintiff's request to strike child support and alimony modification formulas in a separation agreement incorporated in the divorce decree and to strike the obligation of plaintiff's estate to pay child support and alimony after plaintiff's death. *Theokas v. Theokas*, 626.

§ 27 (NCI3d). Attorney's fees and costs in child custody and support proceeding

The trial court did not err in awarding attorney fees to defendant without finding that plaintiff refused to provide adequate child support where the action originally addressed both child support and custody even though the custody issue was resolved by agreement in fifteen minutes at trial. *Theokas v. Theokas*, 626.

DIVORCE AND ALIMONY — Continued

§ 30 (NCI3d). Distribution of marital property in divorce action

The trial court in an equitable distribution proceeding did not err in failing to value and distribute as marital debt a judgment in favor of a lumber company which was entered against both husband and wife during the marriage where no evidence was presented as to the value of the debt on the date of separation or the circumstances giving rise to the debt. *Miller v. Miller*, 77.

Where the parties stipulated that an equal division of the marital property was equitable, it would have been improper for the trial court to credit plaintiff with mortgage payments he made after separation of the parties. *Ibid.*

EASEMENTS

§ 6.1 (NCI3d). Easement by prescription; sufficiency of evidence

Plaintiff established a prescriptive easement in a street crossing defendants' property. *Town of Sparta v. Hamm*, 82.

ELECTION OF REMEDIES

§ 1.1 (NCI3d). When election is not required

Settlement of a declaratory judgment action to construe a will was not an election of remedies which prevented plaintiff from suing an attorney for negligent will drafting. *McCabe v. Dawkins*, 447.

EVIDENCE

§ 15.2 (NCI3d). Relevancy; particular circumstances

The trial court did not err in an action arising from the breach of a lease by admitting evidence of the lessee's emotions and future. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

§ 19.1 (NCI3d). Conditions at other times

The trial court did not err in a negligence action arising from an airplane crash caused by a dog on a runway in 1985 by admitting evidence which showed the number of animal sightings made by airport personnel during the period from 1978 through 1983. *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth County*, 30.

§ 28 (NCI3d). Public records and documents

The trial court did not err in a negligence action arising from an airplane crash caused by a dog on a runway by admitting daily logs maintained by air traffic controllers. *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth County*, 30.

§ 51 (NCI3d). Testimony as to blood tests

The trial court in a negligence action arising from an automobile accident did not err by refusing to admit hospital records with respect to the blood test tending to show the amount of alcohol in the driver's blood immediately after the accident. *Bare v. Barrington*, 282.

EXECUTION

§ 15.1 (NCI3d). Sheriff's deeds

Inadequacy of price alone is not sufficient to declare a deed issued pursuant to an execution sale void. *Short v. Bryant*, 327.

FALSE IMPRISONMENT

§ 2.1 (NCI3d). Sufficiency of evidence

The trial court erred by granting summary judgment in favor of Duke University on the issue of false imprisonment arising from plaintiff's involuntary commitment. *You v. Roe*, 1.

FRAUD

§ 9 (NCI3d). Pleadings

The trial court properly refused to instruct the jury on negligent misrepresentation where the complaint contained no allegation of negligent misrepresentation, and the parties did not litigate such issue by consent based on evidence to prove fraudulent misrepresentation. *J. M. Westall & Co. v. Windswept View of Asheville*, 71.

Plaintiffs' complaint was sufficient to state a claim for fraud by defendant realtor in concealing his purchase of a house plaintiffs were interested in buying and immediately reselling it to plaintiffs for $10,000 more than he had paid for it. *Hunter v. Spaulding*, 372.

§ 12.1 (NCI3d). Nonsuit

The trial court properly granted summary judgment for defendants in an action for fraud arising from the sale of a house. *Johnson v. Beverly-Hanks & Assoc.*, 335.

GUARANTY

§ 2 (NCI3d). Action to enforce guaranty

Defendant guarantors of a corporate debt held no property interest and could not assert the defense contained in G.S. 45-21.36 where title to the real property was held solely in the name of the corporation. *Borg-Warner Acceptance Corp. v. Johnson*, 575.

Defendant guarantors of a corporate debt could not utilize the provisions of G.S. 45-21.36 through G.S. 26-12 since that statute requires that the principal be joined as a party and the court had no jurisdiction over the corporate principals since it had filed bankruptcy. *Ibid.*

Defendant guarantors waived in the guaranty agreement their right to defenses based on lack of diligence by the lessor or commercially reasonable disposition of the collateral. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 9.3 (NCI3d). Interpretation of "extra work"

The Department of Transportation was not liable on a breach of warranty theory because the amount of unclassified excavation in two highway construction projects underran bid estimates in the two contracts. *Thompson-Arthur Paving Co. v. N.C. Dept. of Transportation*, 92.

HOMICIDE

§ 28.3 (NCI3d). Self-defense; aggression or provocation by defendant; use of excessive force

The trial court's instruction on adequate provocation did not require an additional instruction on assault. *S. v. Martin*, 604.

INDICTMENT AND WARRANT

§ 12 (NCI3d). Amendment; extent of power to amend

A change in indictments to reflect the proper name of the victim was not an impermissible amendment. *S. v. Bailey*, 472.

§ 13.1 (NCI3d). Discretionary denial of motion for bill of particulars

The trial court did not err in denying defendant's motion for a bill of particulars as to the date and place of alleged sexual offenses where the indictments alleged that the offenses occurred "on or about" a certain date. *S. v. Joyce*, 464.

INJUNCTIONS

§ 6 (NCI3d). Injunction to enforce personal contractual obligations

Plaintiff was not entitled to an injunction restraining defendant from further violation of the terms of a lease because defendant on one occasion had breached the lease by keeping its store closed during hours which it was required to be open. *Asheville Mall, Inc. v. Sam Wyche Sports World*, 133.

§ 7 (NCI3d). Injunctions to restrain occupancy or use of land

Plaintiffs' motion for a preliminary injunction was erroneously granted in an action in which plaintiffs sought possession of church property where plaintiffs did not meet their threshold burden of demonstrating a likelihood of success on the merits or of irreparable harm. *Looney v. Wilson*, 304.

INSURANCE

§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorists generally

The UIM coverages provided in two separate automobile policies issued to plaintiff could not be "stacked" to compensate him for the death of his daughter who was killed while driving a vehicle owned by the insured and the daughter where the "household-owned vehicle" exclusion in one of the policies precluded UIM coverage for the daughter's death. *Smith v. Nationwide Mutual Ins. Co.*, 363.

§ 79.3 (NCI3d). Automobile liability insurance rates; findings of fact; sufficiency of evidence

The Commissioner of Insurance erred in declining to take into account dividends and deviations in figuring underwriting profit when ordering into effect rate decreases for automobile and motorcycle insurance. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 644.

An automobile liability insurance case is remanded for findings concerning underwriting profit figures and the overall return they will produce. *Ibid.*

§ 143 (NCI3d). Construction of property damage policies generally; homeowners insurance

A provision in a homeowners insurance policy excluding liability for injuries arising out of the ownership, maintenance or use of an aircraft applied to exclude coverage for injuries to passengers in an airplane crash allegedly caused by defendant insured's negligent failure to warn the pilot and passengers of damage to the engine and negligent failure to properly instruct the pilot as to the operation of the airplane. *Wilkins v. American Motorists Ins. Co.*, 266.

INSURANCE — Continued

§ 148 (NCI3d). Title insurance

The insured grantee was a necessary party in an action for breach of warranty against encumbrances brought by a title insurer against defendant grantors to recover expenses incurred by grantee and paid by the insurer. *Commonwealth Land Title Ins. Co. v. Stephenson*, 123.

§ 149 (NCI3d). Liability insurance

An insurer's duty to defend an insured is determined by the facts alleged in the pleadings of the lawsuit against the insured. *Wilkins v. American Motorists Ins. Co.*, 266.

JUDGES

§ 5 (NCI3d). Disqualification of judges

The trial judge in a child support action did not err by failing to recuse himself from further hearings in an action or by failing to have the recusal motion heard by another judge. *Koufman v. Koufman*, 227.

JUDGMENTS

§ 10 (NCI3d). Construction and operation of consent judgment

Although the trial court in an action for malicious interference with contract and unfair and deceptive trade practices erred by taking judicial notice of a consent order, the error was harmless because the judge relied on the order in finding a fact alleged and admitted in the pleadings. *American Aluminum Products, Inc. v. Pollard*, 541.

§ 21.1 (NCI3d). Consent judgments; lack of consent

A consent judgment entered by the trial court was void and must be set aside where the circumstances were sufficient to put the trial judge on notice that he could not rely on plaintiff's signature and that plaintiff did not in fact consent to the judgment at the time the judgment was entered. *Hill v. Hill*, 499.

§ 36 (NCI3d). Judgments as estoppel; parties concluded in general

Where plaintiff took a voluntary dismissal against defendant driver in a wrongful death action against the driver and his employers but the driver's negligence and the contributory negligence of plaintiff's intestate remained the critical issues in the action against defendant's employers, the judgment in the action against the employers collaterally estopped plaintiff from bringing a subsequent action against defendant driver. *Johnson v. Smith*, 450.

JURY

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenges

Defendant failed to make out a prima facie case of racial discrimination in the State's exercise of peremptory challenges of black jurors. *S. v. Robinson*, 597.

KIDNAPPING

§ 1.2 (NCI3d). Sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a first degree kidnapping charge where the victim escaped by her own wits rather than by being released by defendant. *S. v. Mayse*, 559.

LIBEL AND SLANDER

§ 5.2 (NCI3d). Imputations affecting business, trade, or profession

The evidence was sufficient for the jury in plaintiff's slander action against his supervisor where it tended to show that a week after plaintiff complained about plant safety violations to his employer's safety director, he was fired because his supervisor falsely reported to other management personnel at the plant that plaintiff had threatened him with physical violence. *Shreve v. Duke Power Co.*, 648.

§ 10.1 (NCI3d). Qualified privilege; communication relating to business matters

The trial court properly granted directed verdict for defendant employer in plaintiff's action for slander where utterances by defendant's management personnel with regard to a negative report by plaintiff's supervisor were privileged. *Shreve v. Duke Power Co.*, 648.

§ 16 (NCI3d). Sufficiency of evidence

Summary judgment was properly granted for defendants in a slander action arising from the termination of plaintiff's employment and from his involuntary commitment, but should not have been granted for defendant Roe on a claim for libel per se or for defendant Duke University on a libel claim arising from the employment termination letter. *You v. Roe*, 1.

LIMITATION OF ACTIONS

§ 4.3 (NCI3d). Accrual of claim for breach of contract in general

Plaintiff's action for breach of contract was not barred by the three-year statute of limitations where plaintiff was notified by one defendant on 27 August 1984 that her association with defendants had been terminated and the suit was filed on 26 August 1987. *Potter v. Homestead Preservation Assn.*, 454.

§ 12.1 (NCI3d). New action after a failure of original suit

The trial court properly granted defendant's motion for summary judgment based upon the statute of limitation where the initial action was voluntarily dismissed, a new action was filed, the allegations in both complaints were substantially the same, defendants were distinct and separate corporate entities, and the fact that they shared an address, directors and officers was immaterial. *Cherokee Ins. Co. v. R/I, Inc.*, 295.

MALICIOUS PROSECUTION

§ 13.2 (NCI3d). Probable cause

Summary judgment was properly granted for defendant doctor on a malicious prosecution claim arising from plaintiff's involuntary commitment. *You v. Roe*, 1.

MASTER AND SERVANT

§ 8 (NCI3d). Terms of contract of employment generally

Defendant employer's personnel handbook which stated that a full-time employee who became disabled during his employment would be able to maintain his group insurance constituted a unilateral contract based upon defendant's offer of extra benefits to employees who continued in its employment until disabled and plaintiff's acceptance of that offer by remaining in defendant's employment until she was disabled. *White v. Hugh Chatham Memorial Hospital*, 130.

MASTER AND SERVANT — Continued

§ 9 (NCI3d). Actions to recover compensation

There was sufficient evidence to support the trial court's finding that defendants were liable for the entire amount of commission overpayment in an action arising from the movement of salesmen from one company to another. *American Aluminum Products, Inc. v. Pollard*, 541.

§ 33 (NCI3d). Employer's liability for injuries to third persons; respondeat superior

The negligence of a subcontractor and its employees could not be imputed to the contractor where there was no evidence that the contractor controlled the subcontractor's operations. *Britt v. American Hoist and Derrick Co.*, 442.

§ 69 (NCI3d). Amount of workers' compensation recovery generally

The Industrial Commission did not err in deducting from plaintiff's workers' compensation award the payments he received under the employer's medical disability plan while his claim for further compensation was being processed. *Johnson v. IBM*, 493.

§ 108 (NCI3d). Right to unemployment compensation generally

The evidence was sufficient to support a finding by the Employment Security Commission that petitioner voluntarily quit his job after a discussion with his supervisor about his absence from work for two days while serving on a jury without informing his employer. *Celis v. N.C. Employment Security Comm.*, 636.

§ 108.1 (NCI3d). Right to unemployment compensation; effect of misconduct

The trial court did not err by upholding an Employment Security Commission determination that claimant was discharged for cause where claimant's rewiring of telephone lines so that he could make long-distance calls was discovered only after he was discharged. *Nadeau v. Employment Security Commission*, 272.

A claimant for unemployment compensation who had been discharged for misconduct received sufficient notice of the reason for his termination. *Ibid.*

§ 111 (NCI3d). Appeal and review.

The appropriate standard of judicial review of an unemployment compensation proceeding is whether there is any competent evidence to support the Commission's findings, not whether there is substantial evidence to support them. *Celis v. N.C. Employment Security Comm.*, 636.

MUNICIPAL CORPORATIONS

§ 2.1 (NCI3d). Compliance with statutory requirements for annexation in general

A town council's amendment of the annexation report after a public hearing did not require a new hearing before the annexation ordinance was adopted. *Chapel Hill Country Club v. Town of Chapel Hill*, 171.

§ 2.2 (NCI3d). Annexation; requirement of use and size of tracts

Property owned by a private country club, much of which consisted of its golf course, could properly be classified as in institutional use for annexation purposes. *Chapel Hill Country Club v. Town of Chapel Hill*, 171.

A town was not estopped from classifying private country club property as being put to institutional use for annexation purposes because the property was labeled "recreational" and "conservation" in prior land use plans. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

A municipality may divide an annexation area into subareas and qualify each of these subareas as property developed for urban purposes pursuant to separate subdivisions of G.S. 160A-48(c). *Ibid.*

§ 2.5 (NCI3d). Effect of annexation

The trial court did not err in granting a town's motion to allow immediate effectiveness of an annexation ordinance with respect to one subdivision in the annexed area. *Chapel Hill Country Club v. Town of Chapel Hill*, 171.

§ 2.6 (NCI3d). Extension of utilities to annexed territory

The evidence supported the trial court's finding that a town's plan to provide police and fire protection to an annexed area met statutory requirements although the town failed to promise additional personnel and equipment and there was expert testimony that the average response time to a fire or police emergency in the annexed area would be greater than that in the municipality as a whole. *Chapel Hill Country Club v. Town of Chapel Hill*, 171.

A town's plan for the extension of water and sewer services to an annexed area by a water and sewer authority rather than by the town met statutory requirements. *Ibid.*

§ 23.3 (NCI3d). Furnishing of services outside corporate limits

Plaintiff water utilities had standing to contest whether defendant municipality could legally supply water service to customers in a subdivision outside the municipal limits where plaintiffs served areas contiguous to the subdivision. *Quality Water Supply, Inc. v. City of Wilmington*, 400.

Defendant city's extension of water service to private customers in a subdivision beyond its corporate limits was "within reasonable limitations" as required by G.S. 160A-312. *Ibid.*

§ 24.1 (NCI3d). Assessments for public improvements; notice and petition

A county ordinance requiring connection to a sewer line was void as to plaintiffs where the county financed the new sewer system by special assessments but failed to comply with statutory notice procedures. *McNeill v. Harnett County*, 41.

§ 28 (NCI3d). Payment and enforcement of assessment

The provisions of G.S. 1-108 did not prohibit the trial court from setting aside an order of confirmation and a commissioner's deed in a special assessment foreclosure sale when the court determined that the municipality's foreclosure judgment was void because the property owner did not receive proper service of process. *Town of Cary v. Stallings*, 484.

Where plaintiff municipality obtained a judgment against defendant for failure to pay a curb and gutter assessment without having given her proper notice, the trial court correctly determined that the judgment was void and properly set it aside. *Ibid.*

§ 30.20 (NCI3d). Procedure for enactment or amendment of zoning ordinances

The trial court correctly declared invalid an ordinance establishing an historic district where the City Council did not follow the statutory procedure for enacting such an ordinance over the protests of affected property owners. *Unruh v. City of Asheville*, 287.

MUNICIPAL CORPORATIONS — Continued

§ 31 (NCI3d). Judicial review

Plaintiffs could properly challenge an historic zoning district ordinance by a declaratory judgment action before their administrative remedies were exhausted because they were owners of property in the rezoned area. *Unruh v. City of Asheville*, 287.

NARCOTICS

§ 3.1 (NCI3d). Competency and relevance of evidence

The trial court did not err in a prosecution for trafficking in cocaine by possession by admitting testimony regarding the purchase of cocaine by a suspect at defendants' house several hours before the search resulting in the prosecution. *S. v. Winslow*, 551.

§ 3.2 (NCI3d). Evidence obtained by search and seizure

Evidence concerning currency seized from defendant's apartment was not inadmissible in a prosecution for narcotics offenses because officers released the currency to federal officials without obtaining a court order. *S. v. Jones*, 189.

The State's failure to produce at trial currency seized from defendant's residence did not preclude the State from offering other evidence concerning the currency and did not violate defendant's state or federal constitutional rights to confront witnesses against her. *S. v. Jones*, 189.

§ 3.3 (NCI3d). Competency of opinion testimony

An officer could properly testify as to the use of vials found in defendant's car as drug trafficking devices. *S. v. Martin*, 19.

§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient

The evidence was sufficient to support charges of possession of cocaine with intent to sell or deliver and manufacturing cocaine. *S. v. Jones*, 189.

Evidence which supported charges of trafficking in cocaine, possession of cocaine with intent to sell or deliver, and manufacturing cocaine also supported a charge of intentionally maintaining a dwelling for the purpose of keeping or selling a controlled substance when combined with defendant's admission that the apartment where the cocaine was found was her residence. *Ibid.*

The trial court did not err by denying defendant's motion for nonsuit of a charge of felonious possession of cocaine where a bag of cocaine was recovered from a crack in a wall. *S. v. Davis*, 259.

§ 4.2 (NCI3d). Sufficiency of evidence in cases involving sale to undercover narcotics agent; defense of entrapment

The trial court properly denied defendant's motion to dismiss narcotics charges since he did not prove as a matter of law that he was entrapped. *S. v. Goldman*, 589.

§ 4.3 (NCI3d). Sufficiency of the evidence of constructive possession

The trial court did not err in a prosecution for trafficking in cocaine by possession by not submitting the lesser-included offense of possession of cocaine where the evidence was clear that each defendant had constructive possession of all the cocaine. *S. v. Winslow*, 551.

PARENT AND CHILD — Continued

Respondents had sufficient notice of a hearing on a petition to terminate their parental rights. *In re Taylor*, 57.

§ 1.6 (NCI3d). Termination of parental rights; competency and sufficiency of evidence

The trial court correctly found and concluded that respondent failed to provide child support for more than one year preceding the filing of the termination proceeding where respondent acknowledged paying no support to petitioner but contended that payment to the child's psychologist constituted child support. *In re Roberson*, 277.

The trial court did not err by finding and concluding that respondent's failure to pay child support during the relevant period was willful despite the failure of the order to contain a finding of fact on respondent's ability to make support payments and despite evidence of respondent's emotional breakdown. *Ibid.*

It was sufficient that the issues for adjudication were delineated immediately prior to commencement of the hearing to terminate parental rights. *In re Taylor*, 57.

The statute providing for termination of parental rights if the parent has willfully left the child in foster care for more than 18 months under certain circumstances does not require that the 18 months be continuous. *Ibid.*

The evidence in a proceeding to terminate parental rights was sufficient to support the trial court's finding that respondents failed to make reasonable progress toward improving home conditions during the period in which their children were in foster care. *Ibid.*

§ 10 (NCI3d). Uniform reciprocal enforcement of support act

The trial court's uncontested finding that plaintiff properly filed and registered a foreign child support decree adequately supported the court's conclusion of law that the decree was registered. *Williams v. Williams*, 118.

The trial court had authority in a URESA action to order support for a child who had attained the age of 18 where defendant had contractually bound himself in another state to make support payments beyond the age of 18. *Ibid.*

PAYMENT

§ 5 (NCI3d). Prepayment

Defendants had no statutory or common law right to prepay a 1983 promissory note where there was no provision in the note for prepayment. *Hatcher v. Rose*, 652.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 6 (NCI3d). Revocation of licenses

The test for determining the constitutionality of a professional code of ethics is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden. *White v. N.C. Bd. of Examiners of Practicing Psychologists*, 144.

The Preambles to the Ethical Principles of Psychologists are unconstitutionally vague under the North Carolina and the United States Constitutions, but the Ethical Principles of Psychologists are not unconstitutionally vague. *Ibid.*

§ 6.2 (NCI3d). Revocation of licenses; evidence

The Board did not have sufficient evidence under the whole record test to find and conclude that a psychologist had violated ethical principles dealing with

confidentiality, the maintenance of records, the misuse of influence, or the misuse of tests and interpretations by others. *White v. N.C. Bd. of Examiners of Practicing Psychologists*, 144.

There was sufficient evidence to support the finding of the Board that petitioner psychologist had violated ethical principles dealing with the misuse of influence, suspicion of child abuse to the proper governmental agency, and using an outdated intelligence test. *Ibid.*

§ 17 (NCI3d). Sufficiency of evidence of departing from standard of care

The evidence in a medical malpractice case was sufficient for the jury where it tended to show that defendants' failure to take plaintiff's medical history, to hospitalize, and to diagnose more thoroughly plaintiff's condition contributed to his myocardial infarction and its severity. *Felts v. Liberty Emergency Service*, 381.

PRINCIPAL AND AGENT

§ 5.2 (NCI3d). Authority in particular matters

A law firm was not liable for a former firm member's conversion of funds sent to him by plaintiff for investment on the ground that the former member's dealings with plaintiff were within the scope of authority conferred on him by the firm or on the ground that the former member acted within his apparent authority in soliciting funds from plaintiff. *Heath v. Craighill, Rendleman, Ingle & Blythe*, 236.

§ 7 (NCI3d). Undisclosed agency

It was noted that the existence of means by which the fact of agency might be discovered was insufficient to disclose agency. *Strang v. Hollowell*, 316.

§ 11 (NCI3d). Liabilities of agent to third persons

Although defendant auctioneer acted as an agent in selling a vehicle, the auctioneer was liable upon a warranty of title where he made a personal contract of warranty. *Gordon v. Northwest Auto Auction*, 88.

PROCESS

§ 19 (NCI3d). Actions for abuse of process

The trial court properly granted summary judgment for defendant doctor in a claim for abuse of process arising from plaintiff's involuntary commitment. *You v. Roe*, 1.

PROFESSIONS AND OCCUPATIONS

§ 1 (NCI3d). Generally

The evidence supported a determination that petitioner engineer was grossly negligent and demonstrated professional incompetence in approving deficient designs for two buildings. *In re Bruce*, 138.

The Board of Registration for Professional Engineers was authorized to suspend petitioner engineer's license to practice or to fine him but not to do both upon a finding that he was grossly negligent and professionally incompetent. *Ibid.*

PUBLIC OFFICERS

§ 6 (NCI3d). Salary and remuneration

A probationary correctional officer who sustained a compensable injury was entitled to salary continuation benefits for two years from the date of injury. *Vandiford v. N.C. Dept. of Correction*, 640.

§ 9 (NCI3d). Personal liability of public officers to private individuals

Summary judgment was properly entered in favor of the Chancellor and a Vice Chancellor of Appalachian State University on the ground of qualified privilege in plaintiff's 42 U.S.C. § 1983 claims to recover damages from them in their individual capacities based upon allegations that his constitutional right to free speech was violated when he was removed as Dean of Learning Resources at Appalachian State University because of statements he made at a staff meeting. *Corum v. University of North Carolina*, 527.

The doctrine of sovereign immunity barred plaintiff's claims for money damages against the University of North Carolina, Appalachian State University, and the President of the University of North Carolina, the Chancellor and a Vice Chancellor of Appalachian State University in their official capacities based on alleged violations of plaintiff's right to free speech guaranteed by the N. C. Constitution. *Ibid.*

The Chancellor and a Vice Chancellor of Appalachian State University did not have immunity from plaintiff's claim against them for money damages in their individual capacities based on allegations that they violated plaintiff's right to free speech under the N. C. Constitution and thus acted outside the scope of their duties in removing plaintiff as Dean of Learning Resources at Appalachian State University. *Ibid.*

QUASI CONTRACTS AND RESTITUTION

§ 1 (NCI3d). Implied contracts; elements and requisites of right of action

The evidence was sufficient to support an award of $110,000 for services rendered by plaintiff in managing, improving and promoting a 700-acre tract of land and defendant association for six or seven months each year for thirteen years. *Potter v. Homestead Preservation Assn.*, 454.

RAPE AND ALLIED OFFENSES

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

Evidence that defendant struggled with the victim and tore her underpants constituted sufficient evidence of defendant's specific intent to commit second degree rape to sustain convictions of first degree burglary and attempted second degree rape. *S. v. Robinson*, 597.

The trial court did not err by denying defendant's motion to dismiss a charge of first degree rape where there was sufficient evidence of use of a deadly weapon and of serious mental injury. *S. v. Mayse*, 559.

§ 6 (NCI3d). Instructions

The trial court in a first degree rape prosecution did not err in its instructions to the jury on the deadly weapon element. *S. v. Mayse*, 559.

The trial court did not commit plain error in a prosecution for attempted second degree rape in failing to instruct the jury that defendant must have used or threatened to use force sufficient to overcome any resistance the victim might

RAPE AND ALLIED OFFENSES — Continued

offer where the court instructed that defendant must have intended to have "vaginal intercourse with the victim by force and against her will." *S. v. Robinson*, 597.

§ 6.1 (NCI3d). Instructions on lesser degrees of the crime

The trial court in a first degree sexual offense case was not required to submit second degree sexual offense to the jury where the State's evidence was not in conflict, and defendants presented no evidence as to the crime. *S. v. Bullard*, 496.

§ 7 (NCI3d). Verdict; sentence and punishment

The mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment. *S. v. Joyce*, 464.

§ 19 (NCI3d). Indecent liberties with child

The State's evidence, including testimony by the 13-year-old male victim that someone was feeling on his "private area," was sufficient to establish in a burglary case the underlying felony of taking indecent liberties with a child. *S. v. Oakman*, 433.

RECEIVING STOLEN GOODS

§ 2 (NCI3d). Indictment

An indictment charging defendant with felonious possession of stolen property was not invalid because it omitted language regarding "dishonest purpose." *S. v. Martin*, 19.

§ 4 (NCI3d). Relevancy and competency of evidence

Testimony by the son of the owner of stolen property that he was indebted to defendant was properly admitted to show a motive for defendant's possession of the stolen property. *S. v. Martin*, 19.

§ 5.1 (NCI3d). Sufficient evidence of receiving or possession of stolen property

The evidence was sufficient to be submitted to the jury in a prosecution for felonious possessions of stolen silverware. *S. v. Martin*, 19.

ROBBERY

§ 4.4 (NCI3d). Attempted robbery cases where evidence held sufficient

The jury could find that defendant's use or threatened use of his gun was concomitant with and inseparable from his robbery attempt where he never took his gun out of his waistband but instead showed it to a store cashier after she denied his request for money, told the cashier to say nothing, and left the store. *S. v. Cunningham*, 631.

RULES OF CIVIL PROCEDURE

§ 4 (NCI3d). Process

The trial court did not abuse its discretion in dismissing plaintiff's action with prejudice following a six-month delay in service of process even though alias and pluries summonses had been issued. *Sellers v. High Point Mem. Hosp.*, 299.

RULES OF CIVIL PROCEDURE – Continued

§ 6 (NCI3d). Commencement of action; service of process, pleadings, motions, and orders; time

The trial court did not err by conducting a hearing and entering an order on Evangeline's motion to dismiss at the same hearing in which it granted Evangeline's petition to intervene. *Gummels v. N.C. Dept. of Human Resources*, 243.

The trial court did not err by dismissing an action after a six-month delay in service of process where defendant was prejudiced by the delay and plaintiffs failed to explain why their intentional delay for tactical reasons should not be considered bad faith or an attempt to gain unfair advantage. *Sellers v. High Point Mem. Hosp.*, 299.

§ 15.1 (NCI3d). Discretion of court to grant amendment to pleadings

The trial court did not abuse its discretion in an action seeking the proceeds from negotiated instruments by denying plaintiff's motion to amend its complaint to add claims for unfair or deceptive trade practices. *Stewart Office Suppliers, Inc. v. First Union Nat. Bank*, 353.

The trial court did not abuse its discretion by denying plaintiff's motion to amend the pleadings where there was nothing to indicate why plaintiffs delayed in making their motion. *Johnson v. Beverly-Hanks & Assoc.*, 335.

The trial court did not abuse its discretion by granting plaintiff's motion to amend his complaint prior to a second trial. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

§ 24 (NCI3d). Intervention

The trial court did not err by granting Evangeline's petition to intervene in an action in which petitioner sought a preliminary injunction to prevent the department from announcing or awarding a certificate of need for nursing home beds to Evangeline. *Gummels v. N.C. Dept. of Human Resources*, 245.

§ 33 (NCI3d). Interrogatories to parties

Defendant did not meet the requirements of Rule 33 where he admitted that he had not personally answered plaintiff's written interrogatories, and the trial judge properly sanctioned defendant by striking his answer and entering a default judgment against him. *Hunter v. Spaulding*, 372.

§ 55 (NCI3d). Default

A party who is defaulted for failure to answer interrogatories must be afforded an opportunity to be heard on the question of punitive damages. *Hunter v. Spaulding*, 372.

§ 58 (NCI3d). Entry of judgment

A judgment was not entered for purposes of giving notice of appeal until the written order was signed and filed, and the clerk erred in noting in the court's minutes the entry of judgment, where the trial judge indicated the nature of his decision and ordered counsel for third-party defendants to draft a judgment to be entered after both the judge and opposing counsel had an opportunity to review it. *Ives v. Real-Venture, Inc.*, 391.

§ 59 (NCI3d). New trials; amendment of judgments

The trial court properly denied plaintiff's motion for a new trial on the issue of damages based on plaintiff's contention that the jury award was less than his medical expenses where there was evidence that some of plaintiff's surgery was

RULES OF CIVIL PROCEDURE — Continued

to relieve arthritic symptoms unrelated to the accident in question. *Moon v. Bostian Heights Volunteer Fire Dept.*, 110.

SALES

§ 5 (NCI3d). Express warranties

The Magnuson-Moss Warranty Act did not apply to plaintiff's lease of a vehicle. *Alpiser v. Eagle Pontiac-GMC-Isuzu*, 610.

SEARCHES AND SEIZURES

§ 9 (NCI3d). Warrantless search after arrest for traffic violation

An officer had probable cause to search defendant's car trunk where the officer stopped the vehicle in which defendant was a passenger for a routine traffic violation and noticed empty vials which he recognized as items used in the trafficking of drugs. *S. v. Martin*, 19.

§ 39 (NCI3d). *Execution of search warrant; places searched; time of execution*

A search was not unlawful because the officer who executed the warrant was not the same officer to whom the warrant was issued. *S. v. Jones*, 189.

Evidence seized in a search under a warrant was not required to be excluded on the ground that officers did not give a receipt for the seized items to defendant where the record indicates that a copy of the inventory was tendered to defendant but she refused to acknowledge its receipt. *Ibid.*

The trial court's findings were sufficient to establish that a search warrant had been issued and officers had it in their possession at the time of their entry into defendant's residence. *Ibid.*

§ 41 (NCI3d). Conduct of officers; knock and announce requirements

Officers complied with statutes when they forcibly entered defendant's premises to execute a search warrant for narcotics after they knocked on the door and announced their identity in a loud voice and received no response after waiting for one minute. *S. v. Jones*, 189.

§ 42 (NCI3d). Exhibiting or delivering warrant

Although G.S. 15A-252 requires service of the warrant before "any search or seizure," the statute does not preclude a preliminary search of the premises to locate, detain, or frisk individuals on the premises prior to service of the warrant in order to ensure the safety of the officers or to prevent suspects from fleeing or destroying evidence. *S. v. Jones*, 189.

STATE

§ 4 (NCI3d). Actions against the State; sovereign immunity

Plaintiff's 42 U.S.C. § 1983 action against the University of North Carolina and Appalachian State University based upon an alleged violation of his constitutional rights by his removal as Dean of Learning Resources at Appalachian State University was barred by the doctrine of sovereign immunity. *Corum v. University of North Carolina*, 527.

STATE — Continued

§ 4.1 (NCI3d). Actions against officers of State

Plaintiff's 42 U.S.C. § 1983 claims for money damages against the President of the University of North Carolina and the Chancellor and Vice Chancellor of Appalachian State University in their official capacities were barred by the doctrine of sovereign immunity, but plaintiff's § 1983 claims for prospective injunctive relief against those three defendants in their official capacities were not barred by sovereign immunity. *Corum v. University of North Carolina*, 527.

The doctrine of sovereign immunity barred plaintiff's claims for money damages against the University of North Carolina, Appalachian State University, and the President of the University of North Carolina and the Chancellor and a Vice Chancellor of Appalachian State University in their official capacities based on alleged violations of plaintiff's right to free speech guaranteed by the N. C. Constitution. *Ibid.*

The Chancellor and a Vice Chancellor of Appalachian State University did not have immunity from plaintiff's claim against them for money damages in their individual capacities based on allegations that they violated plaintiff's right to free speech under the N. C. Constitution and thus acted outside the scope of their duties in removing plaintiff as Dean of Learning Resources at Appalachian State University. *Ibid.*

§ 8.2 (NCI3d). Negligence of State employee; particular actions

The Industrial Commission properly determined that defendant was negligent and plaintiff was not contributorily negligent in causing a collision with defendant's truck which had stopped partially in plaintiff's lane of travel while defendant's employees replaced old speed limit signs. *Pittman v. N.C. Dept. of Transportation*, 658.

The evidence was sufficient to support findings by the Industrial Commission that ALE officers and a highway patrolman were negligent in using excessive force to arrest the inebriated plaintiff and that this negligence was the proximate cause of injuries suffered by plaintiff. *Jackson v. N.C. Dept. of Crime Control and Public Safety*, 425.

§ 9 (NCI3d). Amount of recovery for negligence of State employee

The Industrial Commission's award of $9,000 for pain and suffering and partial disability to a plaintiff who sustained injuries when he was struck by officers during an arrest was not excessive. *Jackson v. N.C. Dept. of Crime Control and Public Safety*, 425.

TAXATION

§ 25.4 (NCI3d). Valuation and assessment for ad valorem taxes

Ownership of a corporate taxpayer's stock by a family corporation for a brief period of time during a reorganization of the family corporation in 1984 which allowed two brothers to divide farmland without substantial federal income tax liabilities did not prohibit present use value assessment and taxation of the corporate taxpayer's farmland for 1984-1986. *In re Appeal of ELE, Inc.*, 253.

§ 25.7 (NCI3d). Factors determining market value generally

It was not prejudicial error for the Property Tax Commission to consider Internal Revenue Code provisions under which a corporate reorganization was accomplished in determining whether the corporate taxpayer was entitled to present use value assessment of its farmland for certain years. *In re Appeal of ELE, Inc.*, 253.

TRIAL

§ 3.2 (NCI3d). Motion for continuance on particular grounds

The trial court erred in failing to grant defendant a continuance after having allowed withdrawal of defendant's counsel where defendant did not know trial was to commence on the day of the special proceeding to allow counsel to withdraw. *Benton v. Mintz*, 583.

§ 15 (NCI3d). Objections and exceptions to evidence

The trial court did not abuse its discretion in an action arising from the breach of a lease by failing to control the allegedly voluminous objections by plaintiff during defendant's cross-examination. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

TROVER AND CONVERSION

§ 2 (NCI3d). Nature and essentials of action

Members of a law firm were not liable for a former firm member's conversion of funds sent to him by plaintiff for investment on the basis of actual or apparent authority, negligence or breach of fiduciary duty, or violation of provisions of the N. C. Securities Act relating to civil liability for offering and selling securities by false or misleading statements. *Heath v. Craighill, Rendleman, Ingle & Blythe*, 236.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

Defendants' alleged misrepresentations to plaintiff relating to the delivery of building materials to a third party contractor affected commerce and could constitute an unfair trade practice even though no contractual relationship existed between the parties. *J. M. Westall & Co. v. Windswept View of Asheville*, 71.

The trial court properly granted summary judgment for defendants in an action for unfair or deceptive trade practices arising from the sale of a house. *Johnson v. Beverly-Hanks & Assoc.*, 335.

There was no error in an action for unfair or deceptive trade practices and interference with contract where the court calculated lost profits and then trebled that amount. *American Aluminum Products, Inc. v. Pollard*, 541.

The trial court did not err in an action arising from a breach of a lease by permitting evidence on a claim for unfair and deceptive trade practices. *Mosley & Mosley Builders v. Landin Ltd.*, 511.

UNIFORM COMMERCIAL CODE

§ 6 (NCI3d). Sales; construction, definitions and subject matter

A contract for the lease of a vehicle with an option to purchase at the end of the term for fair market value was not equivalent to a purchase so as to make the warranty provisions of the UCC applicable. *Alpiser v. Eagle Pontiac-GMC-Isuzu*, 610.

§ 31 (NCI3d). Rights of a holder in due course

The trial court did not err by granting summary judgment for defendants Southern National Bank and First Union Bank in an action seeking the proceeds from negotiated instruments where plaintiff claimed status as a holder in due course. *Stewart Office Suppliers, Inc. v. First Union Nat. Bank*, 353.

UNIFORM COMMERCIAL CODE — Continued

§ 36 (NCI3d). Collection of checks and drafts

The trial court erred by granting summary judgment for defendant Southern National Bank in an action for conversion for paying checks inconsistent with a restrictive endorsement. *Stewart Office Suppliers, Inc. v. First Union Nat. Bank*, 353.

The trial court did not err by granting summary judgment for defendant First Union Bank on an action for wrongful negotiation of instruments and conversion. *Ibid.*

USURY

§ 1.1 (NCI3d). What constitutes usury; character of transaction

Although a provision in plaintiff's note requiring a 5% late payment charge exceeded the 4% limit allowed by statute, the late payment charge was not interest and thus did not invoke the statutory usury penalties; however, the excessive charge did result in a forfeiture of the right to collect a late charge on the loan for the balance of the term of the loan. *Swindell v. Federal National Mortgage Assn.*, 126.

VENDOR AND PURCHASER

§ 2.1 (NCI3d). Duration of options

A consent judgment giving plaintiff's predecessor a right of first refusal to purchase water and sewer systems serving its residents was void ab initio since the consent judgment did not state a time within the rule against perpetuities. *Village of Pinehurst v. Regional Investments of Moore*, 114.

WATERS AND WATERCOURSES

§ 6.1 (NCI3d). Riparian and littoral ownership and rights

The trial court did not err by granting summary judgment for the State where plaintiff contended that the Coastal Resources Commission's denial of a major development permit constituted a taking without compensation. *Weeks v. N.C. Dept. of Natural Resources and Community Development*, 215.

WEAPONS AND FIREARMS

§ 3 (NCI3d). Pointing, aiming, or discharging weapon

State and federal prohibitions against double jeopardy were not violated by prosecution of defendant on two counts of discharging a firearm into occupied property where he allegedly fired shots into one apartment and the bullets penetrated a common wall between that apartment and another. *S. v. Ray*, 621.

The State's evidence was sufficient for the jury in a prosecution for discharging a firearm into occupied apartments. *Ibid.*

WILLS

§ 25 (NCI3d). Costs and attorneys' fees in caveat proceeding

The expense of litigating a caveat was not a lawful claim against the estate or a proper cost of administration but was a cost of court taxable against either party or apportioned among the parties in the discretion of the court. *In re Estate of Ward*, 660.

WILLS — Continued

§ 61 (NCI3d). Dissent of spouse and effect thereof

Decedent's widow was entitled to her intestate share by dissent without regard to the cost of a caveat proceeding instituted by decedent's son. *In re Estate of Ward*, 660.

A surviving spouse is not entitled to dissent from the will of her deceased spouse, as a matter of law, on the ground that a trust in which the surviving spouse is given a life estate only without a general power of appointment cannot be valued for the purposes of G.S. 30-2, since the life interest can be valued. *In re Estate of Finch*, 489.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina